BUSINESS LAW

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Pearson

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Business Law

In the following case the anticipatory breach was not accepted, and the injured party continued to perform the contract. The case was unusual in that the injured party could do this without the cooperation of the party who committed the anticipatory breach.

White and Carter (Councils) v *MacGregor* [1962] 2 WLR 713 (House of Lords)

The claimants were advertising agents who agreed to advertise the defendant's garage for a three year period. On the same day that the contract was made the defendants wrote to the claimants asking them to cancel the contract. The claimants did not accept this anticipatory breach but began to advertise the defendants' business as agreed. One of the terms of the contract said that if any of the instalments the defendants were required to pay became four weeks overdue, then the claimants could sue for the whole contract price. The defendants refused to pay any of the instalments. The claimants advertised the defendants' garage as agreed for the whole three year period and then sued for the whole contract price.

Held. The claimants were entitled to perform the contract and sue for the whole contract price. They were not bound to accept the repudiation and sue for damages.

COMMENT (i) Where a party accepts an anticipatory breach he will not be able to claim for a loss he should have mitigated. (As we saw when considering ***Hochster* v *De La Tour***.) Where the party does not accept the anticipatory breach, as in this case, he may be able to claim for losses which could have been mitigated. (However, the majority of the House of Lords stressed that the action was to recover a debt and so mitigation could not apply. See below at 7.2.3.)

(ii) Lord Reid thought that a party who has no legitimate interest in performing the contract, other than claiming damages, ought not to be allowed to saddle the other party with a burden with no benefit to himself. Subsequent cases have limited the decision of this case in this way. An example can be seen in ***Clea Shipping Corp* v *Bulk Oil International Ltd (The Alaskan Trader)*** [1984] 1 All ER 129. After twelve months of a two-year charterparty the ship needed to be repaired. The owners repaired the ship and kept both it and the crew available for the full two-year period. After the repairs were done the charterers committed an anticipatory breach by refusing to give any instructions regarding the ship. The owners continued to wait for instructions. It was held that the owners had no legitimate interest in keeping the contract open and should instead have claimed damages. So they could not retain the full contract price which the charterers had paid. Subsequent cases have held that the innocent party will not be able to keep the contract open and recover the price if this would be 'wholly unreasonable'.

(iii) The advertising contract was unusual in that it could be performed without the cooperation of the other party. The decision will not apply in cases where such cooperation is required.

MSC Mediterranean Shipping Company SA v *Cottonex Anstalt* [2016] EWCA Civ 789

MSC agreed to carry 35 containers of cotton to Chittagong for Cottonex. Each bill of lading allowed the containers to be used by Cottonex without charge for 14 days after arrival, but then demurrage totalling $840 a day became payable to MSC. Cottonex sold the cotton to R Ltd, a company in Bangladesh. The containers were discharged at Chittagong between 13 May and 27 June 2011. Following a collapse in the price of cotton, a dispute arose between Cottonex and R Ltd, and R Ltd was unwilling to take delivery of the goods. However, R Ltd did pay Cottonex for the goods. Cottonex regarded the property in the goods as having then passed to R Ltd. R Ltd was not willing to take delivery of the goods, and so they remained at the port under the control of the customs authorities, who refused to let anyone deal with the goods without a court order. On 27 September Cottonex sent a note to MSC. Cottonex thought that this conveyed that it no longer had title to the goods and would not be able to redeliver the containers within the foreseeable future, if at all. The trial judge thought it doubtful that MSC interpreted the note that way. MSC insisted that the containers be redelivered and continued to charge the daily demurrage. On 2 February 2012 MSC offered to sell the containers to Cottonex. No deal was done because Cottonex thought that the price was too high. At all material times, replacement containers could have been bought in Chittagong for US$3 262 each.

Held. The property in the goods passed to R Ltd when Cottonex was paid for them. The commercial purpose of the venture was frustrated on 2 February when MSC offered to sell the containers to Cottonex. Where a repudiatory breach continues for so long that the contract is radically altered, the contract will become frustrated and it will no longer be possible for the innocent party to affirm the contract. So the 'legitimate interest' argument did not apply. Because Cottonex →

could no longer redeliver the containers, and were therefore in repudiation of the contract, they were liable in damages for their loss. The loss to MSC was the commercial value of the containers on 2 February. Cottonex also had to pay the daily demurrage up until 2 February when the contract was frustrated.

COMMENT (i) The case is interesting because it allows a repudiatory breach to end a contract without the other party having accepted it. The limits of this idea are not particularly clear.
(ii) ***White and Carter Councils*** was different because it applied only when the party in breach was refusing to perform continuing obligations or future obligations. After 2 February there were no such obligations because the contract had become frustrated.
(iii) If it had been open to the MSC to affirm the contract and force Cottonex to continue to perform its obligations, the Court of Appeal was of the opinion that it would have had no legitimate interest in doing so other than claiming the demurrage. So the question of mitigation did not arise.
(iv) The accrued demurrage already amounted to considerably more than the value of the containers and replacement containers had at all times been readily available.

A person who has the right to terminate a contract on account of a repudiatory breach can lose the right by waiving it. Lord Goff set out how this might be done in ***The Kanchenjunga*** [1990] 1 Lloyd's Rep 391:

> 'Where with knowledge of the relevant facts a party has acted in a manner which is consistent only with his having chosen one of the two alternative and inconsistent courses of action then open to him, for example, to determine a contract or alternatively to affirm it, he is held to have made his election accordingly . . . perhaps because a party who elects not to exercise a right which has become available to him is abandoning that right, he will only be held to have done so if he has communicated his election to the other party in clear and unequivocal terms . . . Moreover, it does not require consideration to support it, and so it is to be distinguished from an express or implied agreement, such as a variation of the relevant contract, which traditionally requires consideration to render it binding in English law.'

7.1.5 Discharge under a statutory right

Once a contract has been concluded then the common law approach is that both sides are bound by it. However, several statutes give consumers the right to cancel concluded contracts. **The Consumer Credit Act 1974** gives such a right, in circumstances which are considered in Chapter 14 at 14.1.4. The **Timeshare Act 1992** gives consumers who have entered into a timeshare agreement a 14 day period in which to cancel the contract.

Part 3 of the **Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013** gives consumers the right to cancel distance or off-premises contracts made with traders. These regulations have replaced the Distance Selling Regulations 2000 and the Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008. Part 1 of the 2013 regulations sets out rather technical definitions, which must be considered if the regulations are to be understood. The standard EU definitions of a consumer and a trader are used. So a consumer is an individual acting for purposes which are wholly or mainly outside that individual's trade, business, craft or profession. A trader is a person acting for purposes relating to that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf. A distance contract is defined as a contract concluded between a trader and a consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded. An off-premises contract is defined as a contract between a trader and a consumer which is either: (a) concluded face-to-face between the consumer and the trader, but off the business premises of the trader; (b) one where the consumer made an offer face-to-face with the trader, but off the business premises of the trader; (c) a contract concluded on the business premises of the trader, or through any means of distance communication, immediately after the consumer was personally and individually off the business premises of the trader in the simultaneous presence of the trader and the consumer; or (d) a contract concluded during an excursion organised by the trader with the aim or effect of promoting and selling goods or services to the consumer. There are various types of contracts to which the regulations do not apply. These include: gambling contracts; banking, insurance credit and investment contracts; contracts to create rights in immovable property; contracts to rent private accommodation; contracts for the construction of new buildings; contract to supply food by traders who make regular rounds to consumers' houses; certain package

holidays; certain timeshare agreements; contracts made by automatic vending machines and contracts to sign up to a telephone, internet or fax connection. These exclusions apply not only to the right to cancel, but also to the criminal offences which the regulations create. These offences are considered in Chapter 22.

There are further restrictions which apply only to the right to cancel. There is no right to cancel off-premises contracts under which the consumer has to pay £42 or less. The right to cancel does exist as regards distance contracts worth less than this amount. Nor is there a right to cancel if: the contract is for passenger transport services; the price of the goods or services depends upon fluctuations in the financial market; the goods are made to the consumer's specification or are clearly personalised; the goods are likely to deteriorate or expire rapidly; the consumer has specifically requested a visit from the trader for the purpose of carrying out urgent repairs or maintenance; the contract is a non-subscription contract for the supply of newspapers or magazines; the contract was concluded at public auction; or if the contract was for the supply of accommodation, transport of goods, vehicle rental services, catering or services related to leisure activities and the contract provided for a specific date or period of performance. The right to cancel ceases to be available as follows: if the contract is for sealed goods which become unsealed and the goods are not suitable for return due to health protection or hygiene reasons; if the contract is for sealed audio or video recordings, or sealed computer software, and the goods become unsealed after delivery; or, in the case of any sales contract, if the goods become mixed inseparably (according to their nature) with other items after delivery.

Regulation 29 allows a consumer to cancel a distance or off-premises contract within the normal cancellation period, which is generally 14 days. No reason needs to be given and the consumer does not incur any liability. However a consumer who cancels can incur liability in four circumstances: if the consumer chose and paid for enhanced delivery, the trader need not reimburse the amount by which this exceeds the cheapest delivery charge; if goods supplied are reduced in value by consumer handling, beyond what is necessary to establish the nature, characteristics and functioning of the goods, the trader can recover an amount from the consumer up to the contract price; if the consumer returns the goods, he must bear the costs of this and if the consumer requests early supply of a service, and then cancels the contract, he must pay a proportionate amount for services supplied.

Regulation 30 sets out details of the normal cancellation period. If the contract is a service contract, or one to download software, the period ends 14 days after the contract was entered into. If the contract is a distance contract or an off-premises contract for the sale of goods, the cancellation periods ends 14 days after the day on which the consumer gains physical possession of the goods. If multiple goods are delivered on different days, the period ends 14 after the consumer came into possession of the last of the goods. However, if the contract is a sales contract for the regular delivery of goods the period ends 14 days after the consumer comes into possession of the first of the goods.

If the contract is a distance or off-premises contract, Schedule 2 requires the trader to give the consumer notice that the right to cancel exists, as well as the conditions, time limit and procedures for exercising that right. If this information is given late but within 12 months, reg. 31 provides that the cancellation period runs from the date when the information was given. If the information is not given within 12 months, the cancellation period ends 12 months after it would have ended if the information had been properly given.

Regulation 32 provides that the consumer cancels a contract, and thereby cancels all obligations to perform it, merely by clearly informing the trader of this. No special form needs to be used and if the cancellation is posted it is effective from the date of posting. However, the burden of proof is on the consumer to show that the contract was cancelled within the period. Once a contract is cancelled reg. 34 requires the trader to reimburse all payments made by the consumer, including standard delivery costs, within 14 days of being informed of the cancellation. No fee can be charged by the trader, and the reimbursement must be made using the same means of payment as the consumer used. As long as the goods can be returned by post, reg. 35 provides that it is generally the consumer's responsibility to send the goods back or hand them over to the trader within 14 days of cancellation and to pay the cost of this. However, if the trader has offered to collect the goods, or if they were delivered to the consumer's house under an off-premises contract and by their nature they cannot normally be returned by post, the trader must collect the goods.

Regulation 36 provides that the trader must not begin to supply a service until the end of the cancellation period, unless the consumer has expressly requested this. If the consumer does expressly request it, but still cancels within the cancellation period, the consumer must pay a proportionate amount of the total price. Regulation 37 proves that the trader must

not supply downloadable software until the end of the cancellation period, unless the consumer has expressly requested this and acknowledged that if the software is supplied the right to cancel will be lost. If a consumer does withdraw an offer or cancel any contract under the regulations, reg. 38 provides that ancillary contracts are also cancelled.

Part 2 of the regulations deals with the information which a trader must supply or make available to a consumer. It does not apply to contracts for passenger transport services. Regulation 8 provides that information is not made available to a consumer unless the consumer can reasonably be expected to know how to access it. As regards on-premises contracts, reg. 9 requires the trader to give or make available the information set out in Schedule 1 of the regulations in a clear and comprehensible manner, if that information is not already apparent from the context. However, this is not the case as regards day-to-day contracts which are performed immediately. Any of the required information is regarded as a term of the contract. Furthermore, the consumer will not be bound by the contract until the information has been given. A change to any of the information, whether made before or after the contract, is not effective unless expressly agreed between the consumer and the trader. The information required by Schedule 1 is as follows: the main characteristics of the goods or services; the identity of the trader; his geographical address and telephone number; the total price to be paid, including taxes, or if the price cannot reasonably be calculated in advance, how it is going to be calculated; and if the contract is a sales contract a reminder that the trader is under a legal duty to supply goods that conform to the contract. Where applicable, Schedule 1 also requires the following information to be supplied: total delivery charges; the arrangements for delivery, payment and performance and the time by which the trader undertakes to deliver the goods or perform the service; the trader's complaints policy; the existence and conditions of after-sales services and guarantees; the duration of the contract or if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating it; the functionality of digital content; and any relevant compatibility of digital content with hardware or software, to the extent that the trader is aware of this or can reasonably be expected to have been aware of it.

Regulation 10 provides that a consumer is not bound by an off-premises contract until he has been given the information contained in Schedule 2 in a clear and comprehensible manner, along with a cancellation form, supplied on paper or other durable medium, if there is a right to cancel. A durable medium means paper, or email, or any other medium which allows information to be addressed personally to the recipient and to be stored and reproduced by him. Schedule 2, which applies to distance contracts and off-premises contracts, requires the trader to give the consumer detailed information about: the main characteristics of the goods or services, to the extent appropriate to the medium of communication and to the goods or services; the trader's identity, address and contact details; the identity and contact details of any other trader on behalf of whom the trader is acting; the total price of the goods or services, including taxes, or if the price cannot reasonably be calculated in advance, how it is going to be calculated; details of all additional delivery charges or any other costs; if the contract is for an indeterminate duration, or is a subscription contract, the total monthly costs; the cost of using any means of distance communication to conclude the contract if the cost is not calculated at the basic rate; the arrangements for delivery, payment and performance and the time by which the trader undertakes to deliver the goods or perform the service; where applicable, the trader's complaint handling policy; where a right to cancel exists, the conditions, time limits and procedures for exercising that right in accordance with the regulations; where applicable, any costs which the consumer will have to pay in connection with returning the goods; if there is no right to cancel that there is no such right, or the circumstances in which the right to cancel can be lost; if the contract is a sales contract a reminder that the trader is under a legal duty to supply goods that conform to the contract; where applicable, details of after-sales assistance, after-sales service and commercial guarantees; the existence of relevant codes of practice and how copies of them can be obtained; the duration of the contract or if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating it; where applicable the minimum duration of the consumer's obligations under the contract; where applicable the existence and conditions of any deposits or other financial guarantees to be paid by the consumer; where applicable the functionality of digital content; where applicable the compatibility of digital content with hardware or software to the extent that the trader is aware of this or can reasonably be expected to have been aware of it; and where applicable out-of-court complaint and redress mechanisms.

Regulation 11 provides that reg. 10 does not apply to service contracts for repair or maintenance, if they are requested by the consumer to be carried out

immediately, and the consumer is to pay no more than £170. However, this is the case only if the consumer is given the main characteristics of the services on paper or, if the consumer agrees, on another durable medium. The consumer must also be told any right to cancel, given an estimate of the price and given the trader's identity and the total costs, in accordance with Schedule 2.

Regulation 12 applies to off-premises contracts and requires the trader to give the consumer a copy of the signed agreement or confirmation of the contract within a reasonable time of the conclusion of the contract and before delivery of goods or performance of a service. The copy or confirmation must be supplied on paper or, if the consumer agrees, on another durable medium. The confirmation must include all of the matters in Schedule 2 unless the trader has already supplied this on a durable medium.

Regulation 13 applies to distance contracts. It provides that the consumer is not bound by the contract until he has been given or had made available to him all the information in Schedule 2 in a clear and comprehensible manner. If a right to cancel exists the consumer must be given a cancellation form in accordance with Schedule 3, which sets out a model cancellation form. Any of the required information is regarded as a term of the contract. A change to any of the information, whether made before or after the contract, is not effective unless expressly agreed between the consumer and the trader.

Regulation 14 applies when a distance contract is concluded by electronic means. The trader has to make the consumer aware in a clear and prominent manner of the Schedule 2 requirements relating to the main characteristics of the goods, the total price to be paid, all delivery and extra charges, the duration of the contract and where applicable the consumer's minimum obligations under the contract. The trader must also ensure that when the consumer places the order he explicitly acknowledges that this implies an obligation to pay. If the order is placed by activating a button or a similar function this must be labelled in an easily legible manner with the words 'order with obligation to pay' or a similar unambiguous statement. If the trader does not comply with these requirements the consumer will not be bound by the contract. The trader must also ensure that any trading website through which the contract is concluded indicates clearly and legibly whether any delivery restrictions apply and which means of payment are accepted.

If a trader makes a telephone call to a consumer with a view to concluding a distance contract, reg. 15 requires the trader to disclose his identity, where applicable the identity of any person on whose behalf he is acting, and the commercial purpose of the call. Regulation 16 requires a trader who makes a distance contract to give the consumer confirmation of the contract on a durable medium. This confirmation must include all of the matters in Schedule 2 unless this was provided on a durable medium before the conclusion of the contract. This confirmation must be supplied within a reasonable time of the conclusion of the contract and before delivery of goods or performance of a service. As regards the civil law, reg. 17 puts the burden of proof on the trader to show that regs. 10–16 have been complied with. Regulation 18 provides that every contract to which Part 2 applies is to be regarded as containing a term that regs. 9–14 and reg. 16 have been complied with.

Part 2 of the regulations sets out various criminal offences and these are considered in Chapter 22.

Test your understanding 7.2

1. In what circumstances can a contract be frustrated?
2. What is the effect of the 'frustrating' event being the fault of one of the parties?
3. What is a *force majeure* clause? Are such clauses given legal effect?
4. Can a contract be frustrated if one of the parties foresaw the frustrating event?
5. How does the Law Reform (Frustrated Contracts) Act 1943 apportion loss in cases of frustration?
6. How does an anticipatory breach of contract arise?
7. What options are open to a party faced with a repudiatory anticipatory breach?

7.2 REMEDIES FOR BREACH OF CONTRACT

Whenever a contract is breached, one or more remedies will be available to the injured party.

7.2.1 Refusal to further perform the contract

Earlier in this chapter we considered discharge by breach and discharge by performance. We saw that the innocent party will be able to treat his obligations

as discharged, and therefore be entitled to refuse to perform the contract further, in the following circumstances: if the other party repudiates the contract; or if a non-repudiatory breach amounts to breach of condition rather than to breach of warranty; or if a non-repudiatory breach amounts to breach of an innominate term which deprived of substantially the whole intended benefit of the contract.

As well as treating his further obligations as discharged, the injured party may also be entitled to claim damages. However, when assessing these damages account will be taken of any benefit which the injured party has received.

7.2.1.1 Rescission distinguished

It should be remembered that treating the contract as repudiated on account of a breach of contract by the other party is not the same as rescinding a contract for misrepresentation, duress or undue influence. Rescission, an equitable remedy considered in Chapter 6 at 6.1.3, is not a remedy for breach of contract. Unfortunately, some confusion has been caused over the years because at times both writers and judges have used the word rescission to mean treating a contract as repudiated on account of breach of contract.

When we considered misrepresentation we saw that rescission will only be allowed if the parties can be restored to their pre-contract positions. This is because the contract is regarded as having never existed. This requirement is not present when a contract is treated as repudiated for breach. In that case it is further performance of the contract which is discharged. Therefore the fact that the party treating the contract as repudiated cannot restore the parties to their pre-contract positions will not prevent him from treating the contract as repudiated.

7.2.2 Damages

Any breach of contract will entitle the injured party to damages. However, if the injured party has suffered no real loss these damages will be nominal only, perhaps 5p or £1, and costs may not be recoverable. The primary purpose of contract damages is to put the injured party in the financial position he would have been in if the contract had been properly performed. Two steps are necessary to achieve this. First, it must be asked whether or not the loss is too remote for damages in respect of it to be recoverable at all. Then, if the loss is not too remote, damages must be quantified.

7.2.2.1 Remoteness of damage

The injured party cannot claim damages for every loss caused by the breach of contract. Damages can only be recovered for losses which were caused by the breach of contract and which fit within one of the two rules in ***Hadley* v *Baxendale*** (1854) 9 Exch 341. These rules are a very important limitation on damages which can be claimed for a breach of contract. If there were no such limitation, damages could be claimed for any consequence of a breach of contract, no matter how unforeseeable. This potential liability would deter many people from making contracts if they could possibly avoid it.

Rule 1 states that damages are recoverable for a loss which arose naturally from the breach, according to the usual course of things. Rule 2 states that damages are recoverable for a loss which may reasonably be supposed to have been in the contemplation of both parties, as not unlikely to result, at the time when they made the contract. The following case shows how the two rules work.

Victoria Laundry* v *Newman Industries
[1949] 1 All ER 997 (Court of Appeal)

The defendants agreed to sell a second-hand boiler to the claimants, a company of launderers and dyers. At the time of the contract the defendants knew that the claimants wanted the boiler for immediate use. The defendants breached the contract by delivering the boiler 20 weeks late. The claimants claimed £16 a week, representing the increased ordinary profit which they could have made with the boiler which the defendants were to supply. They also claimed £262 a week, representing the value of an exceptionally lucrative contract to dye army uniforms. The unavailability of the new boiler had caused the claimants to lose this contract.

Held. The loss of £16 was recoverable within the first rule in ***Hadley* v *Baxendale***. The loss of £262 was neither within the first nor the second rule and was therefore not recoverable.

COMMENT If the claimants had told the defendants about the lucrative dyeing contract, and that the boiler which the defendants were to supply would be needed in time or the dyeing contract would be lost, then the £262 a week would have been recoverable under the second rule.