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# Contracts -- Innominate Terms: Contractual Encounters of the Third Kind

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CONTRACTS—INNOMINATE TERMS: CONTRACTUAL ENCOUNTERS OF THE THIRD KIND.—A major function of the law of contract is to ensure that the reasonable expectations of the contracting parties are met and enforced.<sup>1</sup> In turn, those expectations will be conditioned and informed by the anticipated legal consequences that will attach to proposed or actual agreements.<sup>2</sup> This “supportive” role of contract law was clearly recognised by John Austin:<sup>3</sup>

Now, as much of the business of human life turns or moves upon conventions, frequent disappointments of those expectations which conventions naturally excite, would render human society a scene of baffled hopes and of thwarted projects and labours. To prevent disappointments of such expectations, is therefore a main object of the legal and moral rules whose direct and appropriate purpose is the enforcement of pacts or agreements.

Yet, the protection and promotion of such interests is not the only function of contract law. Contract law is not exclusively designed to facilitate business activities or oil the wheels of commerce; it has a responsibility to fulfil in regulating and controlling business practices and, thereby, contribute to the solution of the problems of economic justice. Contract law must not allow itself to be used to reinforce and perpetuate economic inequalities; “justice and the interests of society are furthered when the law to some extent ranges itself upon the side of the party who for some reason or another is unable properly to safeguard his own interests”.<sup>4</sup> Obviously, this “regulatory” role will be more appropriate in certain types of agreements, such as contracts between consumers and manufacturers. In large commercial contracts between independent corporations the “regulatory” role will be of less importance.

Contract law is concerned with planned relationships of an economic nature.<sup>5</sup> The formation of a contract creates risks. In most cases, the contracting parties will have allocated between themselves the foreseeable risks and the law provides various devices by which such risks might be allocated. If the contracting parties fail to allocate or foresee certain risks, contract law will determine which party is to

<sup>1</sup> See Farnsworth, “Meaning” in the Law of Contracts (1967), 76 Yale L.J. 939, at p. 951.

<sup>2</sup> The reliance by businesses on the law, especially in continuing relationships, is open to severe doubt; see Macauley, *The Use and Non-Use of Contracts in the Manufacturing Industry* (1963), Vol 9, *The Practical Lawyer* 13 and Beale and Dugdale, *Contracts between Businessmen: Planning and Use of Contractual Remedies* (1975), 2 *Brit. J. of L. & Soc.* 45.

<sup>3</sup> *Lectures on Jurisprudence* (2nd ed., 1861), pp. 299-300.

<sup>4</sup> C. Havinghurst, *The Nature of Private Contract* (1961), p. 111 and I. Stone, *Social Dimensions of Law and Justice* (1966), pp. 251-254.

<sup>5</sup> For an excellent analysis of contract as an exchange transaction, see I.R. Macneil, *Cases and Materials on Contract* (1971).

bear those risks.<sup>6</sup> As such, contract law is an institutional attempt "to mark out a range and an apportionment of risks".<sup>7</sup> In so far as legal doctrine contributes to the planning or drafting of agreements,<sup>8</sup> the law must be certain so as to permit the parties to allocate risks with certainty and, thereby, ensure that appropriate insurance arrangements are effected; "it is an important function of a court . . . to provide [contracting parties] with legal certainty at the negotiating stage".<sup>9</sup> Uncertainty will mean that an informed allocation of risks cannot be made and this may lead to over-insurance.<sup>10</sup>

Nevertheless, although predictability and certainty has obvious and substantial commercial advantages, contract law must strive to incorporate a dimension of flexibility in order to accommodate and reflect the complex reality of commercial activity.<sup>11</sup> Indeed, a due measure of flexibility contributes to certainty in the long run by avoiding anomalous situations. Of course, in so doing, it is important that the possibility for reasonable planning is not seriously curtailed or impaired.<sup>12</sup> In all contractual arrangements, a predominant concern of the contracting parties and their legal advisors is the availability and nature of remedies when a contract is broken, especially the circumstances in which an innocent party is entitled to treat the contract as being at an end. In recent years, English courts have attempted to move away from a rigid categorisation of contractual terms and, through the introduction of innominate terms, to move towards a more commercially responsive and realistic formulation of contract law. Unfortunately their efforts have tended to exacerbate rather than ameliorate the situation.<sup>13</sup>

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<sup>6</sup> See Patterson, *The Apportionment of Business Risks Through Legal Devices* (1924), 24 Col. L. Rev. 335.

<sup>7</sup> Llewellyn, *What Price Contract?—An Essay in Perspective* (1931), 40 Yale L.J. 704, at p. 746.

<sup>8</sup> See *Photo Productions Ltd v. Securicor Ltd*, [1980] 2 W.L.R. 283, at p. 289, per Lord Wilberforce.

<sup>9</sup> *Federal Commerce v. Tradax Export*, [1978] A.C. 1, at p. 8, per Lord Diplock. For other judicial statements of the need for certainty, see *Pau On v. Lau Yin*, [1980] A.C. 614, at p. 634, per Lord Scarman; *Photo Productions, ibid.*, at p. 296, per Lord Diplock; *White & Carter (Councils) Ltd. v. McGregor*, [1962] A.C. 413, at p. 430, per Lord Reid; and *Woodhouse A.C. Israel Cocoa Ltd v. Nigerian Produce Marketing Co.*, [1972] A.C. 741, at p. 758, per Lord Hailsham.

<sup>10</sup> It must be remembered that insurance only reduces the risk, it does not dispense with it completely. As Macneil notes, "instead of a risk of a large loss, the insured has a certain smaller loss, namely the premium", *op. cit.*, footnote 5, p. 805.

<sup>11</sup> See *Reardon-Smith Line v. Hanzen-Tangen*, [1976] 1 W.L.R. 989, at p. 998, per Lord Wilberforce.

<sup>12</sup> See Atiyah, *From Principles to Pragmatism: Change in the Function of the Judicial Process and Law* (1980), 65 Iowa L. Rev. 1249, at p. 1275.

<sup>13</sup> In his inaugural lecture, Professor Trietel suggested that innominate terms are part of a broader legal trend: "a process by which reasonably precise rules are replaced

*Revolution or Aberration*

Traditionally, the English law of contract has maintained a simple bifurcation of contractual terms and the identity of a term is the exclusive determinant of the remedy available. A condition is a major ingredient of an agreement and its breach entitles the victim to repudiate and claim for damages. On the other hand, a warranty is only a subsidiary term of an agreement and its breach can be adequately remedied by the recovery of damages; no right to repudiate arises. Once a term is identified as being a condition, any breach of that term gives rise to the right to repudiate. There is no additional requirement that the victim must actually be seriously prejudiced; a trivial breach will suffice.<sup>14</sup>

In 1962, this rigid bipartite categorisation was severely shaken by the decision of the Court of Appeal in *Hong Kong Fir Shipping Ltd v. Kawasaki Kisen Kaisha Ltd*.<sup>15</sup> The defendants chartered a ship from the plaintiffs for a period of twenty-four months. Due to antiquated machinery and incompetent staff, twenty weeks were lost and the defendants repudiated the contract. Although the plaintiffs admitted that they were in breach of a "seaworthiness" clause, they claimed that the defendants were only entitled to damages and that their repudiation was wrongful. In the event, the plaintiffs prevailed.<sup>16</sup> Yet, while the decision was unremarkable, if quite hard on the charterer, the reasoning of the court was little short of "revolutionary".<sup>17</sup> The Court of Appeal refused to treat the dual categorisation of contractual terms as exhaustive; such a simple dichotomy distorted the complex reality of business life. In the words of the landmark judgment of Diplock L.J.:<sup>18</sup>

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by . . . vague or open-textured terms": see *Doctrine and Discretion in the Law of Contract* (1981), p. 2.

<sup>14</sup> See, for example, *Re Moore & Co. Ltd and Landover & Co.*, [1921] 2 K.B. 519; *Jackson v. Rotax Motor & Cycle Co.*, [1910] 2 K.B. 937 and *Arcos Ltd v. E. A. Ronaasen & Sons*, [1933] A.C. 470.

<sup>15</sup> [1962] 2 Q.B. 26. For a contemporary discussion of the case, see Furmston, Note (1962), 25 Mod. L. Rev. 584, and Reynolds, *Warranty Condition and Fundamental Term* (1963), 79 L.Q. Rev. 534. For an early criticism of the simple bifurcation, see Montrose (1960), 23 Mod. L. Rev. 550.

<sup>16</sup> The case was similarly decided at first instance by Salmon J., [1961] 2 W.L.R. 76. For a short note on this decision, see Sealy, [1981] Camb. L.J. 152.

<sup>17</sup> See Atiyah, Book Review (1981), 1 L.S. 100, at p. 103 and *The Sale of Goods* (6th ed., 1980), pp. 42 and 45.

<sup>18</sup> *Supra*, footnote 15, at p. 72. Diplock L.J.'s use of "rescind" is confusing for he presumably means "repudiate"; the two terms are different and cannot be used interchangeably. Whereas repudiation means terminating an existing contract, rescission renders a contract void *ab initio*. For a good account of the importance of keeping them separate, see Dawson, *Fundamental Breach of Contract* (1975), 9 L.Q. Rev. 380, at pp. 393-399. Failure to do so caused Megarry J. considerable difficulties in *Horsler v. Zorro*, [1975] 2. W.L.R. 183.

What the judge had to do in the present case, as in any other case where one party to a contract relies upon a breach by the other party as giving him a right to elect to rescind the contract, and the contract itself makes no express provision as to this, was to look at the events which had occurred as a result of the breach at the time at which the characters purported to rescind the charterparty and to decide whether the occurrence of these events deprived the charterers of substantially the whole benefit which it was the intention of the parties as expressed in the charterparty that the charterers should obtain from the further performance of their own contractual undertakings.

Accordingly, *Hong Kong Fir* recognised the existence of a third category of contractual terms. Whereas any breach of a condition or warranty gives rise to a previously and precisely ascertainable remedy, the remedy available on the breach of an "innominate term" is not so ascertainable at the time of making the agreement. Whether there is a right to repudiate will depend upon the actual repercussions of the breach. It is not the nature of the term broken but the effect of the breach that will determine the remedy available.

The subsequent judicial treatment of *Hong Kong Fir* was predictably ambivalent. With characteristic conservatism, the courts have begrudgingly recognised the existence of "innominate terms", but endeavoured to neutralise the potentially radical impact of that decision. In the *Mihalis Angelos*,<sup>19</sup> the Court of Appeal was happy to hold that a "readiness to load" clause in a charterparty was a condition and not an innominate term. The court expressly opted for increased certainty at the expense of greater flexibility. In *The Hansa Nord*,<sup>20</sup> the Court of Appeal held that a clause in a sale of goods contract requiring "shipment to be made in good condition" should not be treated as a condition, but as an innominate term. Moreover, as the breach did not go to the root of the contract, the buyer was not entitled to repudiate by rejecting the goods. Also, in *Federal Commerce*,<sup>21</sup> the House of Lords treated a clause in a time-charter requiring the master to follow the charterers' orders as an innominate term.

These decisions left the law in a state of considerable confusion. Although *Hong Kong Fir*<sup>22</sup> has introduced a third category of contractual stipulation in order to bring the law more in line with commercial reality, it had failed to specify the indicia by which such terms could be identified. The choice for the courts was clear. It could revert to the original traditional bifurcation with its considerable appeal of predictability; even though it might distort reality, the contracting

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<sup>19</sup> *Maredelanto Compania Naviera S.A. v. Bergbau-Handel G.m.b.H. The Mihalis Angelos*, [1971] 1 Q.B. 164. For an extended discussion of this case, see Greig, *Condition—or Warranty?* (1973), 89 L.Q. Rev. 93.

<sup>20</sup> *Cehave N.V. v. Bremer Handelsgesellschaft m.b.H. The Hansa Nord*, [1976] Q.B. 44.

<sup>21</sup> *Supra*, footnote 9.

<sup>22</sup> *Supra*, footnote 15.

parties would be able to ascertain their legal obligations and entitlements at the time of making the agreement. On the other hand, the tripartite classification could be retained with its greater elasticity, provided a thorough analysis of the constitutional and distinguishing properties of "innominate terms" was effected. The forlorn hope was expressed that "complete understanding must await a decision of the House of Lords".<sup>23</sup> Sadly, the House did not warm to such a challenge.

### *A Tarnished Opportunity*

In *Bunge Corporation, New York v. Tradax Export, S.A. Panama*,<sup>24</sup> the House was presented with, but missed a golden opportunity. In essence, there was a contract for the sale of 15,000 tons of soya beans of which delivery was to be made in three consignments of 5,000 tons each. The contract provided that the buyers, Bunge Corporation, should give fifteen days' notice before each shipment and specify the vessel to be used. In breach of this "probable readiness to load" clause, Bunge gave only fourteen days' notice in respect of the second consignment. Although the contract was silent as to the status of this stipulation, the sellers, Tradax S.A., contended that this breach was sufficiently serious to entitle them to repudiate the contract. Incredibly, this issue occupied the attention of five different tribunals over six years, only one of the fifteen members found for Bunge and, at the end of the day, no clear statement of general principle emerged from this extensive litigation.<sup>25</sup> The House of Lords, unanimously affirming the "powerful and closely reasoned"<sup>26</sup> judgment of Megaw L.J. in the Court of Appeal,<sup>27</sup> held, as in *The Mihalis Angelos*,<sup>28</sup> that the relevant clause was, as a matter of construction, a condition and, therefore, Tradax was entitled to repudiate the contract.

<sup>23</sup> M. P. Furmston, *Cheshire and Fifoot's Law of Contract* (9th ed., 1976), 143. The major source of difficulty lies in the failure of the courts to heed Diplock L.J.'s jurisprudential advice: "... the common law evolves not merely in breeding new principles, but also, when they are fully grown, by burying their progenitors"; See *supra*, footnote 15, at p. 71.

<sup>24</sup> [1981] 1 W.L.R. 711. For a comment on this case, see Reynolds, (1981), 97 L.Q. Rev. 541.

<sup>25</sup> *Ibid.*, at p. 723, per Lord Roskill. As he went on to say, "the 'relevant phrase' 'give at least 15 consecutive days' notice' consists only of six words and two digits. But the able arguments of which your lordships have had the benefit have extended over three full days". After the issue was decided by an umpire, there was an appeal to the Board of Appeal of GAFTA, another appeal to Parker J. in the Commercial Court, on to the Court of Appeal (Megaw, Browne and Brightman L.J.J.), and, finally to the House of Lords (Lords Wilberforce, Fraser, Scarman, Lowry and Roskill).

<sup>26</sup> *Ibid.*

<sup>27</sup> [1980] 1 LI. Rep. 294, at pp. 297-309.

<sup>28</sup> *Supra*, footnote 19.

In reaching this decision, their lordships exposed the "fundamental fallacy"<sup>29</sup> of the arguments urged in support of Bunge. Counsel had argued that, since the parties had left their intentions as to the contractual status of the "readiness" clause unexpressed, the issue could be disposed of by the application of the test contained in Diplock L.J.'s classic judgment in *Hong Kong Fir*; namely, that to justify repudiation, the breach must be such as to deprive the innocent party of substantially the whole benefit of the contract. Accordingly, it was argued, Tradax was not entitled to repudiate because the breach did not have such an effect. The House of Lords unanimously rejected the force of this argument. It held, in effect, that the mere failure of the parties to express their intention as to what rights should be available in event of breach is a necessary but not a sufficient characteristic for the existence of an innominate term.<sup>30</sup>

Regrettably, the House of Lords did not proceed to enumerate those other characteristics sufficiently to signify the existence of innominate terms. It contented itself with a slight but necessary emendation of Diplock L.J.'s account of such terms so as to make it clear that a term may nevertheless be a condition despite the lack of any express intention to that effect in the contract.<sup>31</sup> Obviously, a contrary decision would utterly fail to explain the status of terms already established as conditions as a matter of statutory or judicial implication.<sup>32</sup> Furthermore, the House of Lords continued to rely upon and cite with approval the standard tests of vague generality to

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<sup>29</sup> *Supra*, footnote 24, at p. 715.

<sup>30</sup> As Megaw L.J. stated "no-one now doubts the correctness of [*Hong Kong Fir*]: that there are intermediate [sic] terms . . .", *supra*, footnote 27, at p. 307. The tendency of the judges to use the labels "innominate" and "intermediate" interchangeably can scarcely contribute to clarity of exegesis; for the introduction of the appellation "intermediate", see *Bremer v. Vanden*, [1978] 2 L.J. Rep. 109, at p. 113, per Lord Wilberforce. It is suggested that neither term is wholly satisfactory.

<sup>31</sup> *Supra*, footnote 24, at pp. 715 and 725, per Lords Wilberforce and Roskill respectively. Furthermore, as Lords Wilberforce and Lowry noted "[Diplock L.J.'s judgment] does not profess to be more than clarificatory" and "by his illuminating analysis purport to establish a new light on old and accepted principles; he did not purport to establish new ones": *ibid.*, at pp. 715 and 719. This is a splendid example of the declaratory theory of common law at work and Hercules J. would be proud of Diplock L.J.'s achievement; see R. M. Dworkin, *Taking Rights Seriously* (1979), *passim*.

<sup>32</sup> See, for example, Sale of Goods Act 1979, c. 54, ss 12-15; *Behn v. Burness* (1863), 1 B. & S. 751; and the *Mihalis Angelos*, *supra*, footnote 19. For a modern judicial analysis of "conditions", see *Schuler A.G. v. Wickman Machine Tool Sale Ltd.*, [1974] A.C. 235 and *Reardon-Smith*, *supra*, footnote 11. As Ormrod L.J. said "a decision in one case will, in effect, categorise the stipulation for other cases in which the same form is used"; see *Cehave N.V. v. Bremer Handelsgesellschaft m.b.H. The Hansa Nord*, *supra*, footnote 20, at p. 62.

identify conditions, especially those contained in the judgment of Bowen L.J. in *Bentsen v. Taylor*.<sup>33</sup>

### *A New Formula*

The recognition of a new "species" of "innominate" or "intermediate" terms also calls into question the *established* tests for identifying terms where the parties have left their intentions unexpressed. The inherent weakness of the traditional formulae is that they were devised at a time when only a simple dichotomy existed and it was only necessary to concentrate on specifying the properties of one term; for if a term was not a condition, it must be a warranty. If the courts are to insist on a tripartite categorisation of contractual terms, a completely new test must be formulated that captures and better reflects this state of affairs.<sup>34</sup> Prior to *Bunge v. Tradax*, the courts maintained that unless a term was a condition as a matter of express intention or on the basis of previous authority, there was a presumption that the term was innominate.<sup>35</sup> The form of this presumption had never been fully explored, especially in regard to the quality and quantity of evidence required in rebuttal. The House of Lords in *Bunge v. Tradax* did not advert to this approach and the decision suggests, but does not articulate, an altogether different approach which concentrates on the substantive rather than the presumptive distinction between conditions and innominate terms. It is also clear that the new approach must focus on this distinction and not, as in the traditional approach, on the difference between conditions and warranties, for a breach of warranty can never give rise to a right to repudiate.

Accordingly, the logic of admitting the existence of innominate terms as a discrete category of contractual stipulation requires a reappraisal of the logical and constitutional properties of conditions. The difficulty with the old test for identifying conditions is that it must also be satisfied in the case of those innominate terms that give rise to the right to repudiate. The challenge is to define a new formula to discriminate between conditions and innominate terms with sufficient precision so as to accommodate the crucial characteristic of a condition: that is, while a breach may not in fact substantially deprive a party of the entire benefit of the contract, it will always generate a right to repudiate. This reveals that the focus for a new approach must sensibly be put on the *consequences* of a breach. Quite apart from the

<sup>33</sup> [1893] 2 Q.B. 274, at p. 281.

<sup>34</sup> In *Schuler*, Lord Wilberforce interpreted *Hong Kong Fir* as not casting any doubt on the meaning of "conditions"; *supra*, footnote 32, at p. 262. As to whether such a tripartite categorisation is desirable, see *infra*.

<sup>35</sup> See *Reardon-Smith*, *supra*, footnote 11.



denial of self-help remedies entailed by such an approach, any breach which is serious enough in its effects will always have a repudiatory quality and there will be no way to distinguish conditions from innominate terms. Accordingly, scrutiny must instead be devoted to the properties of the term itself, which is a question which may be decided in advance of breach at the moment of contracting. Notwithstanding their failure to stipulate expressly, the parties are surely entitled to be able to ascertain at the time of contracting, what rights and obligations their consensual bargain has imposed on them. However, the question of what are the characteristics of a condition, which distinguish it from an innominate term, does not admit of any easy answer. As Megaw L.J. underlined in the Court of Appeal, although any breach of a condition gives rise to the right to repudiate, it does not follow that there has been a loss of substantially the whole benefit of the contract. Therefore, the test for a condition is not co-extensive with an inquiry into whether each and every breach must have that effect. If this were the test, no term could ever pass such a stringent test and conditions would cease to exist. It is always possible to imagine some set of circumstances, however remote or fanciful, which would not result in the loss of substantially all the benefit of the contract.<sup>36</sup>

Although such a test is condemned by its own excesses, it does suggest a more acceptable approach. For, if instead of asking whether every breach of a term would actually result in the loss of substantially the whole contract, it could be asked whether every potential breach *might* have this effect. In this way, it does indeed become possible to determine in advance the difference between conditions and innominate terms. The justification for granting the innocent party a right to repudiate the contract is that the contract is rendered substantially less beneficial than it would have been, but for the breach. However, the assessment of the extent of the benefit which is to be gained from the business of contracting is, like all other contractual risks, capable of being anticipated before performance and, therefore, ahead of breach. It is at that time that the categorisation of terms into conditions, innominate terms and warranties is, if not made express, assumed by the parties. It may be that the effects of a breach of a term assumed to be of the first importance to the contract are not in fact greatly prejudicial. Yet that cannot justify the re-opening of an issue in the light of subsequent events which has already been decided by the act of bargaining. If a term is such that, at the time of contracting, it can fairly be said that each and every breach of it *might* result in the loss of substantially the whole benefit of the contract, that should be enough to fix that term with the status of a condition. However, as events unfold, its breach is easily remediable. In that case, no doubt,

<sup>36</sup> See *Bunge v. Tradax (C.A.)*, *supra*, footnote 27, at p. 308, per Megaw L.J.

the innocent party will avail himself of his option wisely. On the other hand, if it cannot be said that each and every breach *might* have that effect, the term will be an innominate term and the availability of a precise remedy for its breach must await the determination of the effects of its breach.

Typically, a condition will be a term that can only be broken in one way and this fact, in the light of the factors known to the parties at the time of contracting, will have fundamental significance for the contract as a whole. Thus, a contractual stipulation as to time, such as an expected readiness to load clause or title to goods, can only be broken in one way. Its significance is that the range of consequences of breach is predictably narrow and may fairly be treated as being fundamental. Innominate terms will be those which can be broken in a variety of ways because, although each is expressed substantively as a single term, it is in essence a bundle of obligations; some of great and others of small significance to the contract. Consequently, it will not be possible, at the time of contracting, to say of such a term that each and every breach even *might* have the potentially catastrophic effect required to give it a repudiatory quality. As Upjohn L.J. emphasised in *Hong Kong Fir* itself.<sup>37</sup>

Why is this apparently basic and underlying condition of seaworthiness not, in fact, treated as a condition? It is for the simple reason that the seaworthiness clause is breached by the slightest failure to be fitted "in every way" for service. Thus, to take examples from the judgments in some of the cases I have mentioned above, if a nail is missing from one of the timbers of a wooden vessel or if proper medical supplies or two anchors are not on board at the time of sailing, the owners are in breach of the seaworthiness stipulation. It is contrary to common sense to suppose that in such circumstances the parties contemplated that the charterer should at once be entitled to treat the contract as at end for such trifling breaches.

In summary, therefore, the proposed regime of contractual stipulation would consist of three clearly defined and separate categories.<sup>38</sup> A contractual term would be a condition if every breach of it might deprive the innocent party of substantially the whole benefit of the contract; a right to repudiate the contract would be available whatever the actual effects of breach. A contractual term would be an innominate clause if some, but not necessarily every breach might deprive the innocent party of substantially the whole benefit of the contract; a right to repudiate the contract would only be available if the breach did in fact result in the innocent party being deprived of substantially the whole benefit of the contract. A contractual term would be a warranty if its breach could never deprive the

<sup>37</sup> *Supra*, footnote 15, at pp 62-63. Upjohn L.J. repeated his views in *Astley Independent Trust v. Grimley*, [1963] 2 All E.R. 33, at pp. 46-47.

<sup>38</sup> Lord Hailsham described conditions and warranties as "mutually exclusive and starkly contrasted compartments"; see *London & Clydeside Estates Ltd v. Aberdeen D.C.*, [1980] 1 W.L.R. 182, at p. 189.

innocent party of substantially the whole benefit of the contract; a right to repudiate the contract would never arise.

The major appeal of such a regime of contractual stipulations is that it rightly concentrates on the several ways in which a term might be broken rather than upon the term itself.<sup>39</sup> Moreover, it introduces a dimension of realistic flexibility without any appreciable diminution in predictability. Indeed, the critical balance between "the equity of a particular situation" and "the overmastering need of certainty in the transactions of commercial life"<sup>40</sup> has been left undisturbed. The parties remain entirely free to categorise expressly any term of a contract as a condition. As Lord Diplock noted, in regard to shipping parties, when the parties "are matched in bargaining power", they are "at liberty to enter into [agreements] in whatever contractual terms they please".<sup>41</sup> If the parties fail to stipulate expressly the contractual status of any term in their agreement, the need of certainty is no longer of relevance. In such circumstances of unexpressed intention, the courts ought surely to look to the justice of the situation. This will require an inquiry into the possible consequences of breach. Accordingly, when there is a gap or failure in planning by the contracting parties, as there inevitably will be in complex and continuing contractual arrangements,<sup>42</sup> the court must focus its attention on performance and not formation. The proposed tripartite regime best reflects such concerns. Nevertheless, it remains a matter for future debate as to whether the introduction of a third category of contractual term is desirable. Its mere existence and the ensuing difficulties attached to identifying and distinguishing an innominate term from other terms is likely to provide further grist for the litigation mill. There is much to be said for a regime that simply recognises two categories of contractual term; a breach of one type justifying termination and a breach of another not so doing. A decision on which category any particular contractual term falls into will depend on the express or implied choice of the parties; the finding of an implied choice being a matter of construction on all the circumstances of the case.

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<sup>39</sup> See Lord Devlin, [1966] Camb. L.J. 192, at p. 204.

<sup>40</sup> B.N. Cardozo, *The Growth of Law* (1924), pp. 110-111.

<sup>41</sup> *Federal Commerce*, *supra*, footnote 9, at p. 7.

<sup>42</sup> See Macneil, *op. cit.*, footnote 5, at p. 716.

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