IMPORTANT CASE LAW & JUDICIAL REASONING

DISCHARGE OF CONTRACT

Agreement (Discharge By Accord)

- Parties may make an agreement to end the original agreement
- New agreement is subject to the rules of contract formation (needs consideration)
- If a contract is to be discharged unilatery, the other party must pay a cancellation fee

Performance: Starting Point

ARCOS V RONAASEN [1933] AC 470

Facts: Timber staves were bought to make cement barrels of 1,5 inch thickness. The barrels turned out to be 1/16 inch thicker, which breached an expressed condition. Despite no difference in use a buyer would have the right to reject.

Principle: Terms that are conditions in a contract must be executed precisely, if not the buyer can reject what was provided.

A contract can be discharged when both parties strictly perform their contractual obligations.

Judgement:

Lord Atkin [479-80]: "[i]f the written contract specifies conditions of weight, measurement and the like, those conditions must be complied with. A ton does not mean about a ton, or a yard about a yard.....No doubt there may be microscopic deviations which business men and therefore lawyers will ignore....**But....the right view is that the conditions of a contract must be strictly performed. If a condition is not performed the buyer has a right to reject....**"

Performance: Not Complete

CUTTER V POWELL (1795) TR 320

Facts: Mr C was employed on a ship from Jamaica to Liverpool as a second mate. His contract stated that his wage will only be payable upon arrival to Liverpool. Mr C died, and his wife could not bring action for the wages worked for prior to his death. The sum was only payable upon completion.

Principle: The starting point is that when performance is not completed, the contract will not be enforced.

Judgement:

Ashhurst J.

"Where the parties have come to an express contract none can be implied has prevailed so long as to be reduced to an axiom in the law. Here the defendant expressly promised to pay the intestate thirty guineas, provided he proceeded, continued and did his duty as second mate in the ship from Jamaica to Liverpool" (576)

"A written contract, and it speaks for itself. And as it is entire, and as the defendant's promise depends on a condition precedent to be performed by the other party, the condition must be performed before the other party is entitled to receive anything under it." (576)

SGA 1979 s15A

F1 [15A Modification of remedies for breach of condition in non-consumer cases.

(1) Where in the case of a contract of sale—

(a) the buyer would, apart from this subsection, have the right to reject goods by reason of a breach on the part of the seller of a term implied by section 13, 14 or 15 above, but

(b) the breach is so slight that it would be unreasonable for him to reject them,

F2... the breach is not to be treated as a breach of condition but may be treated as a breach of warranty.

***Exceptions**

- Divisible contracts
- Non-performance due to the other party
- Acceptance of partial performance
- Substantial performance

Performance: Substantial

HOENIG V ISAACS [1952] 2 AER 176

Facts: The Def contracted to have his flat decorated for £750, the workman was paid partially in due course, however £350 was outstanding, to be paid when the work was completed. The Def said that the contract was not fulfilled as the workmanship was defective. Court held that substantial performance was delivered so the cl would recover, less a remedy for the defects of £50.

Principle: When substantial performance is delivered the workman can recover for it)

Judgement:
"Then entire performance is usually a condition precedent to payment of the retention money, but not, of course, to the progress payments. The contractor is entitled to payment pro rata as the work proceeds, less a deduction for retention money. But he is not entitled to the retention money until the work is entirely finished, without defects or omissions." (181)

"It was substantially performed. The contractor is entitled, therefore, to the contract price, less a deduction for the defects" (181)

"When a man fully performs his contract in the sense that he supplies all that he agreed to supply but what he supplies is subject to defects of so minor a character that he can be said to have substantially performed his promise, it is, in my judgment, far more equitable to apply the H Dakin & Co Ltd v Lee principle than to deprive him wholly of his contractual rights and relegate him to such remedy (if any) as he may have on a quantum meruit" (182)

FOXHOLES NURSING HOME V ACCORA LTD [2013] EWHC 3712(CH)

Facts: The case involved a dispute over whether some goods delivered by instalments were defective.

SGA 1979 s31(2) applied:

Instalment deliveries.

Unless otherwise agreed, the buyer of goods is not bound to accept delivery of them by instalments.

Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.

Principle: < Hoenig v Isaacs > Applied
The buyer is required to pay the seller for all properly delivered instalments according to the contractual terms.

Judgement:
J Murray
"where the obligor has substantially performed the obligation subject only to some minor defects or omissions, the obligor should be entitled to payment of the agreed price less a deduction based on the cost of making good those defects or omissions" [29]

Performance: Time

UNITED SCIENTIFIC HOLDINGS V BURNLEY [1977] 2 AER 62
Facts: The case concerned a commercial lease rent review clause that allows the owner to increase the rent price. The dispute was whether time was a condition. The court established that a tenant would commonly want to know when changes are made to rent prices, thus time was of the essence.

Principle: Time of performance may be constructed by the court as a condition of the contract. However, an *essence clause* should be expressed by parties in those contracts.

Judgement:
House of Lords: held that "*there was nothing in either of the leases in question to displace the presumption that strict adherence to the time-tables specified in their respective rent review clauses was not of the essence of the contract, and that therefore the new rents should be determined in accordance with the procedures specified in the respective leasest*" (905)

CHARLES RICKARDS V OPPENHEIM [1950] 1 KB 616
Facts: The claimant agreed to have his car worked on by a company which stipulated to finish the work by 6-7 months, but failed to deliver on time. Cl did not pursue his contractual right of cancellation but extended the deadline by pressing the company to get it finished.

Principle: Time may become of the essence in due course of the contracts, for the work to be completed within reasonable time, unless the buyer stipulates no time pressure, he is bound to accept the delivery.

Judgement:
Per Denning L.J. "Where, in such cases, the buyer or the person who has ordered the work continues, when the time originally fixed, being of the essence of the contract, has elapsed, to press for delivery or completion, thus leading the obligee to believe that he will not insist on the stipulation as to the time of performence and that if delivery is made or the work completed he will accept it, he cannot afterwards set up the original condition as to time." (617)

Singleton LJ: "In such a case the person ordering the work has the right in these circumstances to say,

"I will not accept the work unless you deliver it within a certain time" - which must be a reasonable time."

Breach: Efficient

"*In legal theory, particularly in law and economics, efficient breach is a voluntary breach of contract and payment of damages by a party who concludes that they would incur greater economic loss by performing under the contract.*" *Wiki*

Breach: Anticipatory

HOCHSTER V DE LA TOUR (1853) 2 E & B 678
Facts: A courier who entered a contract in April, was to start his contract from June. However, the employer changed his mind and before the time for performance, he expressed his intentions of not performing the contract. This anticipatory breach allowed for the employee to sue the other party for damages before the start of the contract.

Principle: The innocent party to an anticipatory breach is allowed to terminate the contract immediately, and sue for damages.

Judgement:
"The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured: and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer." (927)

STOCZNIA GDAŃSKA SA V LATVIAN SHIPPING CO (NO 3) [2002] EWCA CIV 889
Facts: The case involves the question if it is possible for a company to affirm and then repudiate a contract before the anticipatory breach occurred when the contract would start.
Principle: *Applied Hochster & Safehaven
Judgement:
Lord Justice Rix:
In my judgment the judge was right to adopt and apply Mr Sumption's ratio in Safehaven v. Springbok and right to conclude on the facts that there was a continuing repudiation after affirmation.[96].

> **Safehaven v Springbok (1996)**
> **Sumption QC:** "It does not follow from this analysis that the innocent party may in all cases change his mind after affirming the contract. If, after he had affirmed it, the repudiating party's conduct suggested that he proposed to perform after all, then the previous party's repudiation is spent. It has no further legal significance. If on the other hand, the repudiating party persists in his refusal to perform, the innocent party may later treat the contract as being at an end. The correct analysis in this case is not that the innocent party is terminating on account of the original repudiation and going back on his election to affirm. It is that he is treating the contract as being at an end on account of the continuing repudiation reflected in the other party's behaviour after the affirmation." (66)

Stocznia Gdanska SA v Latvian Shipping Co [1997] 2 Lloyd's Rep. 228

> **Colman J at [1997] 2 Lloyd's Rep 228 at 235**
> "*In the area of anticipatory breach the guilty party needs to know with certainty whether the contract which he has repudiated has been terminated or kept alive, for, if it is still alive, he will yet have the opportunity of performance. For this reason the innocent party who has affirmed the*

contract cannot revert to his right to treat the contract as terminated on the grounds of the same pre-existing anticipatory breach."

YUKONG LINE LTD OF KOREA V RENDSBURG INVESTMENTS CORPORATION OF LIBERIA [1996] 2 LLOYD'S REP 604 (don't use this case)
Facts: When a vessel was charted for 3 years, Def informed the Cl they no longer can perform. The Cl first telexed the party asking the Def to continue, and then sent a message of termination.
Principle: -
Judgement: -

Breach: Election

VITOL SA V NORELF LTD [1996] 3 ALL ER 193
Facts:
Principle: The election to terminate a contract after a repudiatory breach must be communicated between the parties.

810-811, Summary:
- A party has the right to elect whether to terminate or affirm the contract
- The communication of the election must be clear and unequivocal using either communication or conduct.
- A notification on choosing repudiation can be done through an agent

Judgement:
Lord Steyn:
"The contract continues in existence unless and until the aggrieved party elects to bring it to an end. Non-performance by silence or inactivity may be for reasons other than election to terminate the contract." (804)

"In act of acceptance of a repudiation requires no particular form: a communication does not have to be couched in the language of acceptance. It is sufficient that the communication or conduct clearly and unequivocally conveys to the repudiating party that that aggrieved party is treating the contract as at an end." (810-811)

WHITE AND CARTER (COUNCILS) LTD V MCGREGOR [1962] AC 413
Facts: The case concerned a renewal of a litre bin advertisement contract, the party who ordered the advertisement, however, then committed anticipatory breach. The advertisement company instead of discharging the contract, affirmed the contract and advertised the company for 3 years, and then claimed the contract price.

Principle: A party may choose to discharge a contract or affirm it, if the later is chosen the party can claim the contract price for the performance.

Judgement:
Lord Reid

CLEA SHIPPING CORPORATION V BULK OIL INTERNATIONAL LTD, THE ALASKAN TRADER [1984] 1 ALL ER 129
Facts:

Principle: A party is only able to affirm a contract with a legitimate aim.

Judgement:
(Westlaw Case Digest)
The innocent party has an absolute discretion as to whether to accept the repudiation of a contract, where he has no legitimate interest in performing the contract, rather than claiming damages, the court will not allow him to enforce his full contractual rights

"*It is, in my judgment, impossible to say that the appellants should be deprived of their right to claim the contract price merely because the benefit to them, as against claiming damages and re-letting their advertising space, might be small in comparison with the loss to the respondent*" (431) **Per Lord Reid. "***It may well be that, if it can be shown that a person has no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages, he ought not to be allowed to saddle the other party with an additional burden with no benefit to himself. If a party has no interest to enforce a stipulation, he cannot in general enforce it: so it might be said that, if a party has no interest to insist on a particular remedy, he ought not to be allowed to insist on it* " (431)	

AVERY V BOWDEN (1855) E & B 714

Facts: After a breach committed by a party by sailing away the cargo ship early without any cargo, further performance may be frustrated when a war breaks out as it did. If a frustrating event takes place, it deprives a party of taking action for previous breach.

Principle: The injured party after affirming the contract may themselves commit a subsequent breach which cannot be excused by the previous one.

Judgement: -

FERCOMETAL SARL V MSC MEDITERRANEAN SHIPPING CO SA, THE SIMONA [1989] AC 788

Facts: The contract was between the ship owner and a charterparty for a cargo to be transported, the owners had a choice of affirming the contract or its repudiation. The charterers could cancel their contract if the ship was not ready for shipping on an agreed date. The charterers wanted to terminate the contract early. Ship owners did not accept it, but were not ready for the agreed date. Owners could after the breach cancel the contract, due to the right of contractual termination after the breach of a condition.

Principle: A contract cannot be affirmed and then not performed. The company is not excused from their obligations

Judgement:

LORD ACKNER:

"When one party wrongly refuses to perform obligations, this will not automatically bring the contract to an end. The innocent party has an option. He may either accept the wrongful repudiation as determining the contract and sue for damages, or he may ignore or reject the attempt to determine the contract and affirm its continued existence." (799)

"When A wrongfully repudiates his contractual obligations in anticipation of the time for their performance, he presents the innocent party B with two choices. He may either affirm the contract by

treating it as still in force or he may treat it as finally and conclusively discharged. There is no third choice, as a sort of via media, to affirm the contract and yet to be absolved from tendering further performance unless and until A gives reasonable notice that he is once again able and willing to perform. Such a choice would negate the contract being kept alive for the benefit of both parties and would deny the party who unsuccessfully sought to rescind, the right to take advantage of any supervening circumstance which would justify him in declining to complete." (801)

Frustration: Doctrine

THE SEA ANGEL [2007] EWCA CIV 547 AT [111]
Facts: There was a 20-day charter between the appellant (charterers) and the respondents (the ship owners). The charter to tranship oil was not frustrated after 3 months of unlawful detention by Pakistani port authorities. The delay was not found frustrating due to different decisive factors.

Principle: The doctrine of frustration is involved with contracts using which parties allocate or assume risk. A contract is frustrated when what is in their contemplation is radically different from the performance in the novel circumstances.

Judgement:
".....Since the subject matter of the **doctrine of frustration is contract**, and **contracts are about the allocation of risk,** and since the **allocation and assumption of risk is not simply a matter of express or implied provision but may also depend on less easily defined matters such as 'the contemplation of the parties',** the application of the doctrine can often be a difficult one. In such circumstances, the **test of 'radically different' is important:** it tells us that the **doctrine is not to be lightly invoked**; **that mere incidence of expense or delay or onerousness is not sufficient**; and that there has to be as it a were a break in identify between the contract as provided for and contemplated and its performance in the new circumstances."

- Frustration steps in when parties have allocated/ assumed risk for a supervening event that occurred and could not be foreseen.
- The doctrine of frustration narrow, residual doctrine, it cannot apply where the parties have expressly provided for the risk.
- The effect of the doctrine is that it discharges both parties from further performance of contractual obligations.

Frustration: Force Majeure Clause

TANDRIN AVIATION HOLDINGS LTD V AERO TOY STORE LLC [2010] EWHC 40 (COMM)
Facts: A party's 'catch all' force majeure clause was incapable of covering the collapse of financial markets. The court held that such an instance would need to be expressed in a force majeure clause, and that a general blanket statement will not cover specific instances.
Principle: A 'catch all' force majeure clause is ineffective when it comes to specific circumstances like the financial crash of a market.

- **Frustration cannot be relied upon (1):** The courts will not intervene in contracts, where the parties have expressly provided for the allocation of the risk between themselves. The court may however apply the doctrine, where the event is not provided for by the clause.

Judgement: