COMMERCE, CUSTOMERS AND CONTRACTS

By Aubrey L. Diamond*

[*Professor Aubrey L. Diamond delivered the eleventh Allen Hope Southey Memorial Lecture at the University of Melbourne on September 21st, 1977. In his lecture, Professor Diamond examined and analysed certain aspects of current contract law from the perspective of one directly affected by its operation. Having shown how the existing law can work in a manner inimical to the interests of both businessmen and consumers, he argued for changes which, by taking cognizance of commercial realities, would facilitate certainty and predictability in the law.*]

Legal practice gives one experience of the way the law works. But familiarity breeds content. One way to secure a fresh insight into the legal system is to look at it through the eyes of those who are affected by it. That is what I propose to do in this article: to look at certain aspects of the law affecting businessmen to see if lawyers can learn something from the merchant's attitude to the law. I shall look mainly at the law of contract, though some particular kinds of contract will receive special emphasis, such as the contract of sale of goods.

REMEDIES

Of all aspects of the law of contract, the most important in practice is that concerned with remedies. In his day to day work the lawyer finds there are relatively few disputes about whether there *is* a contract and that the rules of formation of contract — offer and acceptance, consideration, and so on — do not loom large. There are some disputes about what the contract means — questions of construction. There are a fair number of disputes about whether a contract has or has not been broken. But what the businessman is most concerned about is the effect of breach, what consequences ensue — in other words, what remedies are available for the breach of contract.

The common law approach is that the primary remedy for breach of contract is damages — an order to pay a sum of money. It has long taken the view that there is no hurt so bad that money cannot make it better. Indeed, Mr Justice Oliver Wendell Holmes went so far as to suggest that every contract could be analysed into an alternative promise to do something or to pay money for not doing it: 'The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass. In every case it

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leaves him free from interference until the time for fulfilment has gone by, and therefore free to break his contract if he chooses.'[1]

For a time the Law Commission for England and Wales, in its work on the codification of the law of contract, toyed with the idea that specific performance should become the primary remedy for breach of contract.[2] The view was expressed that the law of contract should see that contracts were performed, not that a party could buy his way out of performing. It was pointed out that in Scots law specific performance — 'specific implement' in Scots — was the primary remedy, and argued that English law should follow suit.

I have a clear recollection of a meeting on the law of contract which I attended before I became a Law Commissioner. Several of the then members of the Law Commission were present, and so was a distinguished Scots lawyer. 'It is quite true', he said, 'that in Scots law specific implement is the primary remedy for breach of contract. But it's very rarely awarded'. I am tempted to say that that scotched the idea. But I will content myself by saying that further consideration showed that the main purpose of entering into business contracts is the making of profit, and that there was much to be said for the view that if you can make the same profit from the other party without his having to perform then that would satisfy many businessmen. So it may be that the common law had a certain down-to-earth realism in its approach.

EXTRA-JUDICIAL REMEDIES

In truth, the primary remedy for breach of contract in real life — in the sense of the remedy most often relied upon — is neither damages nor specific performance. The primary remedy is not to enter into any more contracts with the party in default. Most businessmen don't like litigation, and they are content to take steps to avoid future trouble by this extra-judicial remedy.

Another important remedy for breach of contract is also extra-judicial. It is extra-judicial because in order to exercise the remedy it is usually necessary to act before litigating. I am talking about the remedy of non-performance — what Mr Justice McGarvie called 'the discharge of contracts upon breach'.[3] You have entered into a contract under which both parties have obligations to perform. The other party has broken his part of the contract. The question is: do you have to go ahead and perform your part of the contract notwithstanding his breach? — or can

[1] Holmes, O. W., *The Common Law* (1881) 301; see also his 'The Path of the Law' (1897) 10 *Harvard Law Review* 457, 462, citing Coke C.J. in *Bromage v. Genning* (1616) 1 Rolle 368; 81 E.R. 540.

[2] It is doubtful that this was ever stated by the commission in any published document, but it was no secret. See Lawson, F. H., *Remedies of English Law* (1972) 341.

[3] McGarvie, R. E., 'The Discharge of Contracts upon Breach' (1963-64) 4 *M.U.L.R.* 254 and 305.

you refuse to perform your part because he has broken his part? The answer is a good lawyer's answer: it all depends.

I suspect that most businessmen, faced with the problem in abstract terms as I have put it, would ask why they should have to perform if the other has broken his part. But suppose your part of the contract is the payment of money. You have promised to pay $500 for the construction and erection of a polished wood bookcase, to be fixed to the wall by twenty screws. The bookcase is made and installed. It looks beautiful. But the workman tells you that it is sufficiently stable with sixteen screws, and that is what he has fitted. The contract, then, contained a promise on his part to use twenty screws. He has only used sixteen, and so has clearly broken his contract. Can you get out of paying the $500, and pay nothing, because of the other's breach of contract?

Surprising as it may seem, there *is* an argument to support that result. It is known as the doctrine of entire contracts.[4] But few people would think it a fair result in that particular case, and the doctrine of substantial performance would no doubt come to the workman's aid.[5]

The crucial question is of course how to decide when what I have called the 'remedy of non-performance' is available. In what circumstances can the party not in breach refuse to perform his obligations because of the other's breach? In the early days of the law of contract there was much talk of 'conditions precedent' and of independent and dependent promises. Was the use of twenty screws a condition precedent to payment of the price of $500? Was the promise to pay dependent on performance of the promise to use twenty screws?[6]

By the latter part of the 19th century the use of the word 'condition' to describe one kind of contractual term had become common, though not universal. Sir Mackenzie Chalmers, successively a county court judge, the First Parliamentary Counsel and the Permanent Secretary to the Home Office, set the seal on this special, rather unusual, use of the word 'condition' in his draft of what became the Sale of Goods Act 1893 (U.K.).[7] He divided contract terms in contracts of sale of goods into 'conditions' and 'warranties'. The difference between them rested in the remedies for breach. If there was a breach of condition by the seller, the buyer could reject the goods; if the term broken by the seller was only a

[4] See Starke, J. G. and Higgins, P. F. P., Cheshire and Fifoot, *The Law of Contract* (3rd Aust. ed. 1974) 659-61.

[5] *Ibid.* 662-3.

[6] The literature on this subject is immense. For a useful discussion see Stoljar, S. J., 'The Contractual Concept of Condition', (1953) 69 *Law Quarterly Review* 485.

[7] On the meaning of 'condition' see the (English) Court of Appeal in *Wickman Machine Tool Sales Ltd v. L. Schuler A.G.* [1972] 2 All E.R. 1173, 1179-82, *per* Lord Denning M.R., 1182-86, *per* Edmund Davies L.J. and 1189-90, *per* Stephenson L.J.; and the House of Lords in *L. Schuler A.G. v. Wickman Machine Tool Sales Ltd* [1973] 2 All E.R. 39, 44-5, *per* Lord Reid, 49-50, *per* Lord Morris of Borth-y-Gest, and 56-7, *per* Lord Simon of Glaisdale.

warranty, the buyer could not reject the goods; he could only claim damages for breach of the warranty.

There was a great advantage to this rigid dichotomy. It made for certainty and predictability. This was important, for if the buyer wanted to reject the goods he had to act fast: under the Sale of Goods Act he could lose his right to reject. The rule, originally enacted in s. 11 of the United Kingdom Act, is now to be found in s. 16(3) of the Goods Act 1958 (Vic.):

> Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, *or where the contract is for specific goods the property in which has passed to the buyer*, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated unless there be a term of the contract express or implied to that effect.

Thus there are two cases where the buyer can no longer reject the goods for breach of condition:

(a) where he has accepted the goods;[8] and

(b) where the ownership of specific goods has passed to the buyer. This turns on the distinction between 'specific goods' — goods identified and agreed upon at the time a contract of sale is made,[9] such as 'that car' — and unascertained or generic goods, such as 'a new car of that kind'. It also, apparently, turns on the rules in the Act dealing with the passing of the property in goods from seller to buyer.[10]

This second case where the buyer loses the right to reject, set out in my paragraph (b) above and contained in s. 16(3) in the words that I have italicized, is abjectly technical in today's world of commerce. Times have changed since the Act was drafted. The Act is a codification of the case law as it developed during the 19th century, and the cases where the rules evolved were not themselves unreasonable. 'Most of the numerous cases in the reports . . . arose as a result of warranties that horses were sound, free from vice, etc.'[11] Since one of the rules as to the passing of property is that 'Where there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made . . .'[12] what the words in s. 16(3) amount to is this: the proper time to examine specific goods to ascertain whether they are in conformity with the contract[13] is before the contract is made, not after.

That is a perfectly satisfactory rule if the buyer can see the goods, the specific goods in question, at the time the negotiations to enter the contract are being carried on. It is not such a satisfactory rule if the goods are at

[8] See Goods Act 1958 (Vic.), ss. 41 and 42.
[9] *Ibid.* s. 3(1).
[10] *Ibid.* ss. 21-4.
[11] Windeyer J. in *Healing (Sales) Pty Ltd v. Inglis Electrix Pty Ltd* (1968) 121 C.L.R. 584, 614, referring *inter alia* to *Fielder v. Starkin* (1788) 1 H.Bl. 17; 126 E.R. 11 and *Street v. Blay* (1831) 2 B. & Ad. 456; 109 E.R. 1212.
[12] Goods Act 1958 (Vic.), s. 23, Rule 1.
[13] *Cf. ibid.* s. 41(1).

another place and the buyer is relying on the seller's description of them[14] or if the goods are at sea or, as is so often the case today, if the goods are packaged and cannot be examined until after they have been purchased.[15] Nor can complex goods be quickly examined.

The courts, notably in Australia and New Zealand, have wrestled with the words of the Act.[16] In England, however, we have solved the problem by simply repealing the italicized words in the Act.[17] In Australia, only South Australia has followed this lead.[18] In a sense, the Act has come full circle. In Chalmers' original Bill, introduced in 1889 into the House of Lords, what was then clause 19(3) did not refer to the passing of property but only to acceptance — 'Where a contract of sale is not severable, and the buyer has accepted part performance of the contract, a breach of any condition. . . .' It was only in 1891 that the House of Lords Standing Committee amended the subsection by introducing the reference to the passing of property, words that we have now deleted.

This still leaves my paragraph (a) above: the buyer has no right to reject where he has 'accepted' the goods. This means more than just taking delivery of the goods. It is a technical concept, defined later in the Act in sections that themselves have a problem that we have solved by amendment in the United Kingdom.[19] Roughly speaking, what this reference to acceptance means is that the buyer has a reasonable time to decide whether to reject or not. A 'reasonable time' is, I think, related to the reasonable opportunity of examining the goods referred to in s. 41(1) of the Goods Act 1958.

UNSATISFACTORY LAW ON REJECTION

I think it must be admitted that this remedy of non-performance — the right to reject goods for breach of condition, in contracts for the sale of goods — does not work all that well. Three main criticisms can be made of the present law, even in its amended state as in the United Kingdom and South Australia.

The first criticism is that the right to reject depends on the classification of the term broken, not on the seriousness of the breach or its consequences. If the term broken is a warranty, there is no right to reject. If the term broken is a condition, the buyer can reject however little harm has been done. There is no such thing as a 'slight breach of condition'.[20]

[14] As in *Varley v. Whipp* [1900] 1 Q.B. 513.
[15] It is difficult to examine the contents of a can of pineapple before buying it.
[16] See *e.g.* Sutton, K. C. T., *The Law of Sale of Goods in Australia and New Zealand* (2nd ed. 1974) 135-9.
[17] Misrepresentation Act 1967 (U.K.), s. 4(1).
[18] Misrepresentation Act 1971-72 (S.A.), s. 11.
[19] Goods Act 1958 (Vic.), ss. 41 and 42. Amended in the U.K. by the Misrepresentation Act 1967, s. 4(2) and in South Australia by the Misrepresentation Act 1971-72, s. 12.
[20] Subject to the maxim *de minimis non curat lex*, in which case there is no breach of condition at all.

For example, in *Arcos Ltd v. E.A. Ronaasen & Son*[21] there was a contract for the sale of wooden staves to be used for the making of cement barrels. The contract specified staves ½ inch in thickness. Of the staves rendered by the sellers, only a small percentage were exactly ½ inch thick. The vast majority were between ½ inch and 9/16 inch in thickness with a smaller amount up to ⅝ inch thick. The buyer purported to reject the entire consignment, and the dispute went to arbitration. The umpire found in favour of the sellers and said this: 'It was admitted by the buyers that some excess in thickness is permissible and I find that staves of thickness not exceeding ⅝ inch are fit for the purpose of making cement barrels whether as sides or headings.'[22] The House of Lords unanimously agreed with all the judges below that the umpire was wrong. The buyers' complaint was not that the goods were not fit for their purpose or not of merchantable quality, but that the implied condition that the goods should correspond with the description had been broken. How relevant was it that the goods were perfectly suitable for their purposes? Not at all, said the judges. 'If the article they have purchased is not in fact the article that has been delivered, they are entitled to reject it, even though it is the commercial equivalent of that which they have bought.'[23]

Take another example, *In re Moore & Co. Ltd and Landauer & Co.*[24] The sellers sold to the buyers an approximate quantity of Australian canned fruits in cases each containing 30 tins. On delivery it was found that about half the cases contained 30 tins each, but that the other half contained only 24 tins each. It appears that the correct total quantity of tins was delivered, and the umpire found that there was no difference in the market value of the goods whether they were packed 24 tins or 30 tins in a case. This case, too, turned on the implied condition in the Sale of Goods Act that '[w]here there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description'. The Court of Appeal unanimously held, affirming the judge at first instance, that the buyer could reject. Bankes L.J. said that 'it is plain upon the face of this contract that the packing of these particular goods was part of the description of the goods. In these circumstances, it is irrelevant to inquire whether it was considered in the trade a matter of importance, or whether it affected the market value of the goods'.[25] Scrutton L.J. adopted as his own the language of McCardie J. in an earlier case where starch had been sold in 280-pound bags but tendered in bags of 220 pounds and 140 pounds: 'A man may prefer to receive starch either in small or large or medium bags. If the size of the bags was immaterial I fail to see why it should have been so clearly specified in the

[21] [1933] A.C. 470.
[22] *Ibid.* 473.
[23] *Ibid.* 474, *per* Lord Buckmaster, 479 and 480, *per* Lord Atkin.
[24] [1921] 2 K.B. 519.
[25] *Ibid.* 523.

contract. A vendor must supply goods in accordance with the contract description, and he is not entitled to say that another description of goods will suffice for the purposes of the purchaser. . . .'[26]

It seems to me to be odd that the courts should adopt such a literal approach to contracts, rather like they used to adopt to statutes, and ignore the commercial realities. How much more sensible it would be if the court could decide how serious the breach of contract was in all the circumstances of the case before holding that the buyer could reject the goods. It seems paradoxical that on the facts of these cases it might well have been held that, had the right to reject the goods been lost because, perhaps, of delay, the damages to which the buyers were entitled were nominal only, they having suffered no real loss.

Perhaps it is not too late for the law to move in this direction. Lord Wilberforce, adopting what looks a little like a technique of 'prospective overruling',[27] has given notice that he is willing to be persuaded that cases such as *Arcos Ltd v. E.A. Ronaasen & Son*[28] were wrongly decided: 'I am not prepared to accept that authorities as to 'description' in sale of goods cases are to be extended, or applied, to such a contract as we have here [*i.e.*, a charterparty]. Some of the cases either in themselves (*In re Moore & Co. and Landauer & Co.*[29]) or as they have been interpreted (*e.g. Behn v. Burness*[30]) I find to be excessively technical and due for fresh examination in this House. Even if a strict and technical view must be taken as regards the description of unascertained future goods (*e.g.*, commodities) as to which each detail of the description must be assumed to be vital, it may be, and in my opinion is, right to treat other contracts of sale of goods in a similar manner to other contracts generally. . . . I would respectfully endorse what was recently said by Roskill L.J. in *Cehave N.V. v. Bremer Handelsgesellschaft m.b.H.*:[31] "In principle it is not easy to see why the law relating to contracts for the sale of goods should be different from the law relating to the performance of other contractual obligations, whether charterparties or other types of contract. It is desirable that the same legal principles should apply to the law of contract as a whole and that different legal principles should not apply to different branches of that law." . . . The general law of contract has developed, along much more rational lines (*e.g. Hongkong Fir Shipping Co. Ltd v. Kawasaki Kisen Kaisha Ltd*[32]), in attending to the nature and gravity of a breach or departure rather

[26] *Manbre Saccharine Co. Ltd v. Corn Products Co. Ltd* [1919] 1 K.B. 198, 207.

[27] See Lord Simon of Glaisdale in *Jones v. Secretary of State for Social Services* [1972] A.C. 944, 1026 and 1015, *per* Lord Diplock; Freeman, M. D. A., 'Standards of Adjudication, Judicial Law-Making and Prospective Overruling' (1973) 26 *Current Legal Problems* 166; Nicol, A. G. L., 'Prospective Overruling: A New Device for English Courts?' (1976) 39 *Modern Law Review* 542.

[28] [1933] A.C. 470.

[29] [1921] 2 K.B. 519.

[30] (1863) 3 B. & S. 751; 122 E.R. 281.

[31] [1976] Q.B. 44, 71.

[32] [1962] 2 Q.B. 26.

than in accepting rigid categories which do or do not automatically give a right to rescind. . . .'[33]

One must however concede that there are arguments in favour of the present law. It does make it easier for businessmen to act swiftly in deciding whether or not to reject goods. It is really not possible, in everyday business activities, to contemplate the need to apply to a court before rejecting, and neither businessmen nor their professional advisers would welcome any increase in the risk, necessarily involved in every attempt to reject goods, that the rejection may be wrongful, so placing the buyer in the position of being the party in breach. Even the express use of the word 'condition' in a contract can lead to litigation going to the Lords.[34] There is, clearly, something to be said for a rule that makes for certainty and predictability. But a rule that promotes injustice in individual cases must be suspect. And there are other criticisms of the law to be considered.

The second criticism of the law relating to rejection is that the grounds for rejection are all too often irrelevant. In many cases one suspects that the buyer does not really care about the breach of condition on which he is founding his claim. It is merely a peg used by his lawyer to get his client out of a bad contract. As Lord Atkin put it, 'In a normal market if [businessmen] get something substantially like the specified goods they may take them with or without grumbling and a claim for an allowance. But in a falling market I find that buyers are often as eager to insist on their legal rights as courts of law are ready to maintain them.'[35] I believe that in the present state of the law it is too easy for a businessman to get out of a bad bargain.

The third criticism is, paradoxically, the reverse of the second. It is that it is too hard for consumers to get out of a contract that has been broken by the commercial supplier. I have said that I think it is too easy for a businessman to get out of a bad bargain. This is in part because I believe that, if the seller in a commercial contract has broken the contract, damages will usually be an adequate remedy for the buyer. If a business buyer gets goods that are not exactly what he wanted he can often off-load them without much difficulty at a loss. That loss he can then recover from the seller as damages. But if a consumer gets goods he does not want, or goods that are faulty, damages are not much good to him. He is not buying the goods to make a profit, but because he wants them. It is not very satisfactory from his point of view to have to keep the goods he does not want, even if he has to pay less for them because of his right to damages representing the difference in value between what he wanted and what he got.

[33] *Reardon Smith Line Ltd v. Hansen-Tangen* [1976] 1 W.L.R. 989, 998 and 1001 where Lord Kilbrandon expressly agreed with Lord Wilberforce's views, while Viscount Dilhorne disassociated himself from them, [1976] 1 W.L.R. 989, 1000.

[34] *Wickman Machine Tool Sales Ltd v. L. Schuler A.G.* [1973] 2 All E.R. 39.

[35] *Arcos Ltd v. E.A. Ronaasen & Son* [1933] A.C. 470, 480. *Cf. Boston Deep Sea Fishing and Ice Co. v. Ansell* (1888) 39 Ch. D. 339 and *Singh v. Jeram* (1945) 12 E.A.C.A. 21, 28-9.

Yet this is often the position in the present law because the consumer, being inexpert in the ways of business, may well lose his right to reject faulty goods even before he knows he has such a right. Leaving aside the fact that in consumer contracts goods are quite likely to be 'specific goods' in respect of which there is, arguably, no right to reject,[36] consumers may not act quickly enough to be able to reject. As we have seen, the concept of 'acceptance' of goods means that the buyer must reject within a reasonable time; if he fails to do so he will be left only with his right to damages. Although s. 41(1) of the Goods Act 1958 says that the buyer 'is not deemed to have accepted them [the goods] unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract', the consumer buyer may not examine the goods until he is ready to use them, and if he has let time go by he may find he is too late.

DAMAGES

Now I come to look at the 'primary remedy' of damages itself. Let me first pick up the consumer where I have just left him: a buyer who has lost his right to reject goods and is left with his remedy in damages. I have suggested that the remedy of damages is not what he wants. There may even be cases where he would have had the right to reject goods but, having lost that right, is left without any claim to damages either, because his only right would be to nominal damages. For example, the buyer has the choice of buying brand X or brand Y. For some good reason he prefers brand X and objects to brand Y — perhaps he has had bad experience of brand Y in the past, perhaps he objects to the political system in the country where brand Y is made, perhaps his brother is managing director of the company that makes brand X. He therefore specifically stipulates that he wants brand X. The goods are delivered, but when he inspects them a few weeks later he finds to his horror that brand Y has been delivered. If he is too late to reject, he may find that in the open market brand X and brand Y are worth the same, so that he has suffered no financial loss. In that case he will get no damages, or only nominal damages. In other words, in this situation there will be no sanction for breach of contract.

This will be the case in particular where the goods cannot be, and could not have been, rejected. The American case of *Jacob and Youngs v. Kent*[37] is a good example. The plaintiffs were builders who contracted to build a country residence for the defendant. The cost, in 1914, was U.S.$77,000. The specification for plumbing work stated that 'all . . . pipe must be . . . lap welded pipe of the grade known as "standard pipe" of Reading manufacture'. Nine months after he moved in, the defendant discovered that some of the pipe was not Reading pipe but Cohoes pipe. The two

[36] See *supra*.
[37] (1921) 129 N.E. 889 (New York Court of Appeals).

could only be distinguished by the brand name stamped on the pipe at every 2 metres. Much of the Cohoes piping was encased in brickwork. The architect instructed the builders to replace the pipe by Reading pipe, although this would have involved substantial demolition and rebuilding, and withheld $3,500. The builders refused to do the extra work and sued for the $3,500.

The trial court found that the installation of the wrong brand of pipe was neither fraudulent nor wilful, but dismissed the builders' claim. On appeal McLaughlin J. was in agreement. 'The defendant', he said, 'had a right to contract for what he wanted. He had a right before making payment to get what the contract called for. It is no answer . . . to say that the pipe put in was just as good. . . .' But he was in the minority and Cardozo J., speaking for the majority, allowed the appeal, holding that the defendant must pay, for he had suffered no loss.

In some situations there is a possible choice between claiming damages and claiming a lump sum. There are important procedural advantages in many jurisdictions in claiming a lump sum; in particular, there may be no need to call evidence to prove the loss or to value it, and it is often quicker and cheaper to proceed to judgment. There are three problem areas worth considering in relation to such a choice.

PENALTY CLAUSES

The first issue I wish to discuss is that of 'penalty clauses'. I use this term as convenient shorthand to include both provisions for liquidated damages, which will be upheld by the courts, and provisions for a penalty which are invalid. I think this is the way most people, including lawyers, talk about such contractual terms when they are not being over-technical. The distinction between valid terms that specify the amount of damages payable for breach of contract and invalid terms is well-known: a provision that represents a genuine attempt to estimate the loss in advance will be upheld as liquidated damages, whereas a provision that does not represent a genuine pre-estimate but is in the nature of a threat *in terrorem* will be struck down as a penalty.[38]

It is clear that it is no answer to a claim based on a valid clause for liquidated damages that the amount stipulated is different from the loss actually suffered by the plaintiff, whether smaller or greater. One of the advantages of suing on a liquidated damages clause is of course that no evidence need be called as to the loss, so that no problem of assessment of damages arises. But suppose it is manifest on the facts that the stipulated sum is very much larger than the loss actually suffered — indeed, suppose it is clear that no loss at all was suffered by reason of the breach of contract? There seems to be no suggestion in Australia, or in English law,

[38] An over simplification, of course. See Cheshire and Fifoot *The Law of Contract op. cit.* 737-40.

that the stipulated amount cannot be recovered in such circumstances. Here, then, is a real advantage in suing for a lump sum rather than damages.

As usual, we must turn to the United States for an example of such a situation: *Massman Construction Co. v. City Council of Greenville, Miss.*[39] The City Council employed a construction company to build four piers to support a new bridge over the Mississippi river. The contract provided as follows: 'The bridge is to be operated as a toll project and delay in completion will cause interference with traffic and losses, such as lost earnings, interest on investment, administration expenses and other tangible and intangible loss and will incommode the public. To cover partially such losses and expenses, the Owner shall have the right to deduct from the total compensation otherwise due . . ., as liquidated damages, . . . for each 24 hour calendar day that the . . . work . . . remains in an uncompleted state . . . the sum of $250. . . .'

Due to circumstances beyond the control of the construction company they finished the work 96 days late, and the Council duly deducted $24,000 from the payments made to them. But the western end of the bridge was in Arkansas, and despite the delay the entire bridge was finished thirty days before the road leading to the bridge on that side was built. ' "All dressed up and nowhere to go", the bridge sat unutilized for 30 days or more after its full completion, so that the delay by Appellant did not cause a delay in beginning the operation of the toll bridge. . . .'[40] Thus the City Council had suffered no loss by reason of the breach of contract, and it was held that the clause in question was accordingly unenforceable as a penalty. In England and, I dare say, in Australia, I think the clause might well be upheld as a genuine pre-estimate.[41]

We even seem to have something in the nature of an implied liquidated damages clause in our jurisdictions. In *Denman v. Winstanley*[42] a contract for the education of children at a private school provided that 'A term's notice is required prior to the removal of a child'. On a claim for a term's fees in lieu of notice the county court judge awarded the amount claimed, but on appeal the Divisional Court reduced the sum awarded from £39 to £15 saying that plaintiff was entitled only to loss of profit. The Court were referred to an earlier case which held that such a term was not a penalty[43] but it was not mentioned in the judgment as reported.

Denman v. Winstanley was swept aside by the Court of Appeal in 1973 in *Mount v. Oldham Corporation.*[44] In a contract with a private school

[39] (1945) 147 F. 2d 925 (Circuit Court of Appeals, Fifth Circuit).
[40] *Ibid.* 926 *per* Waller J.
[41] There is of course no doubt that if two people break a contract with the plaintiff, it is no defence for one to argue that he caused no loss to the plaintiff because the other's breach would have robbed the plaintiff of the benefit of his performance.
[42] (1887) 4 T.L.R. 127.
[43] *Lennssen v. Thornton* (1887) 3 T.L.R. 657.
[44] [1973] 1 Q.B. 309.

there was no express term providing for a term's notice, but Lord Denning M.R. said: 'It is an understood thing in all schools that if a parent wishes to withdraw a boy, he can do so; but if he does so, he has either to give a term's notice or to pay a term's fee in lieu of notice. That is a usage well known throughout the education world. So well known that we can take notice of it ourselves.'[45] To the argument that the plaintiff's claim should have been for damages and not for fees (no doubt there is some saving at a boarding school if a pupil is absent) he said: 'It was suggested that the claim should lie for damages and not a term's fees. *Denman v. Winstanley*[46] was cited for that proposition. But I do not think that is correct. The claim can properly be made for fees in lieu of notice: because that is the understanding in the profession.'[47] In this case it is clear that the plaintiff suffered some loss from the absence of the child for the whole of the term in question, but it is not clear that his loss was equal to the whole of the fees. By claiming fees instead of damages, however, the plaintiff avoided any inquiry into his loss.

ACTIONS FOR THE PRICE

From clauses providing for the amount payable on breach we can move to another way of claiming a lump sum: bring the claim for the contract price rather than for damages.

In *Clark v. Marsiglia*[48] a number of paintings were delivered for cleaning and repair at a price of $156. The repairer started work but the owner changed his mind and told him to stop. The repairer nevertheless finished the job and sued for the price. It was held that the owner's order to stop was a breach of contract making him liable for damages, but that the repairer could not sustain an action for the full price: 'the plaintiff had no right, by obstinately persisting in the work, to make the penalty upon the defendant greater than it would otherwise have been.'[49]

You will recognize that this American case has brought me to one of the most-criticised cases in the law reports, *White and Carter (Councils) Ltd v. McGregor*.[50] Hardly anyone has a good word to say for it.[51]

[45] *Ibid.* 315. It is not clear whether the obligation to give a term's notice was conceded: see 316, *per* Edmund Davies L.J.

[46] (1887) 4 T.L.R. 127.

[47] [1973] 1 Q.B. 309, 316. Stephenson L.J. could not understand *Denman v. Winstanley, ibid.* 317.

[48] (1845) 1 Denio 317; (1845) 16 N.Y. Com. Law Rep. 808.

[49] Followed, *inter alia*, in *Rockingham County v. Luten Bridge Co.* (1929) 35 F. 2d 301, another bridge (completed despite orders to stop) without a road.

[50] [1962] A.C. 413, H.L.

[51] See *e.g.* Goodhart, A. L., 'Measure of Damages when a Contract is Repudiated' (1962) 78 *Law Quarterly Review* 263; Stoljar, S. J., 'Some Problems of Anticipatory Breach' (1974) 9 *M.U.L.R.* 355, 368; Walker, D. M., 'Reform, Restatement and the Law Commissions' [1965] *Juridical Review* 245, 258. But see Nienaber, P. M., 'The Effect of Anticipatory Repudiation: Principle and Policy' [1962] *Cambridge Law Journal* 213.

A few miles along the river Clyde west of Glasgow lies the salubrious district of Clydebank. There are lampposts in Clydebank. Indeed, some of them may still have lamps in them that work. Some of them have attached to them, a few feet off the ground, litter bins. These are not provided by a beneficent council but by an entrepreneur who makes a profit to enable him to provide this public service by selling advertising space on the litter bins. Twenty or more years ago you would have seen advertisements for Mr McGregor's garage business.

The facts are well known. Mr McGregor's sales manager signed a printed contract to advertise the garage on the litter bins for three years. Later that day, when Mr McGregor learnt about this, he exploded. He immediately purported to cancel the contract, even though it was headed by a warning that it was not cancellable by the advertiser. According to the judges in the House of Lords, the advertising agents 'refused to accept this cancellation. They prepared the necessary plates for attachment to the bins and exhibited them on the bins. . . .'[52] Nevertheless Mr McGregor would not pay the first annual payment, and under an acceleration clause all three years' rentals thereupon fell due. It was held by a majority of three to two in the House of Lords that the garage proprietor was bound to pay the full three-year rental even though he did not want to advertise.

It is said by Cheshire and Fifoot that the appellants 'were not content to be passive. They embarked upon a course of conduct which cost money, served no useful purpose and was, as they knew, unwanted by the respondent. They had chosen, in other words, to inflate their loss.'[53] Admittedly they could sue for damages, and get compensation for their loss, if any were proved. But what they did was to sue for a nice fixed sum of £196. They deliberately did not sue for damages; they sued for the contract price.[54]

I know that one must consider the legal principles in this case in the light of the facts as stated by the House of Lords, but I think they got them wrong. I do not believe that the appellants inflated their loss at all. I believe that if they had sued for damages they would have been able to prove their loss at the full amount and so would have obtained judgment for the same sum.

Why do I think this? Because the contract was a renewal contract: for the previous three years the garage proprietor's advertisements had been exhibited.[55] They were still out on the bins when the renewal contract was signed and cancelled. So I do not think that the agents had to make any fresh plates and send men out to fix them. The most they had to do was their routine inspection and maintenance of all the litter bins, and they

[52] Taken from the speech of Lord Reid, [1962] A.C. 413, 426.
[53] Cheshire and Fifoot, *The Law of Contract* (9th ed., 1976) 607, (3rd Aust. ed., 1974) 736-7.
[54] 1960 S.C. 276, 283 *per* Lord Patrick.
[55] [1962] A.C. 413, 426 *per* Lord Reid.

probably would not have saved much money if this contract had come to end without any renewal contract being signed. Moreover, I doubt if they could have relet the sites (though here I must admit I am less sure of my ground); my guess is that there were probably more lampposts than litter bins anyway. Accordingly, in my view it is more than likely that the three years' renewal rental was nearly all pure profit.

Why, then, did the advertising agents deliberately claim the price rather than sue for damages? I think we can see the answer if we look at the question from their point of view. They carry on business throughout Britain. They enter into a large number of contracts, and no doubt have a fair number of defaults. They evidently have a fair number of cancellations too, judging by the warning that the contract is non-cancellable specifically printed on their forms. Each time they sue, are they to call evidence in every case of their loss, of the availability of sites in the particular municipal area, of details of current lettings? How expensive and time-consuming this would be. What they want to be able to do is to issue summonses in the local courts for fixed sums of money and, in most cases, to get default judgments. I must say I don't blame them.

Perhaps the majority in the House of Lords saw this. But if they did, they did not mention it, which is a pity, for I think they might well have been able to produce a decision that would have produced this result for the particular appellants, without playing havoc with the basic principles of the law of contract, which is what they did.[56] In other words, I would like them to have found a way for the advertising agents to continue to issue default summonses while recognising that *Clark v. Marsiglia*[57] is still good law both in the United States (where it *is* law) and in the United Kingdom (where it presumably is not).

FAILURE OF CONSIDERATION

Finally, let me look at the third way in which a claim may be made for a lump sum instead of for damages. Suppose you see an advertisement for a 'Silver Jubilee Commemorative Cup' made of sterling silver for $2,000.[58] You send off your $2,000. You receive an acknowledgement of your order, but the Cup does not come. In due course you write to the advertiser to point out that he has broken his contract to supply you with the Cup. You receive a reply in which the advertiser says you are absolutely right; he *has* broken his contract. He accordingly assures you of his willingness to pay you damages for breach of contract without delay.

There is, of course, a snag. He has to confess to you that the Cup was overpriced. In fact, he tells you that he was making a considerable profit

[56] See Stoljar, S. J., 'Some Problems of Anticipatory Breach' *op. cit.* 368-9.
[57] (1845) 1 Denio 317.
[58] 1977 was the year of Queen Elizabeth II's silver jubilee.

on the Cup for it was only worth $1,000, and that identical cups are now available in the shops at that price. You check up on this and discover that he is quite correct: such cups *are* available at $1,000.

Why is this relevant? The answer is to be found in a famous judgment of Parke B.: 'The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.'[59] If the contract had been performed you would have been in possession of a cup worth $1,000, having paid $2,000 for it. If, then, the advertiser is to pay you damages, the damages should be sufficient to enable you to obtain a cup worth $1,000. That he can achieve by paying you $1,000. From his point of view, that looks like an attractive way to do business. No need to spend money buying and storing stock: he simply makes his profit by charging $2,000 and then paying $1,000 as damages.

Not so attractive from your point of view, of course. You do not want damages at all. You want to get your $2,000 back. So you will sue for the lump sum: an action based on one of the old 'common counts', an action for money paid on a consideration that has wholly failed. Yet, astonishing as it may seem, there is authority for the proposition that you are not entitled to your money back: *Dutch v. Warren*, decided in 1721.[60] The plaintiff paid £262.10s. to the defendant in return for a promise to transfer shares in the Welsh copper mines 'as soon as the books are open'. Four days later the books opened but the defendant refused to transfer the shares, telling the plaintiff 'he might take his remedy'. The plaintiff sued for money had and received to the plaintiff's use, but the jury awarded £175 damages, the value of the shares on the day the books opened. It was held that 'the recovery was right, being not for the whole money paid, but for the damages, in not transferring the stock at the time'. Lord Mansfield commented: 'The damages recovered in that case, shew the liberality with which this kind of action is considered: for though the defendant received from the plaintiff £262.10s. yet the difference money only, £175 was retained by him against conscience: and therefore the plaintiff, *ex aequo et bono*, ought to recover no more.'

Having cited the authority which may support the view that the claim properly lies for damages, it is only right to give the authorities for the

[59] *Robinson v. Harman* (1848) 1 Ex. 850, 855; 154 E.R. 363, 365. *Cf.* Fuller, L. L. and Perdue, W. R., 'The Reliance Interest in Contract Damages', (1936) 46 *Yale Law Journal* 52, 79: 'We will not in a suit for reimbursement for losses incurred in reliance on a contract knowingly put the plaintiff in a better position than he would have occupied had the contract been fully performed.'

[60] The report in 1 Str. 406; 93 E.R. 598, is no more than a headnote. The case is more fully reported in the citation by Lord Mansfield C.J. in *Moses v. Macferlan* (1760) 2 Burr. 1005, 1010; 97 E.R. 676, 680. Although *Dutch v. Warren* appears to be cited with approval by Lord Mansfield it is not at all clear that the decision is consistent with that in *Moses v. Macferlan* itself. *Cf.* Anon 1 Str. 407; 93 E.R. 600.

contrary view. Apart from *Moses v. Macferlan*[61] itself, there is an American case directly in point: *Bush v. Canfield*.[62] The buyer agreed to buy 2,000 barrels of flour at $7.00 a barrel and paid $5,000 in advance. At the date for performance the flour had fallen in value to $5.50 a barrel. The seller failed to deliver the flour and the buyer sued. The seller argued that had he performed the contract the buyer would have lost $1.50 a barrel on 2,000 barrels, a total of $3,000, and that accordingly he should only get $2,000 back so as to put him in the position he would have been in had the contract been performed. Despite a logically persuasive dissent, the majority held that it was not for the seller, having broken the contract, to say that the buyer would have lost money even if he had performed it. The buyer recovered the full $5,000.

The choice between the action for damages and the lump sum claim would, it seems, be crucial in this case, and not merely of procedural advantage. Yet the claim for money paid on a consideration that has wholly failed is curiously limited. It is widely accepted that the requirement that the consideration has 'wholly failed' is all-important: any failure of consideration that is less than total does not lead to a claim for money paid. The rule that a partial failure of consideration is not enough derives, it is said, from *Hunt v. Silk*.[63]

A distinguished writer has referred to this common law rule that a person who has paid money under a contract cannot recover any part of the money on the ground of failure of consideration if he received any benefit in pursuance of the contract, however small that benefit might have been. He commented: 'If the occasion of the determination of the contract is the payee's breach, the rule does not work hardship, because the payer can if necessary recoup himself by means of an action for damages for breach of contract.'[64] But take the example of the Silver Jubilee Commemorative Cup. Suppose it was advertised as a cup 'with plinth', and you received the plinth — a small piece of plastic — without the cup. No doubt you could reject the plinth,[65] but once you lost the right to reject it you would find that there was no total failure of consideration, just a partial failure. Would your damages then be limited to the $1,000 it would take to put you in the same position as if the contract had been performed?

CONCLUSION

What I have tried to do in this article is to identify some of the problems and infelicities in our present law of contract. I have tried to look at these

[61] (1760) 2 Burr. 1005; 97 E.R. 676.
[62] (1818) 2 Conn. 485.
[63] (1804) 5 East 449; 102 E.R. 1142.
[64] Goff, R. L. A., (now Mr Justice Goff), 'Reform of the Law of Restitution' (1961) 24 *Modern Law Review* 85, 89.
[65] Is this so? See Goods Act 1958 (Vic.), ss. 18, 37, 38.

issues, not from the point of view of legal principle, but as they would appear to the eyes of those who are affected by their practical consequences. Sometimes, I would suggest, the results are less than satisfactory.

There is a theme to the rather unconnected examples I have given. It is the tensions that exist in our legal system — in any legal system — between certainty and justice, between simplicity and flexibility, between predictability and discretion. The arguments are not all on one side. Sometimes the advantage lies with the lump sum claim, for instance, sometimes with the judicial assessment of damages. There is much to be said for certainty and predictability in law. But a higher value is justice in the individual case.