HE WHO COMES TO COMMON LAW MUST COME WITH CLEAN HANDS

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The volatile economic conditions of the 1970's have resulted in rapid and unpredictable changes in real property values. In consequence, the scope for property speculation, the temptation to resile from contracts for the sale of land which subsequently prove disadvantageous, and the potential resultant loss of bargain injury to the other party have increased. But this loss of bargain injury is not always represented in contract damages where a decree of specific performance has been sought. Courts in the United Kingdom, constrained by precedent and authority of long standing, a want of sympathy for the property speculator, and impelled by an expansive view of judicial discretion, adopt a restrictive view of the proper operation of the ordinary processes of the law of contract. The Australian courts compensate fully on the contractual basis.

Australian law as to the consequences of a breach of an essential term in a contract for the sale of land has long been clear. The innocent party is entitled to ordinary contractual remedies. He may elect either to affirm the contract or discharge it *in futuro*. In either case, losses arising from the breach sound in damages. If he elects to discharge, one of the compensable losses is the loss of bargain itself. If, however, he has instituted suit for specific performance his act in so doing affirms the contract but does not prevent a fresh ground for discharge arising on a subsequent refusal by the other party to complete. If he obtains judgment in specific performance he may need some assistance from the court to give effect to his act of discharge on the subsequent breach.

The relevant English law is less clear. Until the decision of the House of Lords in *Johnson* v. *Agnew*[1] there was considerable doubt that serious breach of the contract ever gave rise to an election to discharge and a claim in damages for the loss of bargain. Rather, the innocent party might rescind *ab initio* and by the process of *restitutio in integrum* be restored to his pre-contractual position. The suggestion that rescission *ab initio* was a remedy for breach of contract, long since

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

rejected by the Australian courts,[2] but consistently applied by the English Court of Appeal,[3] at last yielded to the "powerful tide of logical objection and judicial reasoning",[4] when considered for the first time by the House of Lords in *Johnson* v. *Agnew*.[5] The House found in the decisions of the Australian courts which had adopted "a robuster attitude" support for the "more attractive and logical" proposition that the innocent party's act of termination in the circumstances was a discharge for breach.[6] He was therefore entitled to compensation in damages for the loss of his bargain.

However, in removing that obstacle to recovery of damages, the "powerful tide" did not also erode the high water mark of judicial discretion which prevents the innocent party claiming *as of right* his contractual remedies after his attempt to enforce the contract by decree of specific performance has been thwarted by the non-compliance of the other party. The innocent party is not permitted to recover damages except when the court in its discretion discharges the decree and the contract, on the basis that "[o]nce the matter has been placed in the hands of a court of equity . . . the subsequent control of the matter will be exercised according to equitable principles".[7] The basis on which common law relief is withheld is broad enough to include cases where a decree has been sought but not granted, and in the recent case of *Sudagar Singh* v. *Nazeer* it precluded resort to contractual rights by the *guilty* party who had *not* sought equitable relief and against whom a decree had been granted.[8] If the English courts are correct in believing that the fundamental contractual right to receive the benefit of the bargain either in performance or damages for the loss of it is qualified in this way by reason only that one party has at some point sought equitable relief, the strange proposition expressed in the title of this article manifests itself in legal principle. And that further divergence from the Australian attitude of minimal interference with contractual rights requires examination.

Before examining the obstacles which doctrine and principle place in the path of damages, it is useful to consider the options of which the innocent party might be able to avail himself at the successive stages in the development of a typical fact situation.

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[2] *McDonald* v. *Dennys Lascelles Ltd.* (1933) 48 C.L.R. 457; *Holland* v. *Wiltshire* (1954) 90 C.L.R. 409; *Ogle* v. *Comboyuro Investments Pty. Ltd.* (1976) 136 C.L.R. 444; the rule is also rejected in New Zealand: *White* v. *Ross* [1960] N.Z.L.R. 249, *Hunt* v. *Hyde* [1976] 2 N.Z.L.R. 463.

[3] *Capital & Suburban Properties Ltd.* v. *Swycher* [1976] 1 Ch. 319; *Johnson* v. *Agnew* [1978] 1 Ch. 176.

[4] *Supra* n. 1 at 894 *per* Lord Wilberforce, with whom the other members of the House of Lords agreed.

[5] *Supra* n. 1.

[6] *Id.* 892 *per* Lord Wilberforce.

[7] *Id.* 895.

[8] [1978] 3 W.L.R. 785. Lord Wilberforce, *supra* n. 1 at 390, extends apparently unquestioning approval to the decision of Megarry, V.-C. in *Sudagar Singh* v. *Nazeer*.

A purchaser in a market in which prices are falling agrees to buy a house for $60,000. Within a short time it becomes apparent to him that he could buy it for $50,000. He begins to prevaricate, and the vendor issues a completion notice making time of the essence. The purchaser does not complete within the requisite time. At this point the vendor may wish to:

(a) *accept the breach as discharging the contract.*

In this event, the obligation on both sides to complete is destroyed, and he can therefore seek damages compensating him *inter alia* for his $10,000 loss of bargain injury (permissible Australia and England);

or

(b) *affirm the contract, and seek a decree of specific performance.*

In this case he is willing to give up his right to discharge the obligation to complete and thus his right to loss of bargain damages (permissible Australia and England).

If the vendor has taken the (b) option, but after instituting suit decides not to pursue it to judgment, because, for example, his mortgagees have meanwhile realized their securities and sold his land, or he realizes it would be futile to seek execution of a decree if obtained against his impecunious purchaser, then he will want to accept the breach as discharging the contract and claim damages in the same manner as under (a) (permissible Australia, doubtful England, unless the suit for specific performance has been withdrawn).

If the vendor has taken the (b) option and obtains judgment in specific performance, but the purchaser has not complied with the decree the vendor may wish to:

(i) *seek execution of the decree or a judgment in contempt or both* against the purchaser (although the fact that none of the cases refer to the possibility of invoking the contempt power is curious);

or

(ii) *forego his rights under the decree, discharge the contract and seek loss of bargain damages.* Here difficulty lies in the steps the vendor must take in order to forego his rights under the decree, that being *semble* a prerequisite to discharge and loss of bargain damages.

I. THE PROBLEM

(a) Damages on Discharge for Breach

The first doubt that arose was whether loss of bargain damages could ever be available to the innocent party who accepted the other's repudiatory action as discharging for breach a contract for the sale of land. Multiple use of the word "rescission" seems to have been the primary cause of this doubt. "Rescission" has been used in this context variously to refer to rescission *stricto sensu* (that is, in the

sense of avoidance *ab initio* because of defect at formation), discharge for breach by the innocent party at common law, termination pursuant to the provisions of the contract, and judicial discharge. The confusion engendered by multiple use was heightened by the factual similarity of consequences which flow from rescission *ab initio* and from common law discharge for breach,[9] and reinforced by the now discredited views of Mr. Cyprian Williams.[10]

Mr. Williams suggested on the basis of a number of doubtful authorities[11] that the innocent party could seek only a rescission *ab initio* complemented by an equitable restitutionary indemnity. Contractual damages could not be awarded in satisfaction of the expectation interest on the contract.[12] That view was accepted in a series of cases of which the last was the decision of the English High Court in *Horsler v. Zorro*.[13] There Megarry, J. held that the innocent party who had said he was "rescinding" and had not expressly reserved a right to contractual damages had rescinded *ab initio*. His entitlement to monetary relief was limited to the equitable indemnity.[14] When, however, the Court of Appeal came to consider the question in the later cases of *Capital & Suburban Properties Ltd.* v. *Swycher*,[15] *Johnson* v. *Agnew*[16] and *Buckland* v. *Farmer & Moody*[17] it took the view that the normal construction to be placed on the innocent party's termina-

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[9] The vendor's primary promise under a contract for the sale of land is to convey in exchange for the reciprocal and dependent promise to pay the purchase money. If the contract is discharged before conveyance, any amount of the purchase money he may have received will be recoverable in an action for money had and received because entitlement to retain it is dependent on final conveyance; *Palmer* v. *Temple* (1839) 9 Ad. & E. at 520, 521; 112 E.R. at 1309; *McDonald* v. *Dennys Lascelles Ltd., supra* n. 2 at 477-478 *per* Dixon, J. The handing back of property which has passed pursuant to the contract superficially resembles the process of *restitutio in integrum* which follows rescission *ab initio*. See also S. Stoljar, "Normal, Elective and Preparatory Damages in Contract" (1975) 91 *L.Q.R.* 68; M. Albery, "Mr. Cyprian Williams' Great Heresy" (1975) 91 *L.Q.R.* 337 at 343; F. Dawson, Note: "Rescission and Damages" (1976) 39 *Mod.L.R.* 214; W. M. C. Gummow, Note (1976) 92 *L.Q.R.* 5.

[10] Mr. Cyprian Williams in his books on *Vendor and Purchaser* (4th ed., at 993 and 1004) and *The Contract of Sale of Land* (at 119-121) committed himself to the theory that rescission *stricto sensu* was the remedy alternative to affirmation for a repudiatory breach of a contract for the sale of land. At 119 in the latter work he said that the innocent party "may, at his election, either rescind the contract and sue for restitution to his former position, or affirm the contract and sue either for damages for the breach or for specific performance of the agreement". This theory (heavily criticised by Albery, *supra* n. 9; A. J. Oakley, Note: [1977] *Camb. L.J.* 20; and Dawson, *supra* n. 9), was held to be incorrect by the House of Lords in *Johnson* v. *Agnew, supra* n. 1 at 892 *per* Lord Wilberforce.

[11] Of the authorities invoked in support by Mr. Williams, only *Henty* v. *Schroder* (1879) 12 Ch.D. 666 was in point. These authorities are discussed briefly by Lord Wilberforce in *Johnson, supra* n. 1 at 892 and in detail by Albery, *supra* n. 9 at 340-343.

[12] Williams, *Vendor and Purchaser, op. cit. supra* n. 10 at 1004, note (m).

[13] [1975] Ch. 302.

[14] [1975] Ch. 302, at 314-315.

[15] *Supra* n. 3.

[16] *Ibid.*

[17] [1978] 3 All E.R. 929; [1979] 1 W.L.R. 221.

tion is discharge for breach and he is thus entitled to contract damages.[18] In the last case, Goff, L.J., in a passage later approved by the House of Lords[19], was prepared to exclude the possibility of ever construing this act as rescission *ab initio*:

> I must say, with all respect, that I very much doubt whether Mr. Williams' view was correct, and for my part I think that *Horsler* v. *Zorro* was wrongly decided, insofar as it held that on the breach by one party to a contract for the sale of land of a fundamental term, time being of the essence, the other party can rescind *ab initio,* in which case he is entitled only to restitution and can only recover damages on affirming the contract. I cannot see any principle on which he can claim to do that, the contract not having been voidable when made. On the contrary, the view that he can do so seems to me to be inconsistent with the general principles of common law. . . .[20]

But neither he nor Buckley, L.J., in the same case considered the law on the matter sufficiently clear that a solicitor who failed to recognize the distinction between the circumstances justifying rescission *ab initio* and discharge for breach would be liable in negligence.[21]

The House of Lords dealt a swift death blow to Mr. Williams' "erroneous conception"[22] and the status of the judgment of Sir George Jessel, M.R. in *Henty* v. *Schroder*[23] as authority for it. On that decision "a judgment in which no reasons are given, and which may rest on any one of several foundations, of which one is unsound, another obsolete, a wavering chain of precedent has been built up relying on that foundation, which is itself unsound".[24] It had been followed "usually uncritically" by judges at first instance[25] and was supported generally by textbook authority and particularly by the writing of Mr. Williams, which afforded "almost a perfect illustration of the dangers, well perceived by our predecessors but tending to be neglected in modern times, of placing reliance on text book authority for an analysis of judicial decisions".[26] The relevant extract from the fourth edition of *Williams on Vendor and Purchaser*[27] was "on the face of it a jumble of unclear propositions not logically related to each other,"[28] and largely unsupported by the cases proffered. The House of Lords might, perhaps, for completeness have noted the opportunity afforded the Court

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[18] However, of all the judges involved in the appeals, only Goff, L.J., in the passage cited *infra,* thought the termination could never be rescission *ab initio.*
[19] *Supra* n. 1 at 891 *per* Lord Wilberforce.
[20] [1978] 3 All E.R. 929 at 943.
[21] *Id.* 943-944 and 938-939 respectively.
[22] *Supra* n. 1 at 891.
[23] *Supra* n. 11.
[24] *Supra* n. 1 at 892.
[25] *Id.* 891.
[26] *Id.* 892.
[27] *Op. cit. supra* n. 10 at 1004.
[28] *Supra* n. 1 at 892.

of Appeal to disabuse itself of Mr. Williams' "great heresy" by applying the scholarly analysis of precedent and principle put forward in Mr. Michael Albery's article in 1975 in the *Law Quarterly Review*.[29]

The House of Lords, under a "duty to take a fresh look", rather than "endorse a line of authority so weak and unconvincing in principle", found support "for a more attractive and logical approach from another bastion of the common law whose courts have adopted a robuster attitude",[30] the Australian High Court. Since the decision of that court in *McDonald* v. *Dennys Lascelles Ltd.*[31] in 1933, it had been accepted throughout the Australian jurisdictions that the general principles of the law of contract governed the consequences of discharge for breach of contracts for the sale of land:[32]

> [W]hen a contract, which is not void or voidable at law, or liable to be set aside in equity, is dissolved at the election of one party because the other has not observed an essential condition or has committed a breach going to its root, the contract is determined so far as it is executory only and the party in default is liable for damages for breach.[33]

(b) Damages After Equitable Decree

The party who elects not to discharge for breach, but instead seeks specific performance of the contract, faces greater difficulties in recovering damages for loss of bargain if he does not subsequently receive the benefit of the bargain in performance. The suit for specific performance or an election in favour of specific performance where both that remedy and discharge have been pleaded in the alternative effects affirmation of the contract and waiver of the right to discharge.[34] The losses in respect of which damages can be assessed differ from those recoverable on a discharge for breach. Where the contract has been discharged, *in futuro* obligations of both parties are destroyed, and there is no difficulty in describing the loss of bargain as a loss which has arisen as a consequence of the defendant's breach. Where, however, the contract has been affirmed, the plaintiff has preserved his right to receive the benefit of his bargain in performance. As long as the defendant's obligation to perform subsists, there is at least a theoretical possibility that he will fulfil it, and the plaintiff cannot maintain that loss of bargain is a loss which has arisen and is compensable in damages.

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[29] Albery, *supra* n. 9.

[30] *Supra* n. 1 at 892. The same robust attitude has prevailed in New Zealand, where Casey, J. in *Hunt* v. *Hyde* [1976] 2 N.Z.L.R. 453 at 457 said that Albery, *supra* n. 9 "administered the coup de grace to Williams' view with a logic and precision which leave no room for further argument".

[31] *Supra n.* 2.

[32] *Id.* 476-477. See Gummow, *supra* n. 9.

[33] *Id.* 476.

[34] *Supra* n. 1 at 889 *per* Lord Wilberforce.

Before the Australian High Court in *Ogle* v. *Comboyuro Investments Pty. Ltd.*[35] it was argued that a plaintiff who had affirmed by instituting proceedings for specific performance could not while those proceedings existed discharge the contract and thus lose his bargain. The Court rejected the argument on the basis that a plaintiff who had been compensated in damages for his loss of bargain would be debarred from subsequently pursuing relief under the decree. The difficulty in including loss of bargain as a compensable loss has not overtly formed part of the reasoning behind the English Court of Appeal in withholding relief, nor of the House of Lords' divergence.

The *Swycher* decision was justified in the Court of Appeal primarily on a technical argument of irrevocability of election,[36] which was supported by that court in *Johnson* with less enthusiasm,[37] and was ultimately found to be "unsound"[38] by the House of Lords on appeal. For both courts in *Johnson* the critical factor lay in the still novel proposition that adequacy of remedy under the decree prevented recourse to common law remedies. The Court of Appeal described this notion as irrevocability "in effect".[39] The House of Lords, however, regarded adequacy of equitable remedy as a matter distinct from the arguments based on the theory of election. It went only to the question whether it was just in the circumstances to discharge the decree and the contract.[40] In the case in hand the Court of Appeal's action in awarding damages under Lord Cairns' Act refuted the argument that there were adequate remedies under the decree.[41] It was therefore just to allow the plaintiff contractual damages. But in a case where there were adequate remedies under the decree, the plaintiff would not be able to have contractual damages, because, although the contract did not merge in the decree for specific performance,[42]

> Once the matter has been placed in the hands of a court of equity, or one exercising equitable jurisdiction, the subsequent control of the matter will be exercised according to equitable principles. The Court would not make an order dissolving the decree of specific performance and terminating the contract (with

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[35] *Supra* n. 2.

[36] [1976] 1 Ch. 319, *per* Buckley, L.J., at 327, *per* Sir John Pennycuick at 331.

[37] [1978] 1 Ch. 176, see Buckley, L.J., at 190-192; Goff, L.J., at 195-197.

[38] *Supra* n. 1 at 894 *per* Lord Wilberforce.

[39] *Supra* n. 3 at 191-192. Buckley, L.J., explained that specific performance or discharge plus substitutionary damages where applicable were "in financial terms equivalent", and therefore the election in favour of specific performance was "in effect irrevocable"; see also Goff, L.J., in agreement at 196-197; to the same effect in *Swycher,* Buckley, L.J., *supra* n. 3 at 328, and Sir John Pennycuick at 331.

[40] *Supra* n. 1 at 894-895.

[41] *Id.* 895 *per* Lord Wilberforce.

[42] It is accepted in all the cases that the contract does not merge in the judgment: *Austins of East Ham Ltd.* v. *Macey* [1941] Ch. 338 is acknowledged as authority on this point at [1979] 1 All E.R. 890 *per* Lord Wilberforce; [1978] 3 W.L.R. 790 *per* Megarry, V.-C.

> recovery of damages) if to do so would be unjust, in the circumstances then existing, to the other party. . . .[43]

The reasons why the equitable jurisdiction to supervise or to set aside decrees should preclude enforcement pursuant to express contractual provisions[44] or discharge on the common law basis[45] were not explained by the House of Lords, but would seem to be those expressed by the court in the *Singh* v. *Nazeer Case*. As a matter of construction, the parties did not intend the common law to govern the carrying out of the contract in the event of an equitable decree being made,[46] and if they did expressly so provide, their stipulation would be inoperative unless the order of the court contained some saving provision which preserved its effect.[47]

The implications of the novel proposition are obvious. Once either party has sought equitable relief, the fundamental right of ***both*** parties to receive the benefit of their bargains either in performance or compensation for the loss of it is no longer a matter of right, but a matter of judicial discretion. An undue sensibility to the integrity of the law of contract is not needed to recognize as a travesty of basic principle a proposition which destroys common law rights because of the availability of concurrent equitable remedies. The correct principle is that a plaintiff is entitled to contractual damages for his loss of bargain if he can show that he has not received it and will not receive it in performance. He can show that he will not receive it by establishing that the defendant's obligation to perform has been destroyed by discharge. The only qualification to his entitlement lies in the preclusion of double recovery which, as indicated above, presented no difficulties to the Australian High Court.

That the proposition also constitutes an unnecessary departure from principle not serving the ends of justice is apparent from the examination which follows of its application to the facts in *Johnson* v. *Agnew,* and *Singh* v. *Nazeer.*

II. THE RECENT CASES

In *Singh* v. *Nazeer* the plaintiff was distinctly lacking in the meritorious qualities which might have made the application of the English approach appear unjust. He was a vendor who for nearly five years strenuously sought to resist carrying out his contract on grounds which lacked substance. His endeavours were halted only by the refusal of the Court of Appeal to give leave to apply to the House of Lords against the award of a decree of specific performance. Then the situation changed. His anxiety to comply was met by the purchaser's prevarica-

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[43] *Supra* n. 1 at 895 *per* Lord Wilberforce.
[44] As in *Sudagar Singh* v. *Nazeer, supra* n. 8.
[45] As in *Johnson* itself, *supra* n. 1; and *Capital & Suburban Properties Ltd.* v. *Swycher, supra* n. 3.
[46] *Per* Megarry, V.-C., *supra* n. 8 at 791.
[47] *Id.* 792.

tion. He issued a completion notice pursuant to condition 19 of the contract of sale, and when this was not complied with he moved with uncharacteristic despatch for an order forfeiting the deposit and awarding pecuniary compensation in respect of the loss of bargain and the expenses of resale. The Vice-Chancellor held that the completion notice was invalid because it had been served subsequent to the issue of the decree of specific performance.

The contract survived the decree, but that did not "necessarily mean that the exercise of the rights that it confers remains unaffected".[48] It was clear that "once an order for specific performance had been made, there are adequate remedies available to either party if the other party does not appear to be proceeding under the order with due dispatch":[49] "the remedy for a party who complains of delay is to come to the court and not to attempt the extra-curial remedy of serving a completion notice".[50] Relief in terms of the decree was the only remedy open to the plaintiff; the "machinery" provisions of a contract are intended to govern the execution of the contract and are not directed to carrying it out when an order for specific performance has been made. That order is made by reference to the rights of the parties under the contract; but, when made it is the provisions of the order and not of the contract which regulate how the contract is to be carried out. The contractual provisions yielded to directions in the decree. Counsel's attempt to "drive a wedge"[51] between compliance with contractual obligations as breach and compliance with judicial decree as contempt of court failed:

> First, as a matter of construction I do not consider that general condition 19 can be intended to operate in any case where a full decree of specific performance has been made. I can see nothing in it which suggests that the parties intend to contract that a notice under that condition is to supersede or transcend or vary or interfere with an order of the court . . . Second . . . even if the condition were to be intended to apply despite an order for specific performance, I do not think it would be operative unless the order of the court contained some saving provision which preserved its effect.[52]

Two novel propositions in the Vice-Chancellor's reasoning invite comment. The first is the suggestion that adequacy of equitable remedy precludes common law relief. This suggestion runs counter to the general principle governing the award of equitable remedies, namely, that they will be available only where the common law remedies are

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[48] *Id.* 790.
[49] *Ibid.*
[50] *Id.* 792.
[51] *Id.* 791.
[52] *Id.* 791-792.

inadequate.[53] The second is that the possibility of equitable relief will inhibit concurrent common law relief. Neither proposition is supported in authority or principle. Is either supported in justice? Would it have been unjust in the instant case for the defendant to have had the orders requested made against him?

The defendant's failure to complete after he had sought and obtained the equitable decree was "wholly unexplained" and the Court was anxious not to condone it.[54] Megarry, V.-C. thought he must also consider the plaintiff's conduct, not just in the existing litigation, but in the five year period of sustained delay and evasion: here was a man who had been judicially described as incapable of telling the truth except when it happened to suit his case.[55] With respect, this is irrelevant. There was no equity in the defendant to preclude the plaintiff's reliance on contractual rights. However undeserving the plaintiff might be, he is not required in coming to common law to come with clean hands.

In *Johnson* v. *Agnew* the plaintiff vendors agreed to sell a house and some grazing property to the defendant purchaser. The properties were mortgaged but the purchase price exceeded the amount required to pay off the mortgages and a bank loan obtained by the vendors for the purchase of another property. The purchaser failed to complete on the due date and the vendors sought and obtained a decree of specific performance with which the purchaser failed to comply. The mortgagees enforced their securities by selling the properties, but the proceeds realized were insufficient to discharge the mortgages in full. The vendor then moved for an order that the purchaser pay the balance of the purchase price to them, credit being given for the sums realized by the mortgagees' sales. On the judge's refusal to make the order, the vendors appealed, seeking, additionally, an inquiry as to damages suffered as a result of the purchaser's failure to complete and, in the alternative, a declaration that they were entitled to treat the contract as repudiated, and an inquiry as to damages. The Court of Appeal found that the vendors were disabled by the mortgagees' sale from performing and thus from pursuing further relief in terms of the decree of specific performance. The Court would therefore relieve them of their obligation to complete, but the contract was not discharged for breach, and they could not seek contractual damages. However, since the order for specific performance was no longer capable of being "worked out", damages in lieu of specific performance in terms of the Lord Cairns' Act jurisdiction were available in accordance with *Biggin* v. *Minton*.[56]

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[53] *Adderly* v. *Dixon* (1824) 1 Sim. & St. 607; see *Beswick* v. *Beswick* [1968] A.C. 58.

[54] *Supra* n. 8 at 789 and 790, *per* Megarry, V.-C.

[55] *Id.* 789.

[56] [1977] 1 W.L.R. 701. There Foster, J., awarded damages in lieu of specific performance to a vendor whose purchaser had failed to comply with a

The purchaser appealed to the House of Lords where it was held that the vendor who had sought specific performance was not electing for an "eternal or unconditional affirmation" of the contract, but simply for the contract to be continued under the court's control.[57] He could subsequently ask the court to discharge the order and terminate the contract.[58] In this case the order should be made. In awarding substitutionary damages under Lord Cairns' Act the Court of Appeal had indicated the inadequacy of the remedies available under the decree and the vendor had acted reasonably in pursuing the remedy in specific performance.[59] The appropriate date for assessment of contractual damages was the date on which the mortgagees had contracted to sell the properties, that being the date at which the remedy was aborted.[60]

In the House of Lords the vendors' claim for contractual damages was met by three arguments, each of which had been accepted by the Court of Appeal.

(a) *failure to perform after decree was not a breach of contract affording fresh grounds for discharge or damages.*

On this point, the Court of Appeal had adopted the statement of Sir John Pennycuick in the *Swycher Case* that such failure was not a breach of contract *and* that a fresh breach was necessary to justify damages:

> Where the purchaser fails to comply with the decree, he certainly commits a breach of the decree. But I do not see how he can be said to commit a new breach of the contract. The position is simply that the original breach continues unremedied. If there is no new breach, I see no ground upon which the claim for damages at common law, against which the vendor has elected in favour of specific performance, could be revived at this stage.[61]

Exactly those arguments were rejected by the Australian High Court in *Ogle*. Gibbs, Mason and Jacobs, JJ., in their joint judgment accepted as a general principle that: "[l]egal rights are not affected at

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Footnote 56 (Continued).
decree of specific performance. A. J. Oakley, Note [1978] *Camb. L.J.* 41 questions whether jurisdiction arises under the statutory provisions (U.K.: Chancery Amendment Act 1858, s. 2; N.S.W. Supreme Court Act, 1970, s. 68) in cases where specific performance has proved futile. The additional challenge to jurisdiction can be made in *Johnson* on the ground of want of mutuality consequent on the mortgagees' sale. However, in deciding that the mode of assessment of substitutionary and common law damages was identical, Lord Wilberforce in *Johnson, supra* n. 1 at 895-896, makes no comment on the jurisdiction to award statutory damages in the circumstances. See also *Price* v. *Strange* [1978] 1 Ch. 337.

[57] *Supra* n. 1 at 894-895.

[58] *Id.* 895.

[59] *Ibid.*

[60] *Id.* 896; following the Court of Appeal which held in *Malhotra* v. *Choudhury* [1978] 3 W.L.R. 825; [1979] 1 All E.R. 186 that contractual and substitutionary damages should be assessed in the same way.

[61] *Swycher, supra* n. 3 at 331.

law by the mere existence of an action for specific performance though they are affected by the election involved in its institution".[62] The principle applied to contracts for the sale of land:

> [W]here the breach is a failure to complete on the due date, a party who has waived a right to treat that failure to complete on the due date as the breach of an essential term may nevertheless call on the other party to complete, and a failure on the part of the latter to complete on or by a further named day fixed reasonably ahead or even a continued long failure to complete will amount to a refusal to be bound by the contract (*Holland* v. *Wiltshire* (1954) 90 C.L.R. 409, per Kitto J. at p. 420) and a repudiation thereof entitling the other party to rescind and to claim damages for the loss of bargain.[63]

Barwick, C.J. went further, expressing the view that loss of bargain damages were available on the basis of the original failure to perform without the contract being discharged:

> Where a promisor has failed to perform his promise, he may, without more, be sued for such damages as flow from the breach. Where the promise which is not performed is the promise to complete a purchase, the damages will include the loss of the benefit of the performance of that promise, properly referred to as damages for the loss of bargain.[64]

The approach of the House of Lords in *Johnson* accords with that of the majority in the Australian High Court in *Ogle*. Lord Wilberforce accepted that, since the contract remained in force after the decree, the purchaser remained in breach of it if he continued to refuse to perform. But the contract would have to be discharged before the plaintiff could follow his contractual remedy in damages.[65]

(b) *the vendor has made an "irrevocable election" in favour of specific performance and would not be permitted thereafter to discharge and seek damages.*

The argument based on the doctrine of election was run along three lines. First, the equitable and common law remedies are in fact "mutually exclusive". Second, election in favour of equitable remedies precluded a return to common law remedies.[66] Third, the election was irrevocable "in effect" in a third sense.[67]

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[62] *Ogle, supra* n. 2 at 460.

[63] *Id.* 458. This statement from the joint judgment accords with the views expressed by Oakley, Note, *supra* n. 10 and F. Dawson, "Damages After Specific Performance" (1977) 93 *L.Q.R.* 232 in their criticisms of the *Swycher* decision.

[64] *Ogle, supra* n. 2 at 450. The Chief Justice's statement does not conform with the view expressed in this article that the defendant's obligation to perform must be removed by discharge of contract before the loss of bargain is a loss which has arisen for the purposes of damages compensation.

[65] *Supra* n. 1 at 89.

[66] In *Swycher, supra* n. 3 at 327, Buckley, L.J., accepts the mutual exclusivity of the common law and equitable remedies, and the finality of election (at

In the *Swycher* decision each of these lines was accepted.[68] However, counsel for the vendors in *Johnson* in the Court of Appeal strenuously resisted the application of the doctrine of election on the grounds that the vendor's election was one between remedies (to which the doctrine of election did not apply) rather than between rights, and the vendor's right to his bargain was not a right susceptible of merger in the decree of specific performance.[69] The Court found that an irrevocable election had been made, cautiously accepting that the doctrine of election applied, but founding its conclusion primarily on the irrevocability "in effect". Irrevocability "in effect" arose in this manner. In most cases execution of the decree (where the vendor receives the purchase price in exchange for the land) or judicial discharge (where the vendor is allowed to retain his land and the purchaser his money) will yield the same result in financial terms. That result will match the contractual expectations of the parties. There is therefore no benefit in making contractual damages available to the vendor, because he will have suffered no loss of bargain injury. It is only in those cases where there is a discrepancy between purchase price and value that damages might be relevant. If the property has increased in value since the contract, the vendor receives a windfall in retaining his land. If the value is less than the contract price, and the diminution in value has taken place since the original failure to complete in breach of contract, the vendor may well be better off with the more flexible remedy of damages in lieu of specific performance rather than contractual damages.[70]

The House of Lords, however, rejected the arguments based on the doctrine of election as "unsound": the vendor who sought specific performance was not electing for "eternal and unconditional affirmation but a continuance of the contract under control of the court".[71]

> Election, though the subject of much learning and refinement, is in the end a doctrine based on simple considerations of

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Footnote 36 (Continued).

328). Counsel's arguments for the same propositions in the Court of Appeal in *Johnson* appear in [1978] 1 Ch. 176 at 184-185.

[67] See note 39 *supra.*

[68] See note 66 *supra.*

[69] See Goff, L.J., *Johnson, supra* n. 3 at 195. The irrelevance of the theory of election and the doctrine of merger is concisely explained by Albery, *supra* n. 9, and Dawson, *supra* n. 63. Identical arguments are rejected by the Australian High Court in *Ogle, supra* n. 2 at 452-453 *per* Barwick, C.J., 460-461 *per* Gibbs, Mason and Jacobs, JJ.

[70] *Johnson, supra* n. 3 at 191-192 *per* Buckley, L.J., and Goff, L.J., at 196-197. It would not seem possible to argue since the House of Lords decision in *Johnson* that contractual and substitutionary damages would be differently assessed. Lord Wilberforce at 896 follows *Malhotra* v. *Choudhury, supra* n. 60 in holding that the date for assessing both types of damages was the date on which the remedy of specific performance was aborted. The same rule applies in Australia, *Bosaid* v. *Andry* [1963] V.R. 465 and New Zealand, *Hickey* v. *Bruhns* [1977] 2 N.Z.L.R. 71.

[71] *Supra* n. 1 at 894 *per* Lord Wilberforce.

> common sense and equity. It is easy to see that a party who has chosen to put an end to a contract by accepting the other party's repudiation cannot afterwards seek specific performance. This is simply because the contract has gone, what is dead is dead. But it is no more difficult to agree that a party, who has chosen to seek specific performance, may quite well thereafter, if specific performance fails to be realized, say, "well, this is no use — let us now end the contract's life".

This view of the doctrine of election accords substantially with that expressed by the Australian High Court in rejecting the argument in *Ogle*.[72] The House of Lords expressed no opinion on the irrevocability "in effect" argument, but accepted the facts on which it was based as a guide to the exercise of the discretion to set aside the decree and terminating the contract.

(c) *the court enjoyed a discretion regarding the setting aside of decrees and the terms on which they would be set aside.*

The Court of Appeal in both *Swycher* and *Johnson* was convinced that the judicial discharge of an order for specific performance did not restore the legal *status quo ante* the making of the order.[73] The innocent party was not entitled to avail himself of the ordinary processes of the law of contract, because the court would not consider it equitable to restore to him the rights to sue for damages.[74]

In *Austins of East Ham Ltd.* v. *Macey,* Lord Greene, M.R. had stated:

> The contract is still there. Until it is got rid of, it remains as a blot on the title, and the position of the vendor, where the purchaser has made default, is that he is entitled, not to annul the contract by aid of the court, but to obtain the normal remedy of a party to a contract which the other party has repudiated. He cannot, in the circumstances, treat it as repudiated except by order of the court and the effect of obtaining such an order is that the contract, which until then existed, is brought to an end. The real position, in my judgment, is that, so far from proceeding to the enforcement of an order for specific performance, the vendor, in such circumstances is choosing a remedy which is alternative to the remedy of proceeding under the order for specific performance. He could attempt to enforce that order and could levy an execution which might prove completely fruitless. Instead of doing that, he elects to ask the

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[72] See note 69 *supra.*

[73] *Johnson, supra* n. 3 at 191 *per* Buckley, L.J., at 197 *per* Goff, L.J. *Swycher, supra* n. 3 at 328 *per* Buckley, L.J., at 330 *per* Sir John Pennycuick.

[74] *Id. Johnson* at 191 *per* Buckley, L.J.

court to put an end to the contract, and that it is an alternative to an order for specific performance.[75]

Buckley, L. J. in *Johnson* found in this statement authority that the vendor could not discharge the contract unless the court had first discharged its order for specific performance; if it was equitable to discharge the order, the court would take that course upon "equitable terms" which would not permit the innocent party to reassert his right to damages.[76] His Lordship does not explain how it could be equitable to discharge the decree but inequitable for the vendors to insist that if they are not to have the benefit of their bargain in performance they will have it in damages. Goff, L. J., saw the matter a little differently. He denied a judicial power to discharge the contract, but claimed an equally wide power to deny common law rights: ". . . the vendor has not, neither has the court, any power to rescind the contract, and the true principle is that notwithstanding its previous order the court allows the vendor to accept the repudiation, which he had formerly declined to do . . .".[77] The discharge would not allow the vendor to sue in damages because it was the long standing and accepted practice of the court not to permit it: "[i]t is truly a matter of what the court will allow".[78]

The House of Lords in *Johnson* differed only to the extent that it did not regard refusal of contractual damages as a component of the terms on which the decree would be set aside:

> Once the matter has been placed in the hands of a court of equity, or one exercising equity jurisdiction, the subsequent control of the matter will be exercised according to equitable principles. The court would not make an order dissolving the decree of specific performance and terminating the contract (with recovery of damages) if to do so would be unjust, in the circumstances then existing, to the other party, in this case to the purchaser. (To this extent, in describing the vendor's right to an order as *ex debito justitiae* Clauson, L.J. may have to put the case rather too strongly in *John Barker & Co. Ltd.* v. *Littman*[79]). This is why there was, in the Court of Appeal, rightly, a relevant and substantial argument, repeated in this House, that the non-completion of the contract was due to the default of the vendors: if this had been made good, the court could properly have refused them the relief sought.[80]

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[75] *Supra* n. 42 at 341.
[76] *Supra* n. 3 at 190-191.
[77] *Id.* 196.
[78] *Id.* 197.
[79] [1941] Ch. 405 at 412.
[80] *Supra* n. 1 at 895.

As the House went on to decide that in this case the appropriate measure of common law damages was identical with the measure of substitutionary damages[81] the apparent reduction of judicial discretion was illusory. It makes no difference whether:

(a) the court decides whether to set aside the decree taking into account the justice of a subsequent award of contractual damages (House of Lords); or

(b) the court imposes terms on the setting aside of the decree including a term refusing common law damages, but awards substitutionary damages of the same measure (Buckley, L. J. and Sir John Pennycuick); or

(c) the court permits the vendor to accept the repudiation and additionally awards substitutionary damages of the same measure as common law damages were they available (Goff, L. J.).

The judges are in agreement on the *extent* of judicial discretion; where they differ is in the jurisdictional basis for the discretion.

If what Lord Greene had to say in the statement quoted above reflects the law, the minimum demanded from the plaintiff before he can seek contractual damages is that he will get rid of the contract with the assistance of the court. It is not a necessary or a possible inference from his Lordship's words that the court discharges the contract. When Lord Greene says that "the effect of obtaining such an order" is that the contract is "brought to an end", he conforms with the accepted view that it is the repudiatory act itself which effects termination.[82] He adds that in the circumstances the order of the court is a necessary prerequisite to the ordinary operation of that contractual process. By electing to seek the court's order, the plaintiff is enabled, "not to annul the contract by aid of the court, but to obtain the normal remedy of a party to a contract which the other party has repudiated". Further, there is no necessary implication *either* that the setting aside of the decree (which could proceed only on equitable considerations) is a prerequisite to an order enabling the acceptance of repudiation *or* that the court enjoys a discretion as to the making of an order.

Clauson, L. J., in *John Barker & Co. Ltd.* v. *Littman*[83] thought the order was available *ex debito justitae.* Helsham, J., in the New South Wales Supreme Court in *Stevter Holdings Ltd.* v. *Katra Constructions Pty. Ltd.* was constrained by authority rather than principle from reaching the same conclusion:

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[81] *Id.* 895-896.

[82] A repudiatory breach operates automatically to bring a contract to an end unless the innocent party chooses to waive the right to discharge and affirms the contract: see J. M. Thomson, "The Effect of a Repudiatory Breach" (1978) 41 *Mod.L.R.* 137 and Note, (1979) 42 *Mod.L.R.* 91.

[83] *Supra* n. 79 at 412.

> The simple position I believe is this. A contract may be rescinded after a decree of specific performance has been made; it may be rescinded by vendor or purchaser; it may be rescinded upon any available ground . . . [T]he authorities all seem to assert that repudiation or rescission may not take place without the leave of the court. . . . It may be that the contract, having as it were, the imprimatur of the court, cannot be rescinded except with the assistance of the court. It does not matter. I am content to assume that the requirement is there. . . . It is also asserted that the court has a discretion in the matter when it is approached for an order that the contract be discharged, and that there is no absolute right to obtain a discharge when sought. This is not explicitly stated in the cases, but I believe it flows from an examination of them, and is said to be the case in *Halsbury's Laws of England,* 3rd ed., vol. 34, p. 326.[84]

In that case a purchaser, after specific performance had been ordered against him, purported to rescind pursuant to an express term of the contract providing a right of rescission in the event of the land being subject to a residential district proclamation in terms of the relevant legislation. Helsham, J., thought the purchaser here entitled to the benefit of the Court's discretion because the provision as a matter of construction was intended to benefit the purchaser up to the date of completion and he had given notice of rescission immediately on discovering that the land was subject to a proclamation. The fact that the vendor was unaware of the proclamation until this time was irrelevant. The process of construction here employed is in marked contradiction to that employed by the English High Court in *Singh,* where an enforcement clause was described as a "machinery provision" not intended to operate in the event of a decree. But of greater significance for present purposes is the judge's reluctant and limited concession to the authorities that leave of the court is a necessary prerequisite to exercise of common law rights.

On the assumption that there is at least some room for doubting the correctness of the English approach, it is desirable to consider the matter in terms of principle.

III. THE PRINCIPLES

(a) Is the loss of bargain a loss which has arisen?

Contractual damages are recoverable only in respect of such losses as have *arisen* in consequence of breach. Had the plaintiff chosen to discharge the contract on breach, there would have been no difficulty in analysing the loss of bargain as a loss which had arisen. But his suit for specific performance or election in favour of specific

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[84] [1975] 1 N.S.W.L.R. 459 at 468-469.

performance at trial effects affirmation of the contract and waiver of the right to discharge the defendant's continuing obligation to perform. He has thus preserved rather than destroyed his right to receive the benefit of his bargain in performance. As long as the defendant's obligation to perform subsists, so does his right to perform, and the plaintiff cannot maintain that loss of bargain is a loss which has arisen.

How, then, can the plaintiff destroy the bargain so as to leave the way clear for recovery of contractual damages? The general contractual principle is that his affirmation in respect of one breach does not preclude discharge on subsequent breach, even where the subsequent breach is in respect of the same obligation.[85] The Australian High Court in *Ogle* v. *Comboyuro Investments Pty. Ltd.* applied this principle in the context of a contract for the sale of land.[86] Indeed, the House of Lords in *Johnson* v. *Agnew* has indicated that contracts for the sale of land are subject to the ordinary principles of the law of contract.[87]

(b) **Does issue of proceedings or award of decree preclude discharge?**

Is the plaintiff, by reason of the fact that he has instituted proceedings for equitable relief or has obtained a decree, precluded from exercising his common law right to discharge on account of the defendant's subsequent failure to perform? On this question the English and Australian judicial views diverge.

In Australia in *Ogle* the High Court dealt with this question in a case where proceedings for specific performance had been instituted. The Court saw as the only valid objection the danger of double recovery. That possibility did not preclude discharge and loss of bargain damages because it disappeared on merger of the cause of action in the judgment in damages.[88] In *Stevter,* where a decree had in fact been granted, Helsham, J. in the New South Wales Supreme Court could find no objection in principle to the plaintiff's discharge, and saw any limitations on the exercise of common law rights as dictated by authority and the technicality of the existence of a decree.[89] The case did not require his Honour to consider in depth the extent of the court's discretion not to set aside the decree, but he indicated that in his opinion it was very limited.[90] Orthodox application of contractual principle supports the Australian approach. Adequacy of remedy in equity has never constituted a bar to common law relief.

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[85] *Charles Rickards Ltd.* v. *Oppenhaim* [1950] 1 K.B. 616; *Thornton* v. *Bassett* [1975] V.R. 407; *Tramways Advertising Pty. Ltd.* v. *Luna Park (N.S.W.) Ltd.* (1938) 38 S.R. (N.S.W.) 632.

[86] *Ogle, supra* n. 2 at 457-459 *per* Mason, Gibbs and Jacobs, JJ.

[87] *Supra* n. 1 at 889 ff *per* Lord Wilberforce.

[88] *Ogle, supra* n. 2 at 461 *per* Mason, Gibbs and Jacobs, JJ. Also at 461 their Honours state the exceptional circumstance (beyond the scope of those currently under consideration) in which discharge might be prohibited.

[89] *Supra* n. 84 at 468-469.

[90] *Ibid.*

The English courts, however, invoke an equitable jurisdiction to inhibit the ordinary operation of common law processes. The plaintiff can discharge only with leave of the court on "equitable grounds" which will not be found where the plaintiff has adequate remedies under the decree.[91] "Once the matter has been placed in the hands of a court of equity . . . the subsequent control of the matter will be exercised according to equitable principles".[92] The equitable jurisdiction will be exercised to prevent contractual discharge[93] or enforcement[94] on two bases: as a matter of construction, the parties did not intend the common law to govern the carrying out of the contract in the event of an equitable decree; moreover, even if they did so intend, their stipulation would be inoperative unless the order of the court contained some saving provision which preserved its effect.[95] Thus, the plaintiff cannot recover contractual damages unless the court in its discretion first assists him.

Two aspects of the reasoning which leads to this conclusion can be questioned:

(i) *The basis for an equitable jurisdiction to bar common law relief because of the existence of a decree and the adequacy of possible ancillary relief under it.*

The jurisdiction claimed by the court is a discretionary power to permit the plaintiff to discharge the contract, or a discretionary power to discharge it itself. Equity prevents a party asserting his legal rights where it is improper for him to do so[96] but only so far as is necessary to satisfy the equity of the other party.[97] The equity of the party against whom a decree has been awarded by reason of his failure to perform his contractual obligations lies in the terms of the decree. He is obliged to perform specifically, and thus to demand reciprocal performance from the other party. That is the source of the equity which justifies the rule that the plaintiff must after decree hold himself ready, able and willing to perform:[98] "a decree of specific performance

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[91] *Johnson, supra* n. 1 at 895 *per* Lord Wilberforce; *Singh, supra* n. 8 at 790-792 *per* Megarry, V.-C.

[92] *Id. Johnson,* 895.

[93] *Johnson, supra* n. 1.

[94] *Singh, supra* n. 8.

[95] *Id.* 792 *per* Megarry, V.-C.

[96] Equity acts *in personam* on the conscience of the person who would rely on his legal rights to the exclusion of the other's claim. Underlying most (if not all) equitable doctrines and remedies is the equitable concept of "fraud" involved in improper reliance: see R. P. Meagher, W. M. C. Gummow, J. R. F. Lehane, *Equity: Doctrines and Remedies* (1975) Chapter 12. If equitable "fraud" is the impetus, it is also the limitation: where there is no equity in the other party there can be no impropriety in asserting legal rights.

[97] This follows necessarily from note 92 *supra;* and was emphasized recently by the English Court of Appeal in *Crabb* v. *Arun District Council* [1975] 3 All E.R. 865 at 872-873 *per* Denning, M.R., and at 880 *per* Scarman, L.J.

[98] *Halkett* v. *Earl of Dudley* [1907] 1 Ch. 590 at 601 *per* Parker, J.; *Austins of East Ham, supra* n. 42 at 341 *per* Lord Greene, M.R.; and *Johnson, supra* n. 1 at 890 *per* Lord Wilberforce.

enures for the benefit of both parties".[99] The position after decree is that reciprocity of the obligation to perform gives each party an interest in the decree rendering it inequitable for the other to employ the contractual process to discharge. But, once either party has failed to comply with the decree, the situation changes. The non-compliant party can no longer claim that the decree enures for his benefit so as to prevent the innocent party exercising a common law right to destroy prospective contractual obligations. The result of discharge is that the decree is deprived of subject-matter by the destruction of the contract. There would seem in principle to be no ground of objection by the party who has failed to comply with the decree, and therefore no equitable jurisdiction to inhibit the contractual process.

There is some authority for the proposition that the court itself enjoys a jurisdiction to discharge the contract.[100] However, the balance of judicial opinion favours the view that it is the act of the party himself which effects destruction of the obligations.[101] Given the efficacy of that common law remedy there is no justification for a further equitable judicial power to terminate.[102] So the justification for judicial involvement must lie, if anywhere, in the alleged requirement for leave to accept the repudiation as terminating future obligations. Principle does not require leave to be sought because the defendant has extinguished by his own non-compliance his right to insist that the plaintiff comply with the decree. If authority insists that leave be obtained, it can be justified only on the basis that the decree is a technical barrier to the plaintiff's ability to discharge. And if this is so, the court's grant of leave ought to be available *ex debito justitiae* rather than in its discretion. The reasoning in *Ogle* suggests that after decree a refusal to perform on the due date, or a manifest intention never to perform would enable the plaintiff to discharge and seek damages.[103]

(ii) *Construction of express contractual provisions precluding their operation in the event of a decree.*

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[99] *Stevter, supra* n. 84 at 467 *per* Helsham, J.

[100] Including that of Lord Wilberforce, *supra* n. 1 at 895; also Buckley, L. J. in *Johnson, supra* n. 3 at 191; Buckley, L.J., and Sir John Pennycuick in *Swycher, supra* n. 3 at 328 and 331 respectively.

[101] The general rule of the law of contract is that only the innocent party can accept a breach as putting an end to the contract. This principle is applied by the Australian courts since the decision of the High Court in *McDonald* v. *Dennys Lascelles Ltd.* (1933)*supra* n. 2, in particular see *Stevter, supra* n. 84, where Helsham, J., was determining the effectiveness of a discharge pursuant to express contractual provision subsequent to issue of decree of specific performance. In England, Goff, L. J., in his Court of Appeal decision in *Johnson, supra* n. 3 at 196 stated that the court lacked the power to terminate the contract. It has been suggested above in this article that an analysis of *dicta* in *Austins of East Ham Ltd., supra* n. 42 shows that Lord Greene, M.R., held this view also.

[102] Equitable remedial power can be invoked only where the common law remedy is inadequate: *Adderley* v. *Dixon, supra* n. 53.

[103] (1976) 136 C.L.R. 444 at 457-458, *per* Mason, Gibbs and Jacobs, J.J.

The question here for the court is whether the parties intended in the event of non-compliance with an equitable decree that either party should be able to inhibit recourse of the other to their expressly provided mode of enforcement or termination. The English[104] and Australian[105] courts answer this question differently. In *Stevter* and *Singh* the New South Wales Supreme Court and the English High Court respectively were construing standard clauses which did not expressly indicate whether the parties intended them to apply in the event of an equitable decree. Both courts recognized that the want of express indication did not preclude the implication that the parties did not intend the clause to operate in the event *and* that it was desirable to find an interprestation consistent with the accepted view that the contract survived the decree and continued to determine the rights of the parties.[106]

Helsham, J., saw the *Stevter* clause which provided for termination in stated circumstances as intended to benefit the parties up to the time of completion, and therefore not intended to be inhibited in operation by the decree. Thus, no implication was necessary to give effect to the parties' intentions. Megarry, V.-C., described as a "machinery" provision the *Singh* clause which provided a mechanism for making time of the essence and giving rights of rescission, forfeiture and resale on non-compliance. As such, it was not intended by the parties to operate when the court by its decree had provided alternative machinery for the carrying out of the contract. In that the clause provided a mode of enforcement, it could properly be regarded as a "machinery" provision. However, since its operation contemplated a change in rights and obligations under the contract as well as a machinery for enforcement it is indistinguishable from the *Stevter* clause. It is, therefore, possible to regard the approach of Megarry, V.-C. as one which subverts the authority of *Halkett* v. *Earl of Dudley*[107] and *Austins of East Ham Ltd.* v. *Macey*[108] that the contract continues after decree to determine the rights of the parties.

The limitation implied by the court in *Singh* appears also to be questionable. The current liberal, contextual approach to contractual interpretation authorizes implication of the minimum limitation necessary to ensure that the fundamental purpose of the contract is not aborted.[109] A limitation to reasonable exercise after decree would have

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104 *Singh, supra* n. 8.

105 *Stevter, supra* n. 84.

106 *Halkett* v. *Earl of Dudley, supra* n. 98 at 601, applied by Helsham, J., in *Stevter, supra* n. 84 at 468; *Austins of East Ham Ltd., supra* n. 42 accepted by Lord Wilberforce, *supra* n. 1 at 890; Megarry, V.-C. in *Singh, supra* n. 8 at 790.

107 *Supra* n. 98.

108 *Supra* n. 42.

109 Literal, "within the four corners of the document" construction is rejected in favour of liberal, contextual construction by the House of Lords in *Prenn* v. *Simmonds* [1971] 1 W.L.R. 1381 and *Reardon Smith Line Ltd.* v.

been appropriate.[110] In the *Singh Case,* the circumstance of a manifest unwillingness to complete was one in which the use of the clause was reasonable. Megarry, V.-C. however, decided that the clause was not intended to apply *at all* in the event of an equitable decree. The width of that operational limitation does more than exceed the need to preserve the fundamental purpose of the contract. It is itself repugnant to that fundamental purpose in that it qualifies the right to receive the benefit of the bargain either in performance or in damages.

IV. HE WHO COMES TO COMMON LAW MUST COME WITH CLEAN HANDS.

The argument of this article is that considerations of policy, principle and doctrine support the Australian judicial view that a plaintiff, on the non-compliance of the other party with a decree of specific performance, can pursue the alternative remedy of damages for loss of bargain.

The reasons for the English divergence in approach are sufficiently complex as to elude the successive attempts at clarification embarked upon by the courts in the series of cases beginning with *Horsler* v. *Zorro* in 1975[111] and ending with *Johnson* v. *Agnew* in 1979.[112] The progressive trend of the decisions in those cases is to approximate more closely to the Australian position. The remaining ground of difference represents a preference for ensuring that court decrees are not taken lightly over the competing consideration that the innocent party is entitled to receive the benefit of his bargain in damages if he is not to receive it in performance.

In fact neither the Australian nor the English approach is capable of serving the public interest in maintaining respect for court orders. The contract breaker in England is encouraged to the extent that the innocent party's rights to recovery are subject to an equitable discretion. In Australia there is some capacity for the innocent party to approbate and reprobate. The English approach has the additional disadvantage of constituting a divergence from the fundamental principles on which equitable jurisdiction is assumed. An acceptable justification for this divergence does not emerge from the cases.*

Footnote 109 (Continued).

Hansen-Tangen [1976] 1 W.L.R. 989; applied by the Privy Council in ***BP Refinery*** v. *Shire of Hastings* (1977) 16 A.L.R. 363, the English Court of Appeal in *Staffs Health Authority* v. *Staffs Waterworks* [1978] 3 All E.R. 769, the High Court of Australia in *DTR Nominees Pty. Ltd.* v. *Mona Homes Pty. Ltd.* (1978) 19 A.L.R. 223, the New Zealand Court of Appeal in *Fletcher Bernard-Smith* v. *Shell BP and Todd Oil Services Ltd.* (unreported judgment, 14th December, 1978).

[110] Following the cases mentioned in note 109 *supra,* especially ***Staffs Health Authority*** and *Fletcher Bernard-Smith.*

[111] *Supra* n. 13.

[112] *Supra* n. 1.

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