CONTRACT DAMAGES FOR LOSS OF BARGAIN FOLLOWING TERMINATION: THE CAUSATION PROBLEM

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This article is concerned with circumstances in which damages are awarded for loss of bargain without proof that the breach which justified termination of a contract also caused the loss of bargain that followed from the termination. Its argument is that proof of cause of loss should never be dispensed with in a damages claim, and accordingly the only circumstance in which loss of bargain damages should be automatically available is where the termination follows a breach which substantially deprived the innocent party of the benefit of further performance. In making this argument the article necessarily challenges the "primary"/"secondary" obligations analysis of contract law which has achieved a significant level of judicial acceptance in the last two decades.

I. INTRODUCTION.

Before damages can be awarded for breach of contract it is normally necessary for the plaintiff to prove that the loss sustained was caused by the breach complained of.[1] Where, however, the damages sought are for loss of bargain[2] following a discharge for breach at common law, the plaintiff need not demonstrate a causal link between the breach which justified discharge and the loss of bargain.[3] This peculiarity seems to arise from the nature of the process of discharge for breach, which in turn follows from the nature of the event which justifies discharge. The discharge "truncates" the contract, notionally taking the parties directly from the point of termination to the point where completion is due.[4] It ". . . transmutes the primary obligation of the promisor to perform the terms contractually into a secondary obligation, imposed by law, to pay damages for their breach".[5] As Lord Diplock puts it, an "anticipatory secondary obligation" arises to pay loss of bargain damages: "there is substituted by implication of law for the primary obligations of the party in default which remain unperformed a secondary obligation to pay monetary compensation to the other party *for the loss sustained by him in consequence of their non-performance in the future*".[6] The process of discharge has that character because it is of the nature of the event justifying discharge that

it substantially deprives the innocent party of the benefit of further performance.[7] Total loss is presumed from the serious quality of the breach which justified discharge. It seems that, although it is the *discharge* rather than the *event which justified discharge* which appears to be the cause of the loss of bargain, the seriously deprivatory quality of the breach is such that its causal force is not interrupted by the event of discharge. In consequence, a defendant is not free to argue that the plaintiff's act in terminating the contract was the true cause of his loss.

Such is not, however, the case when loss of bargain damages are sought following a termination pursuant to an express contractual provision. Further remedial incidents, including damages liability, follow from construction of the agreement:

> When the parties themselves have provided for the determination of the contract on a given contingency, the consequences flow altogether from their contractual stipulation and are governed by their intention, either actual or imputed.[8]

These terminations do not give rise to a presumption of total loss. Therefore an incidental right to loss of bargain damages does not arise automatically and the normal burden on the plaintiff to demonstrate a causal link between breach and loss is not removed.[9]

Furthermore, courts are reluctant to *imply* into an express power of termination a right to loss of bargain damages. Because of the likely injustice to the party, against whom the power of termination is exercised, that would follow from the award of loss of bargain damages, it is not readily discovered in the process of judicial construction.[10] Thus, where a contract expressly provides a right of termination, cancellation or rescission, the parties are normally required to *include* rather than to *exclude* a right to loss of bargain damages.[11] Moreover, such an express provision is likely to amount to a penalty against which the court will relieve.[12]

Until quite recently the distinction between a discharge for breach at common law and a termination pursuant to contractual provision was readily drawn and there was little room for confusion as to their remedial incidents. Discharge for breach was a process available at common law to the party injured by a serious breach. Its further remedial incidents were attached by the common law.[13] Termination pursuant to contractual provision, on the other hand, arose from the agreement itself. Its further remedial incidents, quite logically, arose form the express words or the proper construction of that agreement.[14] However, the analysis of contractual obligation advanced by Lord Diplock in the House of Lords[15] has tended to blur the difference in process and remedial incidents between discharge for breach and termination pursuant to contractual provision.[16] At the same time, the importance of the distinction has recently been reaffirmed by the High Court of Australia in the case of *Shevill* v. *Builders Licensing Board*.[17]

II. SHEVILL'S CASE

In *Shevill* v. *Builders Licensing Board* a lessee of the respondent was constantly late with payments of rent, but the evidence did not suggest that the lessee was unwilling or likely to be unable to fulfil its obligations under the contract. The respondent exercised its right in terms of clause 9 (a) to forfeit the lease and re-enter

the premises. That right was given expressly "... without prejudice to any action or other remedy which the Lessor has or might or otherwise could have for arrears of rent or breach of covenants or for damages as a result of any such event ...".[18] Subsequently the respondent sued the guarantors of the lessee for arrears of rent and damages assessed as its loss on rents for the remainder of the term of the lease. They succeeded in the Supreme Court of New South Wales, but in the High Court of Australia it was held that the lessor was limited to the recovery of arrears of rent and damages for breaches occurring before forfeiture and re-entry.

The lessor claimed that it was entitled to loss of bargain damages after taking account of mitigation; that is, in this case, the amount which it would have received in rent during the remainder of the term after deduction of the amounts of rent which it was able to receive from the property during that period. He argued, in essence, that since the breaches of contract committed by the lessee entitled the respondent to terminate the contract, it followed that when the respondent exercised its right to do so it became automatically entitled to damages for loss of the benefits which performance of the contract would have conferred upon it.[19]

The High Court rejected that argument, relying on the distinction between discharge for breach at common law and termination pursuant to express contractual provision. Where a contract was discharged at common law for "essential" or "fundamental" breach, the innocent party was automatically entitled to loss of bargain damages.[20] But when a contract was terminated in terms of an express contractual power to do so, an incidental right to loss of bargain damages did not arise automatically. Further, because such a right would frequently be unjust to the party against whom the power of termination was exercisable, it would not be readily inferred, as a matter of construction, as a right incidental to express powers or rights.[21] It would normally require express words[22], and in the case of a lease,

> ...it would require very clear words to bring about the result, which in some circumstances would be quite unjust, that whenever a lessor could exercise the right given by the clause to re-enter, he could also recover damages for the loss resulting from the failure of the lessee to carry out all the covenants of the lease — covenants which, in some cases, the lessee might have been both willing and able to perform had it not been for the re-entry.[23]

In the absence of contractual stipulation specifying the quantum of damages,[24] damages were assessable in the event of termination in accordance with ordinary principles which require the plaintiff to demonstrate the causal link between breach and loss.[25] Here the loss of rent following termination was caused not by the lessee's breach but by the lessor's act of termination[26]. Therefore it was a loss for which the lessee was not legally responsible:

> Although the lessee's failure to pay the rent promptly was a serious breach of contract which the Board should not have been obliged to tolerate indefinitely, it was aware that it might have difficulty in finding another tenant if it were to re-enter and terminate the lease. It was not bound to take that step.... [The lessor] could have sued the lessee or the guarantors for arrears of rent.... Re-entry was a drastic step .... [T]he [lessor] effectively terminated the lease and secured possession of premises which it could not thereafter let for a considerable time. That consequence was not the fault of the former lessee.[27]

Therefore, the lessor was not entitled to damages in substitution for the rent from the time of termination until the end of the period of lease.

The decision appears impeccable in its fairness, its logic, and its orthodoxy, but not, however, in its adherence to the modern analysis of contractual obligation, which appears to have found acceptance with the House of Lords.

III. THE PRIMARY/SECONDARY OBLIGATIONS ANALYSIS OF CONTRACT.

This analysis, in broad outline, takes the following form: contractual obligations fall into two categories, primary obligations and secondary obligations.[28] The primary obligations are the obligations of performance. They can arise either through express provision or implication of law. Lord Diplock describes primary obligations thus: where by express words parties promise to one another "that some thing will be done; for instance, that property and possession of goods will be transferred, that goods will be carried by ship from one port to another, that a building will be constructed in accordance with agreed plans, that services of a particular kind will be provided" those express words are "the source of primary legal obligations upon each party to it to procure that whatever he has promised will be done is done".[29] Normally, however, parties do not expressly specify all the primary obligations and "many are left to be incorporated by implication of law from the legal nature of the contract into which the parties are entering" such implications proceeding routinely in the absence of express contrary stipulation by the parties.[30]

A breach of a primary obligation gives rise to "substituted or secondary obligations" falling on the party in default[31] and obliging him to pay monetary compensation for loss sustained by the injured party in consequence of the breach.[32] These secondary obligations arise, like primary obligations from the *contract*,[33] but yet by "implication"[34] or "operation"[35] of *law*.

Where a breach of contract is serious rather than minor the innocent party may, if he wishes, exercise an election to "discharge" the contract for breach.[36] On the exercise of that election, the parties are reciprocally released from their prospective "primary" obligations under the contract and there is added to the "general secondary obligation"[37] to pay damages in respect of losses suffered through breach, a further obligation, the "anticipatory secondary obligation" to pay loss of bargain damages: "there is substituted by implication of law for the primary obligations of the party in default which remain unperformed a secondary obligation to pay monetary compensation to the other party for the loss sustained by him in consequence of their non-performance in the future".[38] The "anticipatory secondary obligation" is also characterised by dual sources: "[t]his secondary obligation is just as much an obligation arising from the contract as are the primary obligations that it replaces".[39]

Breaches serious enough to justify discharge can arise in any number of ways[40] but the essential quality which appears to unite all such breaches is their tendency to deprive the other party of the benefit of further performance. The conclusion that the deprivatory tendency exists can be reached on one of two bases: either the parties have expresssly or impliedly by their contract said so, or the court finds that in fact

the tendency has materialised in deprivation. In *Photo Production Ltd* v. *Securicor Transport Ltd* Lord Diplock described the two bases in the following way:

> (1) where the event resulting from the failure by one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract, the party not in default may elect to put an end to all primary obligation of both parties remaining unperformed (if the expression 'fundamental breach' is to be retained, it should, in the interests of clarity, be confined to this exception);
>
> (2) where the contracting parties have agreed, whether by express words or by implication of law, that any failure by one party to perform a particular primary obligation ('condition' in the nomenclature of the Sale of Good Act 1893) irrespective of the gravity of the event that has in fact resulted from the breach, shall entitle the other party to elect to put an end to all primary obligations of both parties remaining unperformed (in the interest of clarity, the nomenclature of the Sale of Goods Act 1893 'breach of condition' should be reserved for this exception).[41]

On a theoretical level there are immense difficulties in understanding how obligations can arise simultaneously from the parties' agreement *and* from implication or operation of the common law.[42] But what is of concern for present purposes is the blurring of the boundaries between discharge for breach and termination pursuant to express contractual provision, which follows from the theory's assimilation of express and implied obligation, and the particular implications which that has for the measurement of damages following termination pursuant to express contractual provision.

It will be recalled that Lord Diplock maintains a distinction within his category of secondary obligations between liability in damages for loss arising from breach (the general secondary obligation) and liability in damages for loss of bargain (the anticipatory secondary obligation). There are two reasons why the distinction seems to be important. The first is that it appears to be the case that it is only following discharge that damages for loss of bargain can be recovered at all. They are not recoverable on breach alone because, until discharge, the continuing existence of the reciprocal obligations to perform means that the value of the bargain is not lost and is not therefore assessable in damages.[43] The second is that in a discharge for breach situation, it is only in respect of the first category, the general damages liability, that the causal link between breach and loss must be shown. In respect of damages awarded for loss of bargain the causal link between loss claimed and breach need not be demonstrated. As was observed at the outset although it is the discharge rather than the breach which justified discharge that is the cause of the loss of bargain, the seriousness of the breach, inasmuch as it seriously deprives the injured party of the benefit of further performance, is such that its causal force is not interrupted by the event of discharge. Total loss is presumed from the nature of the event which justified discharge. The function of discharge is "notionally at least, to take the parties direct from the point of termination to the point where completion is due".[44] To put it another way, in order to warrant the drastic consequences that flow from a discharge for breach, the breach must of its nature

deprive the innocent party of the benefit of his bargain through performance, so that he is necessarily entitled to the benefit of it in damages.

That reasoning is sensible and perhaps inevitable in relation to Lord Diplock's category (1), where the event justifying discharge has factually deprived the innocent party of substantially the whole benefit which he was to obtain under the contract. What he has proven to justify discharge he surely need not prove again to measure damages.

The same logic does not, however, flow into category (2). The mere fact that the parties have "agreed, whether by express words or by implication of law, that *any* failure by one party to perform a particular primary obligation ... irrespective of the gravity of the event that has in fact resulted from the breach, shall entitle the other party to elect to put an end to all primary obligations of both parties remaining unperformed",[45] does not of itself justify a presumption that the benefit of the bargain is lost by reason of the breach. And, as has been noted above, the courts have shown a reluctance to adopt any such presumption in the context of express termination clauses.[46]

Of this, *Shevill* v. *Builders Licensing Board*[47] provides an example. The High Court refused to presume from the power of termination arising in the event of unpaid rent that the parties intended the obligation of punctual payment as an essential term, for breach of which loss of bargain damages would be automatically available:

> In my opinion it does not follow from the fact that the contract gave the respondent the right to terminate the contract that it conferred on it the further right to recover damages as compensation for the loss it will sustain as a result of the failure of the lessee to pay the rent and observe the covenants for the rest of the term.[48]

The Court considered that, absent express stipulation, loss of bargain damages could be awarded only in two situations. One situation would be where, as a matter of construction, a right to loss of bargain damages arose incidentally to the express power of termination.[49] In this case, examination of clause 9(a) revealed that the specified grounds for termination were of immense variety in their significance. These included serious and minor breaches and events which were not breaches at all, and accordingly inconsistent with an implied contractual intention that loss of bargain damages should follow clause 9 terminations.[50]

The second situation where loss of bargain damages might be awarded was where the lack of punctuality in rent payment amounted also to serious breach of contract justifying discharge and accordingly loss of bargain damages. That could occur only if the default (a) amounted to breach of "an essential or fundamental term",[51] which an obligation to pay rent at specified times was not,[52] or, (b) if the breach went "so much to the root of the contract that it makes further commercial performance of the contract impossible", which it did not.[53]

The (b) circumstance, of a breach going "to the root of the contract" probably coincides with Lord Diplock's category (1) ("has the effect of substantially depriving the other party of the whole benefit which it was the intention of the parties that he should obtain from the contract..."[54]). Both comprehend situations in which the deprivatory tendency has materialised in *actual deprivation*.

The plaintiff, therefore, need not show twice (first to justify discharge and then for damages measurement) that the loss of his bargain was caused by the breach.

The other categories do not, however, appear to match. The High Court's (a) circumstance (breach of "an essential or fundamental term") seems to correspond with what is commonly known as "breach of condition" on the basis that the parties' agreement indicates that the promise broken is of such importance to the innocent party that he should be able to free himself of further obligations unless he has performance of it.[55] That (a) circumstance appears more narrowly drawn than Lord Diplock's category (2), which at least on its words embraces both "breach of condition" in that sense, and termination pursuant to express contractual provision:

> ... where the contracting parties have agreed, whether by express words or by implication of law, that any failure by one party to perform a particular primary obligation ('condition' in the nomenclature of the Sale of Goods Act 1893) irrespective of the gravity of the event that has in fact resulted from the breach, shall entitle the other party to elect to put an end to all primary obligations of both parties remaining unperformed (in the interest of clarity, the nomenclature of the Sale of Goods Act 1893 'breach of condition' should be reserved for this exception).[56]

IV. CONCLUSIONS

Three categories of circumstances seem to emerge and to call for separate consideration.

1. Discharge Following "Fundamental Breach" or "Breach Going to the Root of the Contract"

Here the automatic availability of damages for loss of bargain can be justified on the basis that the innocent party, having already proved for the purposes of justifying discharge that the breach substantially deprived him of the benefit of further performance, need not prove the same thing again for the purpose of damages assessment[57]. He is not, however, freed from his obligation to demonstrate the factual extent of his loss, or as it is sometimes put, the value of his bargain[58], nor is he freed from the other ordinary requirements of damages law, including the law as to mitigation[59] and remoteness.[60]

2. Termination Pursuant to Express Contractual Provision

Loss of bargain damages are available following a termination pursuant to express contractual provision only:

(a) where the contract expressly so provides (and developments in the law relating to penalties make this increasingly difficult to achieve);[61] or

(b) upon proof that the facts which justified termination amounted also to a breach of contract,[62] which would have justified a discharge at common law.[63]

To the contrary is the view expressly stated by Lord Diplock in *The Afovos*,[64] and impliedly elsewhere,[65] that termination clauses entitle the innocent party to treat the breach which justifies termination as if it justified a discharge at common law.

3. Discharge for Breach of "Condition" or "Essential Term"

Loss of bargain damages are available following discharge for breach of an "essential" term or "condition",[66] automatically and without proof of a causal link between breach and loss[67] but in principle this conclusion is difficult to justify. It is by no means inevitable that every circumstance in which the importance of strict performance permits the innocent party to proceed to a damages claim, without himself performing, results in total loss of the benefit of the contract, which should be the basis on which loss of bargain damages are automatically available. Further, it is by no means self-evident that the considerations of commercial certainty which justify retention of the "condition" category for the purposes of discharge[68] justify, as an automatic incident, loss of bargain damages.

It is suggested that the metaphysics involved in the transmutation of primary obligation into secondary obligation threatens to pervert the compensation principle of damages law which should be employed in the ordinary way when contracts have been discharged or terminated.[69] The possible perversion arises from the tendency of that analysis to suggest that the "primary obligations" are of equal measure, with the result that logically damages are automatically measured by reference to the value of performance of the discharged obligations, when the loss of the value of total performance of discharged obligations may not have been caused by the breach. Two undesirable consequences follow. First, a plaintiff is necessarily relieved of his ordinary duty to establish a causal link between breach and loss. In principle, this cannot be justified. Secondly, the action in damages for loss of a contractual bargain is assimilated to an action for a liquidated sum or debt, and thus loses contact with the principle of compensation which has been devised particularly for the purpose of governing awards of damages.

Considerations of convenience or justice may justify in some circumstances the adoption of standard or prima facie damages measures, which sometimes result in the recovery of damages in respect of losses which may not in fact occur:[70] *omnia praesumuntur contra spoliatorem*.[71] But the compensation principle is offended by the adoption of a standard or prima facie measure in order to relieve the plaintiff of the burden of proof of cause of loss : damages are awarded to compensate for losses resulting from breach[72] and the compensation principle is, of course, more gravely offended by the assimilation of contractual loss of bargain damages to a claim in debt.

The compensation principle requires that the object pursued in damages awards is to put the party whose rights have been violated in the financial position he would have enjoyed had his rights been observed.[73] In cases where the cause of action is based on breach of contract, the position in which the plaintiff would have been but for the wrong is the hypothetical state of affairs that would have arisen upon fulfilment of the promise whose breach is the subject of complaint.[74] The damages are therefore properly measured by estimating the difference between that contemplated, post-performance situation and the actual, post-breach situation in which the plaintiff finds himself,[75] after making appropriate allowances for those elements of the loss for which the defendant should not have to answer.[76] The compensation is thus for loss, reasonably and actually sustained,[77] and estimated by reference to the state of affairs which breach, not discharge, has precluded.

Compensation is not awarded in respect of losses where the defendant's breach is not the cause[78] or a substantial causative factor[79] in the loss.

One final comment can be made. Although nothing in this article has suggested that there is or should be any restriction on the right of the innocent party to a breach of contract to exercise a power afforded him by his contract or by the common law to discharge or terminate contractual obligations, doubt as to the availability of loss of bargain damages may have the effect in practical terms of inhibiting recourse to such a power except in the case of an obviously serious breach. While full recognition must be given to that possible consequence, it need not be regarded as undesirable.

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FOOTNOTES

1 The link between breach and loss is usually expressed in terms of remoteness rather than causation; this is because liability issues have tended to be described in terms of causation, while damages issues have tended to be described in terms of remoteness. In consequence, a loss not shown to be caused by the breach will be considered too remote and accordingly not compensable: *Haynes* v. *Harwood* [1935] 1 K.B. 146, 156; *Sayers* v. *Harlow Urban District Council* [1958] 1 W.L.R. 623, 625; *Compania Financiera "Soleada" S.A.* v. *Hamoor Tanker Corporation Inc. (The Borag)* [1981] 1 W.L.R. 274, 281-82 *per* Lord Denning M.R., 282-83 *per* Shaw L.J., 284 *per* Templeman L.J. However, since in the contract context only breach need be established in order to show liability, enquiry into the link between breach and loss occurs after liability is established when damages are considered, and there is merit in recognising the distinction between the factual, causal aspect of remoteness, and the legal, scope of protection aspect: *Monarch S.S. Co.* v. *Karlshamns Oljefabriker (A/B)* [1949] A.C. 196, 225 *per* Lord Wright; *Schilling* v. *Kidd Garrett Ltd* [1977] 1 N.Z.L.R. 243, 266-68 *per* Cooke J. See further, *McGregor on Damages* (14th ed. 1980) Ch. 6; Ogus, *The Law of Damages* (1973) Ch. 3.

2 "Loss of bargain" and "loss of contract" are expressions which are used in two distinct senses. The first, and it is suggested, the correct use, is to refer to what is normally recognised as the basic contract damages measure, *i.e.*, it reflects the loss the plaintiff suffers through being deprived by breach of the benefit of performance of the promise broken: McGregor, note 1 *supra*, 573; it is sometimes described as the contractual expectation; Ogus, note 1 *supra*, Ch.8. The extent of damage is measured by an estimate of the difference between the plaintiff's actual, post-breach position and the hypothetical, post-performance position he would have enjoyed had the defendant observed rather than broken his promise: *Robinson* v. *Harman* (1848) 1 Ex. 850,855 *per* Parke B.; see also McGregor, note 1 *supra*, Ch.18. The second sense in which they are used is to refer to the loss of the benefits of future performance of obligations which are released following discharge or termination. Because "loss of bargain" and "loss of contract" have been employed in that second sense in the cases under consideration here, the expressions will be used in that second sense in this paper.

3 Following discharge for breach the prima facie measure of damages is fixed by reference to the difference between the plaintiff's actual, post-discharge position and the contemplated, time-of-completion of all performance under the contract: *Johnson* v. *Agnew* [1978] 1 Ch. 176; *Schilling* v. *Kidd Garrett Ltd* note 1 *supra*, 268 *per* Cooke J.; see also discussion in Dawson, "Metaphors and Anticipatory Breach of Contract" [1981] *C.L.J.* 83, 104. The onus of proving that some or all of the loss is not attributable to the breach lies on the defendant: *Maredelanto Compania Naviera S.A.* v. *Bergbau-Handel G.mb.H. (The Mihalis Angelos)* [1971] 1 Q.B. 164; *Schilling* v. *Kidd Garrett Ltd* note 1 *supra*.

4 B. Coote, "The Effect of Discharge by Breach on Exception Clauses" [1970] *C.L.J.* 221, 226.

5 *Moschi* v. *Lep Air Services Ltd* [1973] A.C. 331, 355 *per* Lord Simon of Glaisdale, with whom Lord Diplock expressed agreement at 346.

6 [Emphasis added] *Photo Production Ltd* v. *Securicor Transport Ltd* [1980] A.C. 827, 849; statements to similar effect occur in *Moschi* v. *Lep Air Services Ltd*, note 5 *supra*.

7 *Hong Kong Fir Shipping Co. Ltd* v. *Kawasaki Kisen Kaisha Ltd* [1962] 2 Q.B. 26,65 *per* Diplock L.J.; *Photo Production Ltd* v. *Securicor Transport Ltd*, note 6 *supra*, 849 *per* Lord Diplock; *Moschi* v. *Lep Air Services*, note 5 *supra*, 349 *per* Lord Diplock; Coote in "The Effect of Discharge by Breach on Exception Clauses" [1970] *C.L.J.* 221, 222 and "The Second Rise and Fall of Fundamental Breach" (1981) 55 *A.L.J.* 788, 788 uses similar language, in the latter stating that "...in a significant way, the injured party is denied the performance for which he bargained...".

8 *Westralian Farmers Ltd* v. *Commonwealth Agricultural Service Engineers Limited (In Liquidation)* (1935-1936) 54 C.L.R. 361, 371 *per* Dixon and Evatt, JJ.

9 *Shevill* v. *Builders Licensing Board* (1982) 42 A.L.R. 305; *Brady* v. *St. Margaret's Trust, Ltd* [1963] 2 Q.B. 494; *Westralian Farmers Ltd* v. *Commonwealth Agricultural Service Engineers Limited (In Liquidation)*, note 8 *supra*; *Taylor* v. *Raglan Developments Pty Ltd* [1981] 2 N.S.W.L.R. 117.

10 *Shevill* v. *Builders Licensing Board*, note 9 *supra*, 309-10 *per* Gibbs C.J., 317-318 *per* Wilson J.; *Brady* v. *St. Margaret's Trust, Ltd*, note 9 *supra*; *Westralian Farmers Limited* v. *Commonwealth Agricultural Service Engineers Limited (In Liquidation)*, note 8 *supra*; *Taylor* v. *Raglan Developments Pty Ltd*, note 9 *supra*.

11 *Shevill* v. *Builders Licensing Board*, note 9 *supra*, 309-10 *per* Gibbs C.J.

12 *Dunlop Pneumatic Tyre Co. Ltd* v. *New Garage and Motor Co. Ltd* [1915] A.C. 79; *Coates* v. *Sarich* [1964] W.A.R. 2; *O'Dea* v. *Allstates Leasing System (W.A.) Pty Ltd* (1982-1983) 45 A.L.R. 632; *Export Credits Guarantee Department* v. *Universal Oil Products Co.* [1983] 2 All E.R. 205.

13 *Holland* v. *Wiltshire* (1954) 90 C.L.R. 409; see the distinction drawn by Meagher, Gummow and Lehane in *Equity Doctrines and Remedies* (1975), ch. 24 "Rescission", and by Mr Justice McGarvie in *Discharge of Contracts* (1980) Leo Cussen Institute for Continuing Legal Education.

14 *Brady* v. *St. Margaret's Trust, Ltd*, note 9 *supra*; *Westralian Farmers Limited* v. *Commonwealth Agricultural Service Engineers Limited (In Liquidation)*, note 8 *supra*; *Taylor and Others* v. *Raglan Developments Pty Ltd*, note 9 *supra*.

15 The analysis, which will be discussed later in this paper, proceeds upon a division of contractual obligation into "primary", "secondary" and "anticipatory secondary". It was applied by Brian Coote in *Exception Clauses* (1964) where in Chapter 1 a "primary" and "secondary"/"sanctioning" rights analysis was employed in a consideration of the function of exception clauses. It found a place in the reasoning of Lord Diplock *C. Czarnikow Ltd* v. *Koufos* [1966] 2 Q.B. 695, was later amplified by his Lordship in *Moschi* v. *Lep Air Services Ltd*, note 5 *supra* and was expounded at greater length in *Photo Production Ltd* v. *Securicor Transport Ltd*, note 6 *supra*, with the approval of Lord Wilberforce at 845. The only judge who seems to question the analysis is Lord Denning M.R. who in *George Mitchell (Chesterhall) Ltd* v. *Finney Lock Seeds Ltd* [1983] Q.B. 284, 300-301 found it "too esoteric altogether".

16 There seems to be little doubt that Lord Diplock is consciously seeking to merge the categories of discharge for breach of condition and termination pursuant to express provision. In *Afovos Shipping Co. S.A.* v. *Pagnan (The Afovos)* [1983] 1 All E.R. 449, 455, interpreting a withdrawal clause in a charterparty, His Lordship said: "The owners are to be at liberty to withdraw the vessel from the service of the charterers; in other words they are entitled to treat the breach when it occurs as a breach of condition and so giving them the right to elect to treat it as putting an end to all their own primary obligations under the charterparty...". His Lordship then goes on to describe the substitution of the primary obligations with secondary obligations. That line of reasoning was rejected by the High Court of Australia in *Shevill* v. *Builders Licensing Board*, note 9 *supra*.

17 (1982) 42 A.L.R. 305.

18 Cl 9(a) in its entirety read thus:

The Lessor and its Lessee COVENANT and AGREE:

(a) That if the rent hereby reserved or any part thereof shall be unpaid for the space of fourteen (14) days after any of the days on which the same ought to have been paid in accordance with the covenant for payment of rent herein contained (although no formal or legal demand shall have been made therefor) or if the Lessee commits or suffers to occur any breach or default in the due and punctual observance and performance of any of the covenants obligations and provisions of this lease or of any Rules made hereunder or if the Lessee be a company an order is made or a resolution is effectively passed for the winding up of the Lessee (except for the purpose of reconstruction or amalgamation with the written consent of the Lessor which consent shall not be unreasonably withheld) or if the Lessee goes into liquidation or makes an assignment for the benefit of or enters into an arrangement or composition with its creditors or stops payment of or is unable to pay its debts within the meaning of any relevant Companies Act or ordinance or if execution is levied against the Lessee and not discharged within thirty (30) days or if the Lessee (being an individual) becomes bankrupt or commits an act of bankruptcy or brings his estate within the operation of any law relating to bankrupts then and in any one or more or either of such events the Lessor at any

time or times thereafter shall have the right to re-enter into and upon the demised premises or any part thereof in the name of the whole to have again repossess and enjoy the same as its former estate anything herein contained to the contrary not withstanding but without prejudice to any action or other remedy which the Lessor has or might or otherwise could have for arrears of rent or breach of covenants or for damages as a result of any such event and thereupon the Lessor shall be freed and discharged from any action suit claim or demand by or obligation to the Lessee under or by virtue of this Lease. *Id.*, 306.

19 Note 17 *supra*, 307, 309-10 *per* Gibbs C.J.
20 Note 17 *supra*, 309 *per* Gibbs C.J.; 316-17 *per* Wilson J.
21 Note 17 *supra*, 307-11 *per* Gibbs C.J.; 316 *per* Wilson J.
22 Note 17 *supra*, 310 *per* Gibbs C.J.
23 *Ibid.*
24 Note 17 *supra*, 311 *per* Gibbs C.J.
25 Note 17 *supra*, 318 *per* Wilson J.
26 *Ibid.*
27 Note 17 *supra*, 317-18 *per* Wilson J.
28 The analysis was advanced by Brian Coote, note 15 *supra*, Ch. 1. The major judicial architect and proponent of it appears to be Lord Diplock; see initially *C. Czarnikow Ltd* v. *Koufos*, note 15 *supra*, 730. Acceptance of the analysis is now quite general: *Afovos Shipping Co. S.A.* v. *Pagnan (The Afovos)*, note 16 *supra*, 454-55 *per* Lord Diplock; *Moschi* v. *Lep Air Services Ltd*, note 5 *supra*, 345-46 *per* Lord Reid, 350 *per* Lord Diplock, 355 *per* Lord Simon of Glaisdale; *Photo Production Ltd* v. *Securicor Transport Ltd*, note 6 *supra*, 848-50 *per* Lord Diplock, approved there by Lord Wilberforce at 845 and again in *Port Jackson Stevedoring Pty Ltd* v. *Salmond & Spraggon (Australia) Pty Ltd (The New York Star)* [1980] 3 All E.R. 257, 262; it was applied in *Hyundai Heavy Industries Co. Ltd* v. *Papadopoulos* [1980] 2 All E.R. 29, 38-41 by Lord Edmund-Davies; acknowledged as correct in *George Mitchell (Chesterhall) Ltd* v. *Finney Lock Seeds Ltd*, note 15 *supra*, 118 *per* Oliver L.J., 116 *per* Lord Denning M.R. who, however, found it "too esoteric altogether"; Lord Diplock's analysis in *Photo Production* is also accepted by L.S. Sealy, (1980) 39 *Camb.L.J.* 252, 256, Andrew Nicol and Rick Rawlings, (1980) 43 *Mod.L.Rev.* 567, 572-73 and again by Brian Coote, (1981) 55 *A.L.J.* 788, 795.
29 *Photo Production Ltd* v. *Securicor Transport Ltd*, note 6 *supra*, 848 *per* Lord Diplock.
30 *Ibid.*
31 *Id.*, 848-49.
32 *Moschi* v. *Lep Air Services Ltd*, note 5 *supra*, 350 *per* Lord Diplock, *Photo Production Ltd* v. *Securicor Transport Ltd* note 6 *supra*, 848-50 *per* Lord Diplock.
33 *Ibid.*
34 Note 29 *supra*, 848-50 *per* Lord Diplock.
35 *Moschi* v. *Lep Air Services Ltd*, note 5 *supra*, 350 *per* Lord Diplock.
36 Note 29 *supra*, 849 *per* Lord Diplock.
37 *Ibid.*
38 *Ibid.*
39 Note 35 *supra*.
40 A list of possible instances is provided by A. Shea, "Discharge from Performance of Contracts by Failure of Condition" (1979) 42 *M.L.R.* 623, 623-24.
41 Note 29 *supra*, 849 *per* Lord Diplock.
42 How can parties have "agreed ... by implication of law" (*Photo Production Ltd* v. *Securicor Transport Ltd*, note 6 *supra*, 849 *per* Lord Diplock)? Do we conclude that liability to pay damages arises as a matter of construction (as it should if, in truth, the obligation arises from the contract) and if so, how can it arise also by implication or operation of law? Will a contracting party be required to pay damages in contract only if and to the extent that the court discovers that they have agreed to do so? If, alternatively, the obligation to pay damages arises as a matter of common law, what influence does the parties' agreement have? Does the parties' agreement (express or implied) operate merely by way of exclusion of the incidents otherwise attached by law to their promised exchange of performance.
43 *Johnson* v. *Agnew*, note 3 *supra*, see counsel's argument at 390 and Lord Wilberforce at 392; *Ogle* v. Comboyuro Investments Pty Ltd (1976) 136 C.L.R. 444, 458 *per* Gibbs, Mason and Jacobs JJ. and 450-55 *per* Barwick C.J. expressing the contrary view suggesting that loss of bargain damages might be recovered without discharge of contract.
44 B. Coote, note 4 *supra*.
45 Note 29 *supra*, 849 *per* Lord Diplock and other authorities referred to in note 9 *supra*.
46 See earlier discussion of the judgment in *Shevill* v. *Builders Licensing Board*, note 9 *supra*.

47 *Shevill* v. *Builders Licensing Board*, note 9 *supra*.
48 *Id.*, 309 *per* Gibbs C.J.
49 *Id.*, 309 *per* Gibbs C.J., 316-17 *per* Wilson J.
50 *Ibid.*
51 *Id.*, 309 *per* Gibbs C.J., 316-17 *per* Wilson J.
52 *Ibid.*
53 *Id.*, 308 *per* Gibbs C.J., with quotation from the judgment of Upjohn L.J. in *Hongkong Fir Shipping Co. Ltd* v. *Kawasaki Kisen Kaisha Ltd*, note 7 *supra*.
54 *Photo Production Ltd* v. *Securicor Transport Ltd*, note 6 *supra*, 849 *per* Lord Diplock.
55 See *Bunge Corporation* v. *Tradax SA* [1981] 2 All E.R. 513.
56 Note 6 *supra*, 849 *per* Lord Diplock.
57 See the authorities referred to in note 7 *supra*.
58 "Value" is the expression used by Megaw L.J. in *Maredelanto Compania Naviera S.A.* v. *Bergbau-Handel G.m.b.H. (The Mihalis Angelos)*, note 3 *supra*, 210; however, A.I. Ogus, note 1 *supra*, 290 suggests that "value" is an unhelpful paraphrase of the notion of factual benefit of the obligation which the defendant has broken. Cooke J. in *Schilling* v. *Kidd Garrett Ltd*, note 1 *supra*, 268, while drawing support from the relevant portion of the judgment of Megaw L.J. in *The Mihalis Angelos* does not adopt the "value" approach, but indicates instead that *prima facie* a plaintiff is entitled to damages measured by total performance, with the onus falling on the defendant to prove that the award should be reduced because part or all of the loss was not caused by him. Dawson agrees: F. Dawson, "Metaphors and Anticipatory Breach of Contract" [1981] *Camb. L.J.* 83, 104.
59 *Payzu, Limited* v. *Saunders* [1919] 2 K.B. 581; *Perry* v. *Sidney Phillips* [1982] 3 All E.R. 705.
60 *Monarch Steamship Co. Limited* v. *Karlshamns Oljefabriker (A/B)*, note 1 *supra*; *Cerealmangini SpA* v. *Alfred C. Toepfer (The Eurometal)* [1981] 3 All E.R. 533.
61 See *O'Dea* v. *Allstates Leasing System (WA) Pty Ltd*, note 12 *supra*; *Export Credits Guarantee Department* v. *Universal Oil Products Co.*, note 12 *supra*; in relation to some contracts equitable relief against forfeiture provides another possible escape route for the contract breaker; see *Legione* v. *Hateley* (1983) 57 A.L.J.R. 292, but note that in *Scandinavian Trading Tanker Co A.B.* v. *Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] 2 All E.R. 763 the House of Lords resists the extension of that relief beyond the traditional areas.
62 *Shevill* v. *Builders Licensing Board*, note 9 *supra*; *Export Credits Guarantee Department* v. *Universal Oil Products Co.*, note 12 *supra*.
63 *Progressive Mailing House Pty Ltd* v. *Tabali Pty Ltd* (1982) N.S.W. Conv. R. 55-099; *quaere* whether a plaintiff may rely on some other relevantly serious breach of contract which he has not used as a ground for termination to justify recovery of loss of bargain damages; it could be argued to the contrary, on the basis that if he did not use the breach on which he relies to recover damages to effect release, it did not cause him to lose his bargain.
64 *Afovos Shipping Co. SA* v. *Pagnan (The Afovos)*, note 16 *supra*.
65 Especially in *Photo Production Ltd* v. *Securicor Transport Ltd*, note 6 *supra*, 849.
66 The language of "essentiality" is predominently employed in Australian courts in circumstances where English courts prefer the word "condition"; see *Tramways Advertising Pty Ltd* v. *Luna Park (N.S.W.) Ltd* (1938) 38 S.R. (N.S.W.) 632; *Associated Newspapers* v. *Bancks* (1951) 83 C.L.R. 322; *D.T.R. Nominees Pty Ltd* v. *Mona Homes Pty Ltd* (1978) 138 C.L.R. 423; *Shevill* v. *Builders Licensing Board*, note 9 *supra*; *Bunge Corporation* v. *Tradax SA*, note 55 *supra*; *Photo Production Ltd* v. *Securicor Transport Ltd*, note 6 *supra*.
67 See authorities referred to in note 66 *supra*.
68 *Bunge Corporation* v. *Tradax SA*, note 55 *supra*; *A/S Awilco* v. *Fulvia Sp. A di Navigazione (The Chikuma)* [1981] 1 All E.R. 652.
69 The analysis may have some utility in assisting understanding of the impact of discharge on the "primary obligations" of performance in other respects, as appears from cases such as *Hyundai Heavy Industries Co. Ltd* v. *Papadopoulos*, note 28 *supra*; *Photo Production Ltd* v. *Securicor Transport Ltd*, note 6 *supra*; and *Moschi* v. *Lep Air Services Ltd*, note 5 *supra*. Indeed subject to what is suggested about Lord Diplock in note 16 *supra*, it could be argued that the House of Lords in those cases had no intention of extending the categories of circumstances in which loss of bargain damages were automatically recoverable to include termination pursuant to express contractual provision, although it is clear from the decision in *Bunge Corporation* v. *Tradax SA*, note 55 *supra* that the House of Lords regards loss of bargain damages as automatically available in cases of discharge for breach of condition.
70 Sometimes losses which have not occurred but which are reasonably likely to occur in the circumstances, can be the subject of compensation. This occurs more commonly in tort actions, particularly for personal injuries (see *Callaghan* v. *Wm. C. Lynch Pty Ltd* [1963] N.S.W.R. 871

(F.C.); *Ivkovic* v. *Australian Iron & Steel Ltd* [1963] 63 S.R. (N.S.W.) 598, but it occurs also in contract, *e.g.*, where the likelihood of a loss occurring is valued for the purposes of damages assessment (see *Chaplin* v. *Hicks* [1911] 2 K.B. 786; *Schilling* v. *Kidd Garrett Ltd* note 1 *supra*), where standard measures of damages are employed (*e.g.*, the prima facie measures of Sale of Goods legislation) and also, presumably, in cases where a contract has been discharged on account of anticipatory breach, and action is brought before performance is due.

71 *Callaghan* v. *Wm. C. Lynch Pty Ltd*, *ibid.*

72 See authorities in note 78 *infra*.

73 *Robinson* v. *Harman*, note 2 *supra*.

74 *Livingstone* v. *Rawyards Coal Co.* (1880) 5 App.Cas. 25, 39 *per* Lord Blackburn; *Victoria Laundry (Windsor) Ltd* v. *Newman Industries Ltd* [1949] 2 K.B. 528.

75 Farnsworth, "Legal Remedies for Breach of Contract" (1970) 70 *Col. L. Rev.* 1145.

76 By reason of the doctrines of remoteness and mitigation, or the requirements of certainty of proof of loss, or deduction for compensating advantages; see Ogus, note 1 *supra*.

77 Subject to what is said in note 70 *supra*.

78 *Monarch SS. Co.* v. *Karlshamns Oljefabriker (A/B)*, note 1 *supra*, 225 *per* Lord Wright; *Schilling* v. *Kidd Garrett*, note 1 *supra*, 266-68 *per* Cooke J.; *Compania Financiera "Soleada" S.A.* v. *Hamoor Tanker Corporation Inc. (The Borag)*, note 1 *supra*; see McGregor, note 1 *supra*, Ch. 6; Ogus, note 1 *supra*, Ch. 3.

79 *Schilling* v. *Garrett* note 1 *supra*, 266-68 per Cooke J.