

RECIPROCITY IN CONTRACT LAW

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1 Introduction

A central idea in contract law, around in some form since at least the time of Aristotle (if not before) is the idea of commutative justice. One might transpose this to Latin and say that each is entitled to his *quid pro quo* under a contract. In South African contract law we prefer to describe this concept as the principle of “reciprocity”, while other legal systems might use instead terms such as “mutuality” or “synallagma”. Most bilateral contracts will involve an element of exchange between the parties, with one performance being given in return for another. In such a state of affairs, performance (or at least the tender of performance) by one party becomes conditional upon the right of the other party to receive counter-performance. Since performance by one party is conditional upon performance by the other, this entails a concomitant right to withhold performance should counter-performance not be given or at least tendered. In the words of Jansen JA:

“Die grondslag van hierdie weerwer [the *exceptio non adimpleti contractus*] is die erkenning daarvan dat by sommige kontrakte (wederkerige kontrakte) waaruit wedersydse verpligtinge voortvloei, daar wesenlik ’n uitruiling van prestasies beoog word, met oa die gevolg dat die een party nie verplig is om sy prestasie te verrig nie alvorens die ander op sy beurt sy teenprestasie verrig...Gerieflikheidshalwe sal voortaan in hierdie uitspraak van die ‘wederkerigheidsbeginsel’ gepraat word, terwyl die reg om ’n prestasie as uitvloeisel daarvan terug te hou die ‘weerdhoudingsreg’ genoem sal word...”¹

The question, however, is when can obligations be said to be reciprocal? Corbett J suggested in *ESE Financial Services (Pty) Ltd v Cramer*² (“*ESE Financial Services*”) that obligations were reciprocal when the performances of both parties represented “concurrent conditions”, in other words where a simultaneous exchange was envisaged.³ An example of this scenario would be the exchange of the *merx* for the purchase price under a cash sale.⁴ Alternatively, one performance might be the “condition precedent” for the other – such as where an independent contractor must complete his work in full before the

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¹ *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 (A) 415H per Jansen JA: “The basis of this defence is the acknowledgement that with certain contracts (reciprocal contracts) from which reciprocal obligations flow, an exchange of performances is intended. Amongst other things, this has the consequence that one party is not obligated to tender his performance unless the other performs in return... For the sake of convenience this will be termed the ‘reciprocity principle’ from here on in this judgment, while the right to retain performance which flows from this, will be termed the ‘right of retention’...” (own translation)

² 1973 2 SA 805 (C)

³ 808H-809A

⁴ 808A

employer is obliged to counter-perform.⁵ Whether performances under a contract fall into either of these categories is thus a question of interpretation of the contract in question.⁶ Interpretation would also determine the sequence of performance required.⁷

If reciprocity then refers to a state of affairs where the performance and counter-performance of contractual obligations are conditionally linked, then the concomitant right of such a party – as stated by Jansen JA in *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* (“*BK Tooling*”) above – is to withhold performance should counter-performance not be forthcoming. This *weerhoudingsreg* (or right of retention) is a self-help mechanism in South African contract law, which is given effect to by a defence with the historical name of *exceptio non adimpleti contractus*.⁸ This is a simple contractual device by which a party to a reciprocal contract may refuse to perform should his counter-party not perform and stands therefore as a potential defence to a claim for specific performance.⁹

The statement of the law so far is established in the historical sources as well as in the judgments of the Appellate Division (and later the Supreme Court of Appeal). The problem is that this bald restatement fails to take account of all the nuances of possible factual problems which have been thrown up over the course of history. What follows is an attempt to shed light on some of the major problems which have faced past courts, in this country and others, in resolving disputes involving reciprocal obligations. Once a right to withhold performance is recognised, an immediate inquiry must take place as to whether that retention is justified and whether the principle of reciprocity is served or undermined by upholding the refusal to perform. Ultimately many of these questions involve issues of what is fair *inter partes* – a consideration which has led to several glosses on the basic rules stated above.

This article will proceed in part two to discuss the historical origins of the concept of reciprocity in contract law. From there, in part three, the notion of reciprocity in the conclusion of a contract will be considered, again this section will be largely historical. Part four will give an account of the concomitant doctrines of specific performance and *exceptio non adimpleti contractus*. These concepts will be dealt with historically and comparatively, but with a special focus on South African law. Part five will deal with issues of reciprocity involved when a contract is repudiated, part six with the consequences which reciprocity entails for parties following the termination of a contract, whether through breach or because it is voidable. Finally part seven will deal with the difficult issue of divisibility of obligations or performances in contract law, while part eight will conclude.

⁵ 808A-B

⁶ *ESE Financial Services (Pty) Ltd v Cramer* 1973 2 SA 805 (C) 809H-811A; *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 (A) 418B-C

⁷ *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 (A) 418C-E

⁸ 415H-416A

⁹ See the discussion of *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 (A) in part 4 3 below and for further details, S van der Merwe, LF van Huyssteen, MFB Reinecke & GF Lubbe *Contract: General Principles* 3 ed (2007) 388-391; RH Christie & GB Bradfield *The Law of Contract in South Africa* 6 ed (2011) 437-440

2 Reciprocal contracts through the ages

In a very useful account of the history of the philosophy underpinning contract law, Gordley argues that Aristotle's views on justice played a formative role in medieval legal thought. This influence was prevalent in the writings of authors from the times of St Thomas Aquinas right up to Grotius and only waned thereafter during the natural law years of the seventeenth and eighteenth centuries. It seems fitting therefore, in an account of the philosophical impact of the value of reciprocity in contract law, to begin with Aristotle's views on the concept.

For Aristotle there were two types of justice: commutative and distributive. Distributive justice is reflected in the ways in which "honours or wealth or anything else [are] divided among members of a community who share in a political system".¹⁰ Distributive justice would be determined by the type of political system a state followed.¹¹ Commutative justice concerned "rectification in transactions".¹² Transactions could be voluntary, such as the different forms of contracting, or involuntary, such as theft or murder.¹³ Commutative justice is ensured by enforcing numerical equity in exchange – this is the role of the judge.¹⁴ Agreements for Aristotle thus required that what was tendered by one party had to be the arithmetic equivalent of the other party's performance.

In Roman law, by contrast, little effort was spent on theorising.¹⁵ There was no general law of contract: contracts were classified by type (such as the consensual contracts of sale, lease and pledge) and had particular rules depending on which category the contract fell into. Certain other types of obligation were enforceable due to the verbal formula used (stipulation) or the entry of the obligation into a ledger. There were also *innominate* contracts, such as barter, which did not fit into any of the groups. The remedy for breach of contract was damages,¹⁶ although a lack of performance of an *innominate* contract by one party rendered the agreement unenforceable.¹⁷ The type of theorising on the topic of reciprocity as evidenced in the writings of Aristotle was absent from Roman law, although Gordley points to the remedy of the *laesio enormis*, by which a contract for the sale of land could be set aside if the price fixed therein was less than half the "just" price.¹⁸ Most of the theorising on Roman law was to take place in later years, following the rediscovery of the *Corpus Iuris Civilis* in the middle ages.

Scholars in this period "rediscovered" the old Roman law as laid down in the *Corpus Iuris*.¹⁹ At the same time there was a widespread revival of

¹⁰ Aristotle *Nicomachean Ethics* (trans T Irwin 1985) v, 1130b30

¹¹ v, 1131a20

¹² v, 1131a1

¹³ v, 1131a5

¹⁴ v, 1131b25-1132b20

¹⁵ J Gordley *The Philosophical Origins of Modern Contract Doctrine* (1991) 32

¹⁶ J Dawson "Specific Performance in France and Germany" (1959) *Mich L Rev* 495 497-498

¹⁷ Gordley *Philosophical Origins* 31

¹⁸ 33

¹⁹ O Robinson, T Fergus & W Gordon *European Legal History* 3 ed (2000) 42-43

learning going on, centred largely around the Christian church.²⁰ Thus it is not surprising that the next major thinker to be discussed here wrote not on the civil law, but rather on Christian moral philosophy. St Thomas Aquinas is accredited with being one of the leading thinkers of this period and his moral philosophy drew heavily on the texts of Aristotle, which had recently been translated into Latin.²¹ Aristotle had characterised justice as a virtue,²² and in the same way this philosopher saw generosity as a virtue.²³ Thus an agreement to donate would display the virtue of generosity, as opposed to that of commutative justice.²⁴ This was used by St Thomas Aquinas to characterise agreements into two types: those displaying the virtue of generosity and those displaying the virtue of commutative justice.²⁵ Thus equality in exchange was a requirement for all agreements outside of the sphere of liberality.²⁶ This idea was to have a profound impact on the thinking of future generations of scholars in the field of law. Aristotelian-Thomistic philosophy has been shown by Gordley to have shaped much of the legal developments which followed in later years from the time of the Commentators onwards until it fell out of fashion in the seventeenth and eighteenth centuries with the rise of natural law philosophy.²⁷ Gordley argues further that the centrality of values such as fairness in Aristotelian-Thomistic philosophy presents a counter point to much of what is wrong with the classical contract model of the nineteenth and early 20th centuries.²⁸ He advances this as a diagnosis, rather than a cure, aiming to restore the important tool of value-based reasoning to the judicial function.²⁹ The first context in which the idea of reciprocity as fairness will be considered is the conclusion of a contract.

3 Reciprocity in the conclusion of a contract

Contract is commonly perceived as being a means of facilitating exchange. According to Aristotle, commutative justice was a requirement of exchanges, yet the concepts of freedom of contract and equivalence of performance have been difficult to reconcile with each other down the ages. Modern Anglophone systems of contract typically require “consideration” for the enforceability of a contractual promise, yet does this mean that reciprocity is required in the conclusion of a contract? An even more vexing question is whether equivalence in exchange could be a goal of modern contract law. The tracing of the reciprocity principle in the roots of our modern law will begin with the concept of *causa* as formulated by medieval jurists.

²⁰ 72-74

²¹ Gordley *Philosophical Origins* 3

²² Aristotle *Nicomachean Ethics* v, 1129b25-30

²³ iv, 1120a5

²⁴ iv, 1120a5-15

²⁵ Thomas Aquinas *Summa Theologica* (trans Blackfriars 1972) II-II q61, a3 See also II-II q77, q78 and q117

²⁶ It should be noted that Thomas Aquinas did not view liberality as being an aspect of justice, but rather of charity (Thomas Aquinas *Summa Theologica* II-II q117, a5)

²⁷ This is the main argument advanced in Gordley *Philosophical Origins*

²⁸ See Gordley *Philosophical Origins*, particularly ch 9

²⁹ 231

Bartolus and Baldus, the most famous protagonists of the age of the Commentators,³⁰ are accredited with formulating the doctrine of *causa*.³¹ Since the inspiration of the commentators was the *Corpus Iuris Civilis*, it is from texts therein that the doctrine of *causa* was formulated.³² According to this theory, a contract must be concluded based on a *causa*, or reason. Only two types of reasons were acceptable: liberality or reciprocal exchange.³³

This distinction was maintained during the age of the late scholastics in sixteenth and early seventeenth centuries. This group of scholars combined Roman law with the philosophy of Aristotle and Thomas Aquinas, which Gordley describes as a period of synthesis.³⁴ The late scholastics categorised all contracts as onerous (*causa onerosa*) or gratuitous (*causa gratuita*). Gordley argues that this distinction was aimed more at explaining the reason for contracting than limiting a contract's enforcement, since illegal contracts were still prohibited, quite apart from this doctrine.³⁵

In Roman Dutch law this same distinction can also be found in the writings of Grotius, who was influenced by the late scholastics.³⁶ In his chapter, "On Contracts" in *De Iure Belli ac Pacis*, Grotius divides acts performed for the benefit of others into acts of "kindness" and acts which are "reciprocal".³⁷ All acts of benefit to others, except "mere kindnesses" are contracts.³⁸ Contracts by definition require equality in exchange, and the party who receives less acquires a right of action against the other party.³⁹ This reinforces the late scholastic view of contractual conclusion, which holds that contracts are enforceable if they are made for a good *causa* and accepted by the promisee.⁴⁰ Grotius himself discusses the concept of "*redelicke oorzaecke*" in his *Introduction to Dutch Jurisprudence*,⁴¹ a passage which was to have much airing later in the South African Appellate Division.⁴² Thus reciprocity in the form of *causa* was required for the conclusion of contracts in the late scholastics and the writings of the pre-eminent Roman Dutch scholar, Grotius.⁴³

Gordley describes how the rise of natural law philosophy in the seventeenth century saw a waning of the influence of Aristotle. Reciprocity in the conclusion

³⁰ Robinson et al *European Legal History* 66-67

³¹ Gordley *Philosophical Origins* 49; R Zimmermann *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 551

³² Gordley *Philosophical Origins* 49-57 cites *D 2 14 7 1*, *D 12 7 1* and *D 44 4 2 3* as key examples of these texts which mention the word "*causa*" in the context of requirements for the formation of contracts

³³ 49

³⁴ 69

³⁵ 78-79

³⁶ 75

³⁷ Grotius *De Iure Belli ac Pacis* (trans F Kelsey 1925) II, xii, 1-2 available at <<http://heinonline.org/HOL/Page?handle=hein.beal/cilnc0002&id=389&collection=beal&index=beal/cilnc>> (accessed 16-02-2012)

³⁸ II, xii, 7

³⁹ II, xii, 8

⁴⁰ Gordley *Philosophical Origins* 73

⁴¹ Grotius *Introduction to Dutch Jurisprudence* (trans A Maasdrorp 1903) III, I, 52

⁴² *Conradie v Rossouw* 1919 AD 279

⁴³ It should be noted, however, that the requirement of *causa* for the conclusion of a valid contract is absent from the writings of other notable Roman Dutch scholars, such as Voet, Groenewegen and Vinnius. See *Conradie v Rossouw* 1919 AD 279 288. D Hutchison "Contract Formation" in R Zimmermann & D Visser (eds) *Southern Cross* (1996) 165 notes at 166 n 8 that some Roman Dutch law authors, such as Van der Keesel and Van Leeuwen, did support Grotius' view

of a contract in the form of the idea of a *causa* did not vanish, however, as we have already seen in an examination of the work of the natural law scholar, Grotius. Indeed the doctrine of *causa* can still be found in the works of Pothier in the eighteenth century. Pothier states in his *Treatise on the Law of Obligations* that every contract should have a “just cause”.⁴⁴ In contracts of mutual interest, the cause lay in the thing given or done; in contracts of beneficence the cause was liberality.⁴⁵ Through the influence of Pothier, this concept made its way into the French *Code Civil* in 1804. Today article 1184 holds that a “resolutive condition” is implied by law into every reciprocal contract that if one of the two parties does not carry out his obligation, the other will have the choice whether to compel performance or to terminate the contract and seek damages.⁴⁶

The fate of *causa* in Germany was less successful. Zimmermann describes the role of *causa* as facilitating a transition from the formalities required of the specific forms of contracts in Roman law to the modern idea that “every agreement begets an action”.⁴⁷ The idea of *causa* was not adopted in the writings of Pufendorf, who required instead two “acts of volition” on the part of each party to form a “*pactum*” – as opposed to a promise (*promissio*).⁴⁸ This was later merged with the thinking of Wolff, who introduced the modern German term, “*Vertrag*”, which was formed by “coinciding declarations of intention”.⁴⁹ Today the German Civil Code makes no mention of *causa* in the section on formation of contracts – the inquiry into the existence of a contract is done by offer and acceptance analysis.⁵⁰

In a parallel development, the English common law of contract had, prior to the nineteenth century, come up with the doctrine of consideration, which was necessary to found an action of *assumpsit*.⁵¹ Exactly what consideration meant had not yet crystallised, which led to nineteenth century English writers on contract drawing on the earlier works of Blackstone, who equated this concept with the civil law’s *causa*.⁵² Consideration was thus explained as the “motive” or “reason” for contracting.⁵³ It was only in the times of Holmes and Pollock that the doctrine of consideration was reformulated as a bargain or exchange.⁵⁴ This, combined with the notion of freedom of contract, meant that whatever “a man chooses to bargain for must be conclusively taken to be of some value to

⁴⁴ Pothier *Obligations* (trans W Evans 1853) § 42.

⁴⁵ § 42

⁴⁶ Text paraphrased from the translation: G Rouhette & A Rouhette-Berton “Civil Code” (2006) *Legifrance* <<http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>> (accessed 13-03-2013)

See also Zimmermann *Obligations* 803

⁴⁷ Zimmermann *Obligations* 553

⁴⁸ 568

⁴⁹ 568-569

⁵⁰ *Bürgerliches Gesetzbuch* (“BGB”) §§ 145-157 Translation taken from the *Bundesministerium der Justiz*, available at: <http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0426> (accessed 07-02-2012)

⁵¹ Gordley *Philosophical Origins* 137; A Simpson *A History of the Common Law of Contract* (1975) ch VII

⁵² W Blackstone *Commentaries on the Laws of England* (1766) 2 444-446 Compare Gordley *Philosophical Origins* 137-139; Zimmermann *Obligations* 557 n 79; A Simpson “Innovation in Nineteenth Century Contract Law” (1975) 91 *LQR* 247 262-263

⁵³ Gordley *Philosophical Origins* 171

⁵⁴ Gordley *Philosophical Origins* 172; J Dawson *Gifts and Promises* (1980) 203-204

him”.⁵⁵ Thus, provided there is some form of demonstrable “bargain” at play, the law will not inquire into the adequacy of consideration.⁵⁶ This remains true of English contract law today.⁵⁷

Thus the common law recognises reciprocity in the sense that a contract must involve an exchange, or bargain, of some sort. The literal sense of the term reciprocity – equivalence in exchange – however, is lacking. Reciprocity, in this sense, is absent from the formation of contracts in English law and indeed from modern contract law in general.

A final discussion of the South African context is needed to conclude the brief discussion of reciprocity in contract formation. The South African law of contract represents a mixture of Roman Dutch civil law and English contract law. Over the years, the kinks have been ironed out and there is now a coherent body of law. In the early 20th century, however, there was still a situation of confusion as to exactly what the “proper” rules of South African contract law entailed. In the context of the requirements for the conclusion of a valid contract, there were those – including the Chief Justice of the newly unified South Africa (De Villiers CJ) – who favoured the inclusion of the doctrine of consideration as a requirement for contracting.⁵⁸ The Appellate Division settled the question in 1919, however, in *Conradie v Rossouw*.⁵⁹ By this time De Villiers CJ had passed away and the Appellate Division held unanimously that a contract required only a seriously intended offer and a corresponding acceptance for its conclusion (provided performance under the contract was legal and possible).⁶⁰ Grotius’s concept of *redelijke oorzaak*⁶¹ (or *causa*) was not the same as consideration in the common law sense of that word and was not a requirement for a binding contract in South Africa.⁶² Thus a bare agreement (that is, without consideration) is binding in South Africa on the basis of consensus alone where that consensus is freely given with the intention of creating a legally binding contract.⁶³ (Reliance, as a separate basis for a contract, was adopted separately and came to the fore in the context of mistake in particular.)⁶⁴

Although in South Africa the resolution of the *causa*/consideration debate saw the dismissal of the bargain theory in this country, the idea of *causa* still manifests itself in certain areas. It may no longer be an essential requirement

⁵⁵ Gordley *Philosophical Origins* 172, citing F Pollock *Principles of Contract* (1885) 172

⁵⁶ E Peel *Treitel The Law of Contract* 13 ed (2011) 3-013–3-016; E McKendrick *Contract* 2 ed (2005) 161; MP Furmston *Cheshire, Fifoot & Furmston’s Law of Contract* 15 ed (2007) 106

⁵⁷ See for example the sources listed in n 56

⁵⁸ For the views of De Villiers CJ, see *Alexander v Perry* 1874 4 Buch 59; *Tradesmen’s Benefit Society v Du Preez* 1887 5 SC 269 and *Mtembu v Webster* 1904 21 SC 323

⁵⁹ 1919 AD 279

⁶⁰ 297 per Solomon ACJ, 320 per De Villiers AJA

⁶¹ Note that this variant spelling of the concept was used in the Appellate Division judgment

⁶² See the judgment of De Villiers AJA. See also *Saambou-Nasionale Bouvereniging v Friedman* 1979 3 SA 978 (A) for an application of the requirement of *causa* in the context of negotiable instruments. Zimmermann *Obligations* 558 notes that Grotius seems to use the term “*redelicke oorzaecke*” in a very “untechnical” sense as indication that the law recognises the agreement as “reasonable, acceptable and thus enforceable”

⁶³ *Conradie v Rossouw* 1919 AD 279 297

⁶⁴ Christie & Bradfield *The Law of Contract* 10-12; Hutchison “Contract Formation” in *Southern Cross* 180-194

for contractual validity, but still plays a role in the law of negotiable instruments and unjustified enrichment. Equality in exchange is a noble ideal in contract law, yet appears to have died out with the commercialisation of contract law in the progression towards modern times. Thus reciprocity in the sense of equivalence in exchange is not a requirement of any of the modern legal systems examined above. However, this does not necessarily exclude reciprocity from other areas of law. The next investigation will be into the role of reciprocity in the enforcement of contracts.

4 Reciprocity in the enforcement of contracts

4 1 Origins of specific performance as a contractual remedy and the concomitant defence of *exceptio non adimpleti contractus*

One of the aims of this article is to highlight the “fairness” aspect entwined in much of the court-made law based on reciprocity in contract. Since a large part of fairness between parties involves the upholding of contractual promises, the focus will be narrowed from here to the devices by which counter-performance is enforced in reciprocal contracts. This development must, however, be notionally predicated upon the idea that contracts (to the extent that this word was appropriate in ancient times) are binding. To keep the focus on modern Western law, this account of the enforceability of contractual obligations shall begin with the Roman position.

The Romans had no general right of rescission from agreements, although a situation of “functional synallagma” pertained, whereby a party to a reciprocal agreement could refuse to perform if the other party’s counter-performance was not forthcoming.⁶⁵ The primary remedy for breach of contract in classical Roman law was damages.⁶⁶ In this system a judge was empowered to refuse to order performance of *bonae fidei iudicia* (contracts such as sale and lease) on account of the good faith nature of those transactions.⁶⁷ In medieval times the influence of the canon law saw the end of distinctions between formal types of contracting and all contracts became *iudicia bonae fidei*.⁶⁸ Along with this development came the idea of *pacta sunt servanda*, whereby all agreements are binding, regardless of form.⁶⁹ The Roman right to refuse to counter-perform where the opposing performance in a reciprocal contract was not forthcoming, came to be known as the *exceptio non adimpleti contractus* from about the fifteenth century onwards.⁷⁰

The *exceptio non adimpleti contractus* as a technical rule giving effect to the principle of reciprocity in the enforcement of contracts is premised on the notion that a party may ensure he obtains the promised performance

⁶⁵ Zimmermann *Obligations* 800-801

⁶⁶ Dawson (1959) *Mich L Rev* 496

⁶⁷ Dawson (1959) *Mich L Rev* 496; Zimmermann *Obligations* 770-772

⁶⁸ R Zimmermann “Good Faith and Equity” in R Zimmermann & D Visser (eds) *Southern Cross* (1996) 220

⁶⁹ Zimmermann *Obligations* 576

⁷⁰ 801 n 133

through a court order compelling the other party to perform.⁷¹ Specific performance as an enforcement procedure came to the fore as a legal conundrum in medieval times. Bartolus and Baldus, drawing on the text of *Corpus Iuris Civilis*, distinguished obligations to give (which were specifically enforceable) from obligations to do – or not do – (which were not specifically enforceable).⁷² A person who had contracted (for example) to perform a task could not be compelled to follow through with it, since this would be a form of servitude.⁷³ A second reason was that in a promise “to do” so much depended on the time and manner of performance, that the only fair remedy in the event of breach was damages.⁷⁴

This distinction caught the mind of Pothier, who wrote in his *Treatise on the Law of Obligations* that an obligation to give was binding on the debtor,⁷⁵ whereas an obligation to do or not do was only enforceable in damages.⁷⁶ The distinction between obligations to give and to do is maintained in the *Code Civil* at article 1126. Article 1136 authorises the specific enforcement of obligations to give, while article 1142 authorises only the award of damages for obligations to do. In modern French law, specific enforcement of obligations to give is permitted, while enforcement of obligations to do is achieved by imposing fines (*astreinte*) on recalcitrant debtors in an attempt to “threaten” them into performing. As Dawson notes, this system lacks teeth since in the past the fines often remained unpaid.⁷⁷ Modern authors, Lando and Rose, note that the difficulty in executing an order of specific enforcement has led French plaintiffs to prefer an award of damages.⁷⁸

As to the *exceptio non adimpleti contractus* in French law, Nicholas notes that this is not dealt with in the *Code Civil*.⁷⁹ This was due to a culture which veered away from self-help mechanisms in the law.⁸⁰ Indeed the courts have only begun to allow this defence since the 20th century, hanging it on the peg of *cause* (the equivalent of *causa*).⁸¹ As the argument goes, in reciprocal contracts each obligation is the *cause* for its counterpart, hence non-performance of one justifies non-performance of the other.⁸² This is seen as operating only in the context of temporary non-performance, however, since article 1184 (discussed above) would permit an election whether to compel performance through the courts or to terminate the contract and seek damages.⁸³

⁷¹ 801 n 133 For modern South African authority see: Van der Merwe et al *Contract* 388-391; Christie & Bradfield *The Law of Contract* 437-440; JC de Wet & AH van Wyk *Kontraktereg* 5 ed (1992) 196-197

⁷² Dawson (1959) *Michigan LR* 504

⁷³ Baldus *Commentary* on C 4 49 cited in Dawson (1959) *Mich L Rev* 504

⁷⁴ Bartolus *Commentary* on D 45 1 72 cited in Dawson (1959) *Mich L Rev* 505

⁷⁵ Pothier *Obligations* § 141

⁷⁶ § 157-158

⁷⁷ Dawson (1959) *Mich L Rev* 514-519

⁷⁸ H Lando & C Rose “On the Enforcement of Specific Performance in Civil Law Countries” (2004) 24 *Int'l Rev L & Econ* 473 479

⁷⁹ B Nicholas *The French Law of Contract* 2 ed (1992) 213 Compare the brief discussions in Zimmermann *Obligations* 801 n 133 and *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 (A) 417

⁸⁰ Nicholas *French Law of Contract* 212-213

⁸¹ 214

⁸² 214

⁸³ 214

Thus reciprocity does play an important role in the enforcement of French contracts, but not to the same extent it plays a role in the German system, where the *exceptio non adimpleti contractus* is specifically incorporated in the *BGB* in article 320.⁸⁴ The German law of specific performance proceeds from article 241 in the *BGB*, which gives a plaintiff a right to seek this remedy.⁸⁵ After requesting performance, however, the plaintiff must give the defendant a reasonable period in which to perform (a period known as *Nachfrist*).⁸⁶ The right to specific enforcement is limited by factors such as impossibility (in particular) or where enforcement would require compulsion to be exercised in a personal relationship or over intellectual or artistic creativity.⁸⁷ Where specific performance is allowed, a recalcitrant debtor may be threatened with a fine or imprisonment under the Code of Civil Procedure.⁸⁸ Despite this feature, however, the empirical evidence seems to indicate that plaintiffs prefer to sue for damages, due to the difficulties involved in enforcing specific performance.⁸⁹

In English law, the common law favours damages as the remedy for breach of contract.⁹⁰ Specific performance is a remedy offered in equity and is only available at the discretion of a judge and not as of right.⁹¹ The typical scenario in which specific performance will not be allowed was suggested by Lord Hoffmann in *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*, where he stated that the defendants could not be compelled to run a business, since this would require constant supervision by a court.⁹² This exemplifies the English reluctance to award specific performance in a contract for services.⁹³ Indeed the sphere of application of this remedy is typically limited to contracts for the delivery of unique goods, or the transfer of immovable property.⁹⁴ Given the limited scope of application of specific performance in the English law, it is not surprising that the *exceptio non adimpleti contractus* does not form part of this area of their law.⁹⁵

The principle of reciprocity, or “mutuality”, as it is known in common law systems, does find an outlet in the English law with regard to the time for performance of contractual obligations. In this regard, contractual terms are classified into conditions precedent, concurrent conditions and independent promises with regard to the order in which performance is to occur.⁹⁶ The

⁸⁴ Compare Zimmermann *Obligations* 800

⁸⁵ B Markesinis, H Unberath & A Johnston *The German Law of Contract* (2006) 399

⁸⁶ § 281 *BGB*. See Markesinis et al *German Law of Contract* 400

⁸⁷ Dawson (1959) *Mich L Rev* 530; Markesinis et al *German Law of Contract* 406-418

⁸⁸ *Zivilprozessordnung* (“ZPO”) § 888. See Lando & Rose (2004) *Int'l Rev L & Econ* 478

⁸⁹ Lando & Rose (2004) *Int'l Rev L & Econ* 478-479; Dawson (1959) *Mich L Rev* 530. Compare K. Zweigert & H Kötz *An Introduction to Comparative Law* 3 ed (1998) 484

⁹⁰ See for example: Peel *Treitel The Law of Contract* 20-002; McKendrick *Contract* 1138-1139, Furmston *Cheshire, Fifoot & Furmston's Contract* 750

⁹¹ See sources listed in n 90 above

⁹² [1998] AC 1 15G-16C

⁹³ McKendrick *Contract* 1139. See also s 236 of the Trade Union and Labour Relations (Consolidation) Act 1992

⁹⁴ McKendrick *Contract* 1139

⁹⁵ M Hogg *Promises and Contract Law: Comparative Perspectives* (2011) 340

⁹⁶ Compare J Carter “Suspending Contract Performance for Breach” in J Beatson & D Friedmann (eds) *Good Faith and Fault in Contract Law* (1995) 485 493-497

word “condition” has various meanings in English law, from the contingent sense (in which it is used in South Africa) to a promissory sense, where it indicates that a breach of that type of term gives a right to terminate the contract. (Whereas if the term is a warranty (as opposed to a promissory condition), one may only claim damages in the event of a breach.)⁹⁷ In what follows, a condition is referred to in its contingent sense.

In this contingent sense, a “condition precedent” refers to an obligation which must be performed prior to counter-obligation.⁹⁸ For example, a building project must be completed before payment becomes due.⁹⁹ If the prior performance is not tendered, the other party has a right to withhold his counter-performance.¹⁰⁰ The same is true of a “concurrent condition”, except that performance here is due at the same time as counter-performance.¹⁰¹ An “independent promise” occurs where a party is bound to perform even if the counter-performance is not forthcoming.¹⁰² The performing party in this instance may not withhold performance.¹⁰³ Treitel states that for reasons of fairness, courts are reluctant to hold that terms constitute independent promises and the trend is in favour of concurrent conditions.¹⁰⁴ Treitel thus argues that there is a functional equivalent to the *exceptio non adimpleti contractus* in English law.¹⁰⁵

4 2 Specific performance in South African law

As a “mixed” legal system, the South African law of specific performance shows indications of both the common and civil law approaches. Thus the Appellate Division has asserted that, in accordance with our Roman Dutch law heritage, the primary remedy for breach of contract is specific performance and that the plaintiff has a right to this remedy.¹⁰⁶ At the same time, however, specific performance has been said to be available at the discretion of the court.¹⁰⁷ The leading case, *Benson v SA Mutual Life Assurance Society*¹⁰⁸ (“*Benson*”), attempts to reconcile the conflict between these two strands by stating that although the “right” to specific performance is subject to a judicial discretion, this discretion is absolute and is not constrained by the guidelines

⁹⁷ McKendrick *Contract* 941; Peel *Treitel The Law of Contract* 18-039

⁹⁸ McKendrick *Contract* 942

⁹⁹ 942 Compare s 28 of the (English) Sale of Goods Act 1979, where a seller’s obligation to deliver goods is said to depend on the “condition precedent” of the buyer’s willingness to accept those goods and pay the purchase price

¹⁰⁰ McKendrick *Contract* 942; G Treitel “‘Conditions’ and ‘Conditions Precedent’” (1990) 106 *LQR* 185 192; G Treitel *Remedies for Breach of Contract* (1988) 276-277

¹⁰¹ Treitel *Remedies for Breach* 277

¹⁰² 277

¹⁰³ 277

¹⁰⁴ 279

¹⁰⁵ 277 But see *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1992] 1 QB 656 666-667, discussed in Carter “Suspending Contract Performance” in *Good Faith and Fault* 485-486

¹⁰⁶ *Benson v SA Mutual Life Assurance Society* 1986 1 SA 776 (A) 782I-J

¹⁰⁷ *Haynes v Kingwilliamstown Municipality* 1951 2 SA 371 (A) 378H-379A

¹⁰⁸ *Benson v SA Mutual Life Assurance Society* 1986 1 SA 776 (A)

as found in English law.¹⁰⁹ These guidelines as had previously been set out by the Appellate Division were as follow: where damages would adequately compensate the plaintiff, where enforcement would be difficult to enforce, where alternative performance was readily available, where performance entails personal services or where enforcement would result in hardship.¹¹⁰

Cockrell argues that the judgment in *Benson* fails to adequately address the tension between a right and a discretion inherent in the South African position on specific performance.¹¹¹ This would appear to be in line with the argument of Zweigert and Kötz, as well as Lando and Rose (discussed above) that in reality the common law and civil law rules on specific performance, while different on their face, produce much the same sort of result.¹¹² In other words, that while a plaintiff may have a right to specific performance in civil law countries and in South Africa, judicial and practical constraints may make damages a preferable choice and thus impose a *de facto* limit on the plaintiff's right, not too far removed from the legally recognised limits in common law systems.

4 3 *BK Tooling* and the *exceptio non adimpleti contractus* in South African law

As in civil law systems, the *exceptio non adimpleti contractus* arises in South African law as a defence to a claim for specific performance. If a party claiming specific performance has not himself performed, this is a valid ground for the opposing party to withhold counter-performance.¹¹³ Thus reciprocity is ensured when specific enforcement of a contract is sought in South Africa. Given the primacy of this remedy (as indicated above), the *exceptio non adimpleti contractus* has an important role to play in ensuring fairness *inter partes*. Indeed, even without reference to the *exceptio non*

¹⁰⁹ 785F-G For further comment on *Benson v SA Mutual Life Assurance Society* 1986 1 SA 776 (A) see G Lubbe "Contractual Derogation and the Discretion to Refuse an Order for Specific Performance" in G Glover (ed) *Essays in Honour of AJ Kerr* (2006) 77 80-99

¹¹⁰ *Haynes v Kingwilliamstown Municipality* 1951 2 SA 371 (A) 378H-379A

¹¹¹ A Cockrell "Breach of Contract" in R Zimmermann & D Visser (eds) *Southern Cross* (1996) 303 330

¹¹² There is a strong debate in law and economics literature as to the value of specific performance as a remedy for breach of contract. Certain scholars (for example, Kronman) are of the view that the costs involved in administering the remedy are not worth the ultimate result. This is disputed by others (for example, Schwartz) who argue that the remedy should be routinely available as a remedy (as it is in South Africa). See: A Kronman "Specific Performance" (1978) 45 *U Chi L Rev* 351 and A Schwartz "The Case for Specific Performance" (1979) 89 *Yale LJ* 271. For a discussion of these arguments with reference to South Africa, see B van Heerden "An Exploratory Introduction to the Economic Analysis of Law" (1981) 4 *Responsa Meridiana* 152.

¹¹³ *Smith v Van den Heever* 2011 3 SA 140 (SCA) 144; *Motor Racing Enterprises (Pty) Ltd (in liquidation) v NPS (Electronics) Ltd* 1996 4 SA 950 (A) 961-962; *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 (A) 415-416; Van der Merwe et al *Contract* 388; Christie & Bradfield *The Law of Contract* 437. A similar rule pertains in another "mixed" legal system: Scotland. See *Inveresk plc v Tullis Russel Papermakers Ltd* [2010] UKSC 19, 2010 SLT 941; Hogg *Promises and Contract Law* 341-342; W McBryde *The Law of Contract in Scotland* 2 ed (2001) 20-44-20-61

adimpleti contractus a court may refuse to order performance where the reciprocal counter-performance is not forthcoming.¹¹⁴

Jansen JA's *dictum* cited in the introduction above appeared in the key South African contract case of *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk*,¹¹⁵ where the Appellate Division was called upon to resolve a dispute over payment for a defective performance under an agreement for services to be rendered by an independent contractor. At the heart of *BK Tooling* is the notion that a contracting party who has tendered a partially defective performance (which the defendant is using) should be entitled to a reciprocal performance of some description, despite the tendered performance as a whole not being entirely satisfactory.

In the *BK Tooling* case the Appellate Division was thus squarely faced with the problem of how to resolve the issues facing both parties following the tender of a defective performance. While this question had been raised in a trilogy of early Appellate Division cases,¹¹⁶ and had been much discussed by contract and enrichment textbook writers,¹¹⁷ it was only really settled in the *BK Tooling* case in 1979. The judgment of Jansen JA seemed to answer most of the questions posed by commentators and hence resolved much of the argument on this point, at least from a South African point of view.¹¹⁸

The facts of *BK Tooling* have been alluded to above and will be set out again in simplified form. A manufacturer of motor engine parts had contracted with an engineering firm to produce two sets of precision moulds for casting their goods. The specifications of the moulds were established in a written contract. The engineering firm produced the two moulds, but one of these proved defective in that it was not manufactured strictly in accordance with the contract specifications. Delivery of the moulds had already been taken by a representative of the employer, however, and it refused to return them upon discovering the default. The first mould was used by the engine manufacturer in spite of this and the second, defective, mould was sent to another firm of engineers to be adapted to the specifications. The first producer of the moulds claimed payment but the engine manufacturers refused, raising the *exceptio non adimpleti contractus* as their defence to a claim to enforce payment.

Jansen JA, for a unanimous Appellate Division, dealt in some detail with the *exceptio non adimpleti contractus*, from both an historical and a comparative perspective, and set out five points about the reciprocity principle and its application by means of the above-mentioned device.¹¹⁹

¹¹⁴ *Miloc Financial Solutions (Pty) Ltd v Logistic Technologies (Pty) Ltd* 2008 4 SA 325 (SCA) paras 50-52. Here the releasing of shares held by a creditor as a pledge was held to be reciprocal to the debtor repaying him a separate debt, since it had been envisaged that the shares would be used to secure new finance to service the original loan. Payment of the original loan was suspended until such time as the shares would be released.

¹¹⁵ 1979 1 SA 391 (A).

¹¹⁶ *Hauman v Nortje* 1914 AD 293; *Breslin v Hichens* 1914 AD 312 and *Van Rensburg v Straughan* 1914 AD 317.

¹¹⁷ De Wet & Van Wyk *Kontraktereg* 181; W de Vos *Verrykingsaanspreeklikheid* 3 ed (1987) 274-283.

¹¹⁸ E Clive & D Hutchison "Breach of Contract" in R Zimmermann, D Visser & K Reid (eds) *Mixed Legal Systems in Comparative Perspective* (2004) 176-197 note that the Scottish approach to this problem is less satisfactory than the South African one.

¹¹⁹ *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 (A) 418A-419H.

- (i) In contracts where an exchange of performances is envisaged, it is a question of interpretation as to whether those obligations are sufficiently connected for the reciprocity principle to apply.
- (ii) The sequence of performances also depends on an interpretation of the contractual stipulations.
- (iii) The right to retain performance under the *exceptio non adimpleti contractus* is a means to enforce performance, providing security to the party raising this defence. In this way it is like a pledge.
- (iv) If the analogy of a pledge is correct, one can withhold one's performance until counter-performance had been received in full.
- (v) The burden of proof falls on the plaintiff (against whom the *exceptio* has been raised) to demonstrate that he has indeed performed his side of the contract.

The answer of the Appellate Division in the past to this type of problem had been to uphold the *exceptio non adimpleti contractus* defence, but to permit an enrichment claim to the plaintiff to recover a *quantum meruit*.¹²⁰ In *BK Tooling*, Jansen JA held that where the *exceptio non adimpleti contractus* was employed by a defendant, a court could exercise its discretion to prevent unfairness to the plaintiff by awarding a reduced contract price.¹²¹ Since an order of specific performance could be granted – or not granted – by a court in its discretion, so too the defence of the *exceptio non adimpleti contractus* could be upheld or relaxed at the court's discretion.¹²² The determination whether a right to payment was available would depend upon the utilisation of the performance by the defendant.¹²³ While the contract was still in existence, the appropriate remedy lay in the law of contract and not in the law of enrichment.¹²⁴ It was also not correct to talk of a *quantum meruit*, since this was an enrichment remedy.¹²⁵ The correct remedy should be the awarding of a reduced contract price.¹²⁶ *In casu* this was set at the contract price less the cost of remedying the defect.¹²⁷

Thus *BK Tooling* stands as an important development of the *exceptio non adimpleti contractus* by the Appellate Division. Not only were the issues surrounding this defence discussed in great detail in the judgment, but the court went further too, clarifying that this self-help mechanism could lead to injustice if applied without thought to the context. Hence a measure of discretion needed to be employed when deciding whether to condone its use. Thus a potential role for considerations of fairness was found in the law surrounding the exception, tempering its potentially harsh consequences in the same way that specific performance had been tempered by earlier courts. The relaxation of the *exceptio non adimpleti contractus* in *BK Tooling* should

¹²⁰ See cases in n 116 Compare Zimmermann *Obligations* 801 n 133

¹²¹ *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 (A) 438-440

¹²² 433C-434F

¹²³ 421C

¹²⁴ 422H-423A, 424C

¹²⁵ 422H-423A

¹²⁶ 422H-423A

¹²⁷ 440C

thus be seen as an example of value-based reasoning and an attempt to do justice between the parties.

In a later variation of facts not too far removed from *BK Tooling*, the Supreme Court of Appeal was faced in *Thompson v Scholtz*¹²⁸ (“*Thompson*”) with the problem that a reduced contract price could not simply be calculated as the cost of making right the defect, where the performance in question was continuous and indivisible, namely providing full undisturbed use and occupation of premises under a lease agreement. In *Thompson*, the plaintiff had sold his farm to the defendant. In the approximately six months between conclusion of the sale agreement and transfer, the defendant was to farm the land in question and reside in the farmhouse. The plaintiff allowed him to farm, but did not vacate the farmhouse until transfer. Performance was thus incomplete and undoing the harm impossible, so what was the appropriate remedy? The defendant withheld occupational rent for the entire farm, arguing that counter-performance had not been forthcoming.

Nienaber JA for a unanimous SCA noted that a precise monetary value could not be placed on the use and enjoyment of the farmhouse in question.¹²⁹ He did, however, use the analogy of the *remissio mercedis* by which a court may allow a full or partial reduction in rental to compensate the lessee for interference with the use and enjoyment of the property in question.¹³⁰ This analogy was used to justify a 25% reduction in the occupational rent due. Nienaber JA held that though this might be in favour of the defendant, it was equitable in the circumstances.¹³¹

A remaining question, however, is whether the interpretation of a contract can provide all the answers as to whether that contract creates reciprocal obligations, without which the *exceptio* cannot apply. This is wound up in propositions one and two of the above quoted *dictum* of Jansen JA about this defence. In *Wynns Car Care Products (Pty) Ltd v First National Industrial Bank Ltd*¹³² (“*Wynns Car Care Products*”) a lease was signed in terms of which the lessee hired computer equipment creating an obligation to pay monthly rental in return for the provision of goods. In an interlinked contract the lessor was to maintain those computers. When the lessee defaulted on the rent, the lessor tried to collect on the outstanding debt. The lessee then argued that the maintenance obligation had not been met and that since this was reciprocal to the payment of rent, the *exceptio non adimpleti contractus* was available as a justification for withholding rent. The question to be decided was thus whether these interlinked contracts did indeed create reciprocal obligations. Hefer JA held that a clause excluding the possibility of the lessee withholding rent due under the contract of lease “for any reason whatsoever” indicated clearly that the lease of computer equipment was not reciprocal to the provision of maintenance services.¹³³

¹²⁸ 1999 1 SA 232 (SCA)

¹²⁹ 243F-245H

¹³⁰ 246I-247F

¹³¹ 250A-B

¹³² 1991 2 SA 754 (A)

¹³³ 759A

In *Wynns Car Care Products* the Appellate Division thus seemed to indicate approval for the proposition that one can exclude the application of the *exceptio non adimpleti contractus* by contract. Naudé and Lubbe discuss exemption clauses in a contribution provoked by the case of *Afrox Healthcare Bpk v Strydom*.¹³⁴ Their article also draws on the work of Gordley and Aristotelian-Thomistic philosophy to argue that an exclusion clause which attempts to infringe upon the “essence of a contract by undermining the basic relationship of reciprocity existing between the undertakings characteristic of the contract envisaged by the parties... should... be regarded as legally problematic”.¹³⁵ Transposing this argument to the present context: in (for example) a contract such as sale, it would be legally problematic to attempt to exclude the *exceptio* as a remedy to withhold payment where the *merx* was not forthcoming. Similarly in a case such as *Wynns Car Care Products*, it may have been difficult to justify an exclusion of the ability of the lessee to withhold rent when the lessor was recalcitrant in supplying computer equipment.¹³⁶ Where reciprocity is not clearly established between obligations the issue is less clear, however. It is submitted that exemption clauses should be permitted to clarify that parties did not intend their obligations to be reciprocal, subject to public policy and, where applicable, the Consumer Protection Act 68 of 2008. This would also accord with the approach in *BK Tooling*’s propositions one and two.

This section of the article has attempted to show that the reciprocity principle has deep roots in the philosophy of law and seems to be as old as the idea of promise-keeping and legally binding agreements. In both *BK Tooling* and *Thompson* the Supreme Court of Appeal was required to qualify the right of retention of performance, which arises due to the reciprocal nature of a contract, in the interests of fairness *inter partes*. The reciprocity principle can also therefore in this very real sense be seen as requiring fairness *inter partes*, so that each receives his *quid pro quo*. A related question with regard to withholding performance upon breach is whether a party’s right to performance is suspended by his repudiation of a counter-performance. This will be considered next.

5 Reciprocity and repudiation: suspension of performance

It is established law in South Africa (at High Court level) that where one party to a reciprocal contract repudiates it, the obligation of the opposing party to perform is suspended for so long as the repudiation stands, even where the repudiation has not yet resulted in the cancellation of the contract.¹³⁷ This rule

¹³⁴ 2002 6 SA 21 (SCA) – see T Naudé & G Lubbe “Exemption Clauses – A Rethink Occasioned by *Afrox Healthcare Bpk v Strydom*” (2005) 122 *SALJ* 441

¹³⁵ 452

¹³⁶ See the similar conclusion of Naudé & Lubbe (2005) *SALJ* 452 n 103

¹³⁷ *Erasmus v Pienaar* 1984 4 SA 9 (T) 281-30C; *Moodley v Moodley* 1990 1 SA 427 (D) 431C-1

appears also to apply in English law.¹³⁸ The facts of the leading South African case, *Erasmus v Pienaar*¹³⁹ (“*Erasmus*”), illustrate the point:

Erasmus sold a farm to Pienaar in 1977, with the payment to be made in annual instalments. According to a clause in the written deed of sale, in the event of non-payment the contract could be cancelled 30 days after a written demand for payment had been issued. In 1983, the annual instalment, due on 1 April was not forthcoming. Negotiations ensued, with Erasmus’ attorneys eventually writing to Pienaar on 26 July to cancel the contract. As a result of this letter, Pienaar did not pay the outstanding instalment. It was held by the court that notice of cancellation had been given before the seller was legally entitled to do this, which amounted to a repudiation of the contract.¹⁴⁰ As a result the obligation of the buyer to pay the instalment was suspended.¹⁴¹ Thus the seller could not rely on the failure to tender the instalment as a basis for cancellation of the contract.¹⁴² The court held, however, that the contract had been validly cancelled for a second ground of breach, namely a failure to maintain the farm, and hence the ejection order sought by the seller, Erasmus, was granted.¹⁴³

The basis of this finding was explained in *Erasmus* to be “waiver” by the repudiating party of his right to enforce counter-performance.¹⁴⁴ This opinion was echoed by Nienaber J in *Moodley v Moodley*, where the reasoning of the court in *Erasmus* was followed.¹⁴⁵ Carter argues that the same rule pertains in Anglo-Australian law, although he grounds it on the (closely related) basis of estoppel.¹⁴⁶ The rule is said in those systems to stem from the earlier English case of *Jones v Barkley*.¹⁴⁷ There an argument was upheld that repudiation¹⁴⁸ by one party of his obligation meant the absence of a “condition precedent” for the other’s counter-obligation and hence counter-performance was not enforced.¹⁴⁹ Lord Mansfield stated in that case that the law would not require the doing of a “nugatory” act.¹⁵⁰ *Jones v Barkley* was cited in *Erasmus* as authority, along with further English precedents.¹⁵¹

The Restatement (Second) of Contracts in the United States goes even further than the English position.¹⁵² According to section 251(1) of that model law, where the promisee has “reasonable grounds” to believe that the promisor

¹³⁸ Carter “Suspending Performance” in *Good Faith and Fault* 497-503. The English rule seems to date back to the decision in *Jones v Barkley* 1781 2 Doug 684; 99 ER 434, where what amounted to (in modern terminology) a repudiation resulted in the counter-obligation being dispensed with.

¹³⁹ 1984 4 SA 9 (T)

¹⁴⁰ 19E-F

¹⁴¹ 30B-C

¹⁴² 30B-C

¹⁴³ 30F-31H

¹⁴⁴ 29A-E

¹⁴⁵ 1990 1 SA 427 (D) 431C-I

¹⁴⁶ Carter “Suspending Performance” in *Good Faith and Fault* 501

¹⁴⁷ 1781 2 Doug 684; 99 ER 434

¹⁴⁸ As Carter points out (Carter “Suspending Performance” in *Good Faith and Fault* 499) there was as of yet no doctrine of repudiation in English contract law in those days, hence the terminology above reflects a modern analysis of the case.

¹⁴⁹ 1781 2 Doug 684 694; 99 ER 434 440

¹⁵⁰ 1781 2 Doug 684 694; 99 ER 434 440

¹⁵¹ 1984 4 SA 9 (T) 21-22

¹⁵² The Restatement (Second) Contracts was promulgated in 1981

will “commit a breach by non-performance” that would give rise to a claim for damages under the contract, the promisee may request “adequate assurance of due performance” and may suspend any counter-performance until he receives such assurance. Section 251(2) provides that a failure to provide adequate assurance within a reasonable time may be treated as a repudiation of the contract.¹⁵³ This provision was an adaptation of section 2-609 of the Uniform Commercial Code (“UCC”), which introduced a similar rule into the law of sale in the United States.¹⁵⁴ In an article analysing these two provisions, Robertson notes that while extensive litigation has proceeded under section 2-609 of the UCC, the equivalent provision of the Restatement (Second) has not received much attention in the courts. Thus this rule arguably does not represent a generalised common law of contracts in the United States outside of the law of sale.¹⁵⁵

Carter nevertheless argues in favour of including such a self-help mechanism in Anglo-Australian law, suggesting that it prevents strategic behaviour by parties to a contract (by preventing the party who is to perform first from unfairly obtaining counter-performance) and thus reflects an enforcement of the principle of good faith.¹⁵⁶ Critics might argue, however, that the existing rules on anticipatory breach and repudiation go far enough in South Africa. The Supreme Court of Appeal has held that repudiation of a contract is determined objectively and not subjectively and hence repudiation may be inferred from the conduct of a party, regardless of his good faith intention to perform.¹⁵⁷ Hence the exposition by Van der Merwe and others that a defendant commits anticipatory breach just by creating uncertainty as to whether he will perform or not.¹⁵⁸ This is in line with the section 251(1) right of suspension provided in the Restatement, which can be invoked based on a “reasonable suspicion” of non-performance. If the *Erasmus* right of suspension can be extended also to cover repudiation in the sense described by Van der Merwe and others, the American position will be more or less reflected in South African law.

6 Reciprocity after termination of a contract

The next inquiry is into two related concepts, namely whether rights accrued under a contract can survive the termination of that contract, whether

¹⁵³ Compare the similar provision in art 71 of the United Nations Convention on Contracts for the International Sale of Goods (1980) (“CISG”) and art 7.3.4 of the UNIDROIT *UNIDROIT Principles of Commercial Contracts* (2010). See further D Saidov “Anticipatory Non-Performance and Underlying Values of the Unidroit Principles” (2006) 11 *Uniform Law Review* 795

¹⁵⁴ The UCC was promulgated in 1972

¹⁵⁵ R Robertson “The Right to Demand Adequate Assurance of Due Performance: Uniform Commercial Code Section 2-609 and Restatement (Second) of Contracts Section 251” (1988) 38 *Drake L Rev* 305-353

¹⁵⁶ Carter “Suspending Performance” in *Good Faith and Fault* 490. Compare the argument in J Carter, A Phang & S Phang “Performance Following Repudiation: Legal and Economic Interests” (1999) 15 *J Contract L* 97. The authors of this paper argue that it is in the interests of the community that economic resources are not wasted on pointless performance of a repudiated contract. Damages should rather be mitigated by “accepting” the repudiation and/or not tendering a nugatory performance. See especially 121-131

¹⁵⁷ *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 2 SA 284 (SCA) para 16

¹⁵⁸ Van der Merwe et al *Contract* 358

by cancellation for breach or rescission for flawed consensus. In both cases one needs to decide whether performance is excused retrospectively (*ex nunc*), in which case accrued rights remain enforceable, or merely prospectively (*ex tunc*), in which case these fall away.

6.1 Cancellation for breach: survival of accrued rights

This problem arises where performances by one party (for example, payments under a building contract) are due in instalments during the course of counter-performance by the other party. If the contract is validly cancelled before completion of the (building) work, what happens to the right to payment instalments which had accrued prior to cancellation? The leading South African case is *Thomas Construction (Pty) Ltd (in Liquidation) v Grafton Furniture Manufacturers (Pty) Ltd*¹⁵⁹ (“*Thomas Construction*”):

Thomas Construction had been engaged by Grafton to build a new factory and administration buildings for its furniture business. During the performance of the terms of this contract, Thomas Construction was liquidated and the building contracts were never completed. The buildings thus had to be completed by a third party. Before the liquidation of Thomas Construction, however, two certificates had been issued to it (one by an engineer and the other by an architect) indicating that building work had reached the stage where an instalment of the contract price was due. Upon liquidation of Thomas Construction, Grafton validly cancelled the building contract.

The court, however, accepted the test as laid down in *Crest Enterprises (Pty) Ltd v Rycklof Beleggings (Edms) Bpk*¹⁶⁰ (“*Crest Enterprises*”) that in order for a right to payment to be enforceable, it must, prior to rescission of the contract by acceptance of the opposing party’s repudiation, be “accrued, due and enforceable as a cause of action independent of any executory part of the contract”.¹⁶¹ Nienaber J noted with regard to this test that cancellation sometimes operates *ex nunc (de futuro)* and sometimes *ex tunc (ab initio)* and hence the words “independent of any executory part of the contract” were vital to the determination of enforceability of the right to payment as a whole.¹⁶² In the case of continuing contracts such as lease, rescission would usually operate *de futuro*, so that obligations which had accrued prior to cancellation would remain unaffected by this act.¹⁶³ Where the performance was not divisible in this way, such as with a sale (generally speaking), the accrued right would not be independent of the executory part of the contract.¹⁶⁴ One factor bearing on this would be the nature of the obligation involved; others were considerations

¹⁵⁹ 1986 4 SA 510 (N) Upheld on appeal: *Thomas Construction (Pty) Ltd (in Liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1988 2 SA 546 (A)

¹⁶⁰ 1972 2 SA 863 (A)

¹⁶¹ *Thomas Construction (Pty) Ltd (in Liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1986 4 SA 510 (N) 511G-I This test was laid down in *Crest Enterprises (Pty) Ltd v Rycklof Beleggings (Edms) Bpk* 1972 2 SA 863 (A) 869H-870G, with reference to the earlier case of *Walker’s Fruit Farms Ltd v Sumner* 1930 TPD 394

¹⁶² *Thomas Construction (Pty) Ltd (in Liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1986 4 SA 510 (N) 515E-516A

¹⁶³ 516F-G

¹⁶⁴ 515G-H

of “severability, mutuality of performance” and possibly even whether the “partially executed performance was physically capable of restoration”.¹⁶⁵

Nienaber J discussed the fact that working capital was necessary for building contracts to function and hence the inquiry could not be simply whether work had been properly completed as in *BK Tooling*.¹⁶⁶ However, the sum paid in such an instalment was an advance on the completion sum and hence the making of such payment was balanced not only against partial completion, but also against “willingness and ability to complete the rest of the work”.¹⁶⁷ Although such ability to complete the work might not be a “formal pre-condition” for payment, it does emphasise the “inherent link” between the completion certificate and the executory part of the contract.¹⁶⁸ For this reason, the claim of Thomas Construction could not be said to be *independent* of the executory part of the contract.¹⁶⁹ Nienaber J thus saw the performance of the contractor as an entirety, rather than a continuous series of divisible obligations. A contractor in the position of Thomas Construction, he held, should look to remedies other than the certificate to exact compensation for work done (ie enrichment).¹⁷⁰

As Nienaber J went on at this point to discuss, the position is different in English law.¹⁷¹ Peel notes that the effect of termination for breach on a party’s obligation to perform under a contract (whether or not he is the one in breach) is that he is released from obligations which have not yet fallen due.¹⁷² However, a party remains liable for those obligations which had already fallen due at the time of termination for breach, unless such payment was one which he could have recovered, such as where there has been unjustified enrichment of the opposing party.¹⁷³ The proposition of interest for cases like *Thomas Construction* is the second one, for which Peel relies on *Stocznia Gdanska SA v Latvian Shipping Co*¹⁷⁴ (“*Stocznia*”) as primary authority. In the *Stocznia* case the House of Lords applied its earlier ruling in *Hyundai Heavy Industries Ltd v Papadopoulos*¹⁷⁵ (“*Hyundai*”), the case cited by Nienaber J as authority for the English position on this problem.¹⁷⁶

Both *Stocznia* and *Hyundai* involved claims by shipbuilders for instalments due under contracts to build ships, which had been breached. In both cases,

¹⁶⁵ 515E-516A

¹⁶⁶ 516G-517A

¹⁶⁷ 517A-H

¹⁶⁸ 517H-I

¹⁶⁹ 518B-C The Appellate Division arrived at the opposite conclusion in the subsequent case of *Shelagatha Property Investments CC v Kellywood Homes (Pty) Ltd; Shelifaerie Property Holdings CC v Midrand Shopping Centre (Pty) Ltd* 1995 3 SA 187 (A). There it was the employer who had breached the agreement and the court enforced payment on an interim certificate issued to the contractor, arguing that the factual context was different to *Thomas Construction (Pty) Ltd (in Liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1986 4 SA 510 (N) (1921-195E)

¹⁷⁰ *Thomas Construction (Pty) Ltd (in Liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1986 4 SA 510 (N) 518C

¹⁷¹ 518E-519D

¹⁷² Peel *Treitel The Law of Contract* 18-013

¹⁷³ 18-013

¹⁷⁴ [1998] 1 WLR 574 (HL)

¹⁷⁵ [1980] 1 WLR 1129 (HL)

¹⁷⁶ *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 WLR 574 (HL) 587A-B (Lord Goff) and 599A-H (Lord Lloyd)

the breach was by the buyers of the ships and these parties were held liable to pay for the instalments due under the partially completed contracts.¹⁷⁷ A complicating factor in these cases (as set out above) is as to whether there had been a “total failure of consideration”, that is that the defendant had not received its “promised counter-performance”.¹⁷⁸ As Burrows notes, however, for this defence to apply, the failure of consideration must be “total”.¹⁷⁹ In both cases the contract had been not merely to purchase a ship, but also to design and build it.¹⁸⁰ Although no ship was ultimately delivered due to the breach, the design and construction parts of the contract were carried out and hence it could not be said that there had been a “total” failure of consideration.¹⁸¹

Nienaber J notes in his discussion of the *Hyundai* case that the requirement of enforceability “independent of the executory part of the contract” is not included in English law and thus remains a South African invention.¹⁸² Nienaber J’s criticism of the English position is that it takes no account of the contractor’s willingness and ability to complete the executory portion of the contract.¹⁸³ Of course that criticism is limited to contracts of the kind which was litigated in *Thomas Construction*, where something is being built for the defendant. While this comment will thus largely pertain in building (and related) contracts, this is also largely the field in which this type of problem seems to arise. The rule in *Crest Enterprises* seems to be entirely appropriate to the present circumstances and Nienaber J’s application thereof in *Thomas Construction* seems to address the issues in a satisfactory manner. The South African position would thus seem to provide a nuanced take on the equivalent English approach and to do so without the confusion of the English doctrine of total failure of consideration.

How is reciprocity served by the finding in *Thomas Construction*? The requirement of independent enforceability of the litigated right to payment ensures an examination of which obligations are reciprocal to which in a manner that the less refined English approach misses. This means that in order to apply the *Crest Enterprises* test there will need to be a careful consideration of issues of reciprocity pertaining to a particular contractual context, in other words which performances were agreed as being reciprocal in the initial contract and what was the nature of the bargain struck between the parties. This *quid pro quo* inquiry will prevent an unreciprocated payment under a contract, thereby discouraging breach by contractors and ensuring the mitigation of future damages claims, since the contractor in breach will not be able to claim for outstanding amounts where it has not properly fulfilled its obligations under a building contract as a whole.

¹⁷⁷ *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 WLR 574 (HL) 584F-587C (Lord Goff for the majority) and *Hyundai Heavy Industries Ltd v Papadopoulos* [1980] 1 WLR 1129 (HL) 1136A-B

¹⁷⁸ Compare A Burrows *The Law of Restitution* 3 ed (2011) 319

¹⁷⁹ 322-323

¹⁸⁰ 323

¹⁸¹ 323 Compare *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 WLR 574 (HL) 587D-590H

¹⁸² *Thomas Construction (Pty) Ltd (in Liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1986 4 SA 510 (N) 518E-519D

¹⁸³ 518E-519D

6 2 Voidable contracts: *restitutio in integrum*

The problem of partial performance also arises in the context of voidable contracts. Where consensus has been obtained through improper means, the innocent party has an election whether to abide by the contract or to resile from it.¹⁸⁴ Following a rescission of a contract, restitution of whatever has been received under that contract should take place.¹⁸⁵ The question arises then as to whether this should occur *ex tunc* (from the moment of contracting) or *ex nunc* (from the moment of rescission). In a contract where performance is rendered on a continuous basis, such as lease, this becomes an important question.¹⁸⁶ In this type of case reciprocity is a key value, since performance (use of the premises) cannot be restored to the lessor and it would not therefore be fair to require him to restore the reciprocal counter-performance of rent tendered up to that point on a monthly basis.

Consider the leading case of *Extel Industrial (Pty) Ltd v Crown Mills (Pty) Ltd*¹⁸⁷ (“*Extel Industrial*”). Here the directors of the appellant had obtained a contract to supply partially processed sausage casings to the respondent company through the bribery of two of the respondent’s managers. It was held that this tainted the conclusion of the contract and gave the right to the respondent to resile from the contract.¹⁸⁸ One of the grounds on which the appellant resisted this claim was that the sausage casings had already been processed and sold on to third parties and could thus not be restored to them. The Supreme Court of Appeal held on this point, however, that the fact that restitution was no longer physically possible without fault on the part of the rescinding party did not prevent rescission on this ground alone.¹⁸⁹ The court held further that the act of cancellation of the contract in question was not invalidated due to the failure to tender restitution, since this “may well be to require the unattainable”.¹⁹⁰

Reciprocity was thus not observed in *Extel Industrial*. It should be noted, however, that the contract in question was tainted by fraud, a fact which seemed to weigh heavily in the decision of the court.¹⁹¹ In the earlier case of *Feinstein v Niggli*¹⁹² (“*Feinstein*”) the Appellate Division had stated that a contract could not be set aside unless the innocent party was prepared to restore “completely everything that he has received under the contract”.¹⁹³ This was to prevent unjustified enrichment, despite the presence of fraud in

¹⁸⁴ *Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk* 1986 1 SA 819 (A) 848A-C; *Extel Industrial (Pty) Ltd v Crown Mills (Pty) Ltd* 1999 2 SA 719 (SCA) 730G-I; Van der Merwe et al *Contract* 103; Christie & Bradfield *The Law of Contract* 297-298

¹⁸⁵ *Extel Industrial (Pty) Ltd v Crown Mills (Pty) Ltd* 1999 2 SA 719 (SCA) 730G-731A; *Feinstein v Niggli* 1981 2 SA 684 (A) 700F-G

¹⁸⁶ Van der Merwe et al *Contract* 139

¹⁸⁷ 1999 2 SA 719 (SCA)

¹⁸⁸ Thus the traditional grounds on which contracts are voidable, namely misrepresentation, duress and undue influence were extended, as had been suggested in the earlier case of *Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk* 1986 1 SA 819 (A) 848A-D

¹⁸⁹ *Extel Industrial (Pty) Ltd v Crown Mills (Pty) Ltd* 1999 2 SA 719 (SCA) 731D-E

¹⁹⁰ 732E-G

¹⁹¹ See, for example, 732D-G

¹⁹² 1981 2 SA 684 (A)

¹⁹³ 700F-G

the transaction.¹⁹⁴ In that case, however, the property in question consisted of shares, which had depreciated in value. The court permitted rescission, despite the fact that the performance tendered in restitution was no longer of its original value.¹⁹⁵ This qualification of the extreme position set out in that case was said to be based on “equity and justice”.¹⁹⁶

What is clear in this debate is that the issue of restitution following rescission of a voidable contract is not a clear-cut issue, but will involve a consideration of the substance of the case itself and will not be applied as a blanket rule irrespective of the facts involved. Van der Merwe and others note that the question as to whether restitution must occur *ex nunc* or *ex tunc* has not been finally decided in South African law.¹⁹⁷ It is submitted, however, that in a contract where there has been performance of a continuing nature over time, the issue should be resolved on the basis of divisibility of the performance in question and that the rule in *Crest Enterprises* could play a valuable role in this context as well.¹⁹⁸ If performance is not divisible, as in *Feinstein* and *Extel Industrial*, the requirement of reciprocity may have to be relaxed in the interests of fairness. In such an event, the existence of fraud on the part of one of the parties should be taken into account in deciding whether to allow rescission, despite the contrary *dictum* in *Feinstein*.

7 Reciprocity in severable contracts: divisibility of performances or obligations

Reciprocity plays a key role in determining a fair solution to the problem which occurs when an obligation becomes partially unenforceable. If the duty to make the primary performance is excused, due to supervening impossibility for example, is the counter-performance also excused? What if only part of the primary performance becomes impossible and part has already been performed? The inquiry here delves into the fields of divisibility (or severability) of obligations; and of performance and counter-performance. The leading South African case is *Bob’s Shoe Centre v Heneways Freight Services (Pty) Ltd*¹⁹⁹ (“*Bob’s Shoe Centre*”).

The appellant retailer of shoes imported a consignment of merchandise from Portugal. The shoes were collected from the Portuguese factory, where they had been manufactured, by a Portuguese forwarding agent and placed on board an aircraft to travel to Johannesburg. At the (then) Jan Smuts airport the goods were placed in a bonded warehouse to await customs clearance. It was common cause that the respondent clearing agent had contracted with Bob’s Shoe Centre to obtain this clearance and to transport the shoes from the warehouse to the retail premises in Johannesburg. Bob’s Shoe Centre argued that Heneways’ responsibilities extended right back to the collection of the

¹⁹⁴ 700G-H

¹⁹⁵ 700H-703A

¹⁹⁶ 700H

¹⁹⁷ Van der Merwe et al *Contract* 139

¹⁹⁸ See above at part 6 1

¹⁹⁹ 1995 2 SA 421 (A)

shoes from the Portuguese factory, but Heneways disputed this. Heneways obtained customs clearance for the goods, but when its employees arrived at the warehouse the shoes had been stolen.

As a result of the theft, the remaining obligations of Heneways were discharged due to supervening impossibility. Heneways then contended that the performance obligation was divisible and claimed payment for services rendered up to that point; Bob's Shoe Centre maintained that performance was indivisible and that supervening impossibility had discharged its obligation to pay Heneways at all under the contract. Thereupon Heneways instituted action for the sums spent in obtaining customs clearance and in paying the forwarding agent for transporting the goods to Johannesburg.

The appellant's defence was based on the *exceptio non adimpleti contractus*.²⁰⁰ The principle of reciprocity, it argued, discharged it from paying for any part of the services rendered, since its own claim for performance could be met by the defence of supervening impossibility. Thus the major question facing the Appellate Division was whether the obligations created by the contract between the parties were divisible. The question of divisibility, in turn, had to be determined with reference to the rules on the severability of provisions of a contract.²⁰¹ The test for divisibility thus turned largely on the intention of the contracting parties – that is, whether they would have entered that contract without the (divisible/severable) provision in question.²⁰²

Grosskopf JA held that the evidence established that the appellant had wanted an expert to attend to the transportation of the goods from the factory in Portugal to the airport, but that no such specialist was required for the transport to the retail premises from the airport.²⁰³ Hence the parties would have concluded the contract without the last leg of the transport obligation and this was therefore severable.²⁰⁴ The appeal was thus dismissed and Bob's Shoe Centre was ordered to abide by the finding of the court *a quo*, which had awarded payment to Heneways for the performance it had rendered.²⁰⁵

Thus it seems clear that the question of whether obligations are divisible depends on the intention of the parties to the contract.²⁰⁶ This is the same test as for the severability of obligations, as accepted by the Appellate Division in *Bob's Shoe Centre* with reference to Van der Merwe and others' textbook on contract law.²⁰⁷ This position is fairly well established in the South African case law.²⁰⁸ With regard to the history of these rules, however, it should be noted

²⁰⁰ 428E-F

²⁰¹ 429D The court cited Van der Merwe et al *Contract* as authority for this view. This view is maintained in Van der Merwe et al *Contract* 315

²⁰² 430G-H *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) was cited (*inter alia*) as authority for this proposition

²⁰³ *Bob's Shoe Centre v Heneways Freight Services (Pty) Ltd* 1995 2 SA 421 (A) 430I-431B

²⁰⁴ 430I-431B

²⁰⁵ 431B; 433D

²⁰⁶ *Bob's Shoe Centre v Heneways Freight Services (Pty) Ltd* 1995 2 SA 421 (A) 430G-H; *Collen v Rietfontein Engineering Works* 1948 1 SA 413 (A) 434-436; *Du Plooy v Sasol Bedryf (Edms) Bpk* 1988 1 SA 438 (A) 451A-B; *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 16A-B; Van der Merwe et al *Contract* 313; De Wet & Van Wyk *Kontraktereg* 145

²⁰⁷ See n 201 above

²⁰⁸ See the sources in n 206 above

that Joubert JA conceded in *Du Plooy v Sasol Bedryf (Edms) Bpk*²⁰⁹ that he had consulted the writings of Pothier and Von Glück (a German Pandectist) but had found no answer in the South African common law.²¹⁰

The identification of divisibility of performance with severability of obligations rests on the fact that both deal with the question as to the subsidiary nature of a particular provision in a contract.²¹¹ The test (as we have seen) is therefore whether the parties would have entered into that contract without the particular provision.²¹² Since it had been proven that counter-performance was divisible (the payment of money), this created a presumption that the primary performance was divisible too, provided the thus divided performance could be said to relate to a distinct element of the counter-performance which had been performed.²¹³ This was possible in *Bob's Shoe Centre*, since the payment by the shoe store could easily be allocated to the discrete parts of Heneways' performance. Thus the Appellate Division equated divisibility with severability and came to its conclusion based upon which obligations could be said to fit together. In this way the partial performance did not go unrewarded due to the supervening impossibility of the obligation as a whole.

English law deals with the problem raised in *Bob's Shoe Centre* by means of statute. The Law Reform (Frustrated Contracts) Act 1943 states that if parts of a frustrated contract have been wholly performed and can be severed from the frustrated portion, they are to be treated as separate contracts.²¹⁴ Performance rendered under the frustrated portions will give rise to a claim for restitution under the Act.²¹⁵ The test for severance of promises in English law is very generally stated in terms of the following three propositions: the promise must be of a kind which can be severed; it must not be necessary to redraft the contract after the severance (the so-called "blue pencil" test); and the severance must not alter the nature of the contract.²¹⁶

The English approach is thus different to the South African approach in terms of its authoritative source (as set out in *Bob's Shoe Centre*), but the practical result seems to be largely the same. The dearth of authority in this area of South African law is revealing, although the case law seems fairly settled. Once again, reciprocity could be used by both sides in *Bob's Shoe Centre* to strengthen their respective cases – the appellant relied on the *exceptio non adimpleti contractus*, while the respondent's counterclaim could be said to rest on the notion of receiving its "fair" contract price as the reciprocal tender for services rendered and sums outlaid. The determination of the Appellate Division *in casu* dealt with the substance of the matter and the respective intentions of the parties, before arriving at what appears on its

²⁰⁹ 1988 1 SA 438 (A)

²¹⁰ 453I-454A It should be noted, however, that Voet 21 1 4 discusses divisibility of the *merx* in the context of the *actio redhibitoria*, arguing that divisibility depends on the intention of the parties. This passage is cited in *Collen v Rietfontein Engineering Works* 1948 1 SA 413 (A) 434

²¹¹ *Bob's Shoe Centre v Heneways Freight Services (Pty) Ltd* 1995 2 SA 421 (A) 430G-H

²¹² 430G-H

²¹³ 430B

²¹⁴ S 2(4) of the Law Reform (Frustrated Contracts) Act See Peel *Treitel The Law of Contract* 19-106

²¹⁵ S 1 of the Law Reform (Frustrated Contracts) Act See Peel *Treitel The Law of Contract* 19-106

²¹⁶ 11-159–11-162

face to be a “fair” solution. While the appellant’s stance was individualist and attempted to invoke a rule against enforcement, the substance of the matter and community notions of fairness ensured that the respondent was compensated for its outlays in service of the contract with the appellant.

8 Conclusion

The notion of reciprocity is a fairly straightforward one to explain: this article has made fairly extensive use of the Latin phrase *quid pro quo* in this regard. The issue of what reciprocity entails for contract law, however, is far more difficult to unpack than this simplistic formula. *ESE Financial Services* and *BK Tooling* tell us that in order to determine whether obligations are reciprocal one should interpret the contract in question. This holds true in most cases, since one must determine whether two performances are sufficiently closely linked to create the link entailed in reciprocity. Sometimes that link will be obvious (such as purchase price in exchange for *merx* in a contract of sale), but sometimes closer examination of the contract as a whole will be required. This should be both an objective and a subjective analysis, so that the presence (for example) of a clause expressly excluding reciprocity should not always be taken at face value, but weighed against the objective intentions of the parties and the natural incidents of the type of contract in question. Thus this article upholds the view in the two cases mentioned above that interpretation will reveal reciprocity in contractual obligations, subject to a judicial discretion to refuse to recognise an expressly stipulated (lack of) reciprocity where the context of the contract indicates otherwise.

Then, on the question of the right of retention of performance, which arises out of the reciprocity principle, the *exceptio non adimpleti contractus* has been examined at some length herein. Indeed, this has been shown to have been accepted as a self-help mechanism available to parties since medieval times. Given the high costs of litigation today, there can be no doubt as to the value of enforcement procedures which do not involve lawyers’ fees. Fairness requires that in a situation where one party has not performed, he should not be able to force performance from the other. At the same time, however, “fairness” is a discretionary concept, and in the same way that the enforcement of contractual rights through specific performance may lead to hardship and injustice, so too, the withholding of contractual performance may have these results. This is illustrated by the facts of *BK Tooling* very clearly. Hence the same judicial discretion which governs specific performance must also govern the *exceptio non adimpleti contractus*. This is an important contribution to the law on the *exceptio* and underlines the lasting value of the decision in *BK Tooling*. Thus the *exceptio* is a straightforward self-help mechanism, but one which must operate within the bounds of the law and judicial policy making.

Beyond this mechanism, however, reciprocity in contract law may entitle a party to withhold performance where counter-performance is not forthcoming, even in a situation where specific performance is not demanded. This article has examined several problem areas of this type which reciprocal obligations throw up for contract law. In the same way that fairness was achieved through

judicial discretion in *BK Tooling*, so too has there been an attempt to bring fairness to other areas beyond the defective performance, such as anticipatory breach, accrued rights under cancelled contracts, rescission and restitution and the concept of divisibility of performance in contract law.

In addition an historical account of the eradication of the doctrine of *causa* from South African law in the early 20th century was set out. This article showed that there is no inquiry into the respective values of exchanged performances, so that equivalence in exchange, as required by Aristotle, was not necessary for South African contract law (or indeed other Western systems of contract law). Thus reciprocity would seem to play a role in the enforcement of contractual provisions, but beyond the (irrelevant) motives of the parties, not in the conclusion of a contract.

Continuing on the historical theme, a further aim of this article was to demonstrate the ancient origins of reciprocity in contract law through an examination of the contribution of Aristotle to this area. The notion of equivalence in exchange was at the heart of Aristotle's concept of commutative justice and continued to play a role in medieval times. Although classical contract law does not require equivalence in this sense, there has been an increase in the role played by fairness in South African law in recent times. One might say that the pendulum is swinging from a climate of classical contract law to a more altruistic vision, as evidenced by the promulgation of statutes such as the Consumer Protection Act 68 of 2008 and the National Credit Act 34 of 2005, as well as in the jurisprudence of our Constitutional Court surrounding public policy and the limits it places on contractual freedoms.²¹⁷ Cases such as *BK Tooling* and those considered in part four of this contribution show a concern for the fairness inherent in the notion of reciprocity and hence indicate that no major revision of this area of contract law will be necessary in this new climate of legal altruism. The concern for justice in the 20th century case of *BK Tooling* has made this judgment into one of lasting influence and injects an element of policy-based fairness into the mechanism of the *exceptio non adimpleti contractus*. Thus this self-help mechanism operates within carefully crafted limits, so that extra-judicial powers remain justiciable.

The resurgence of a concern for fairness in the case law of the 20th century manifests itself in this instance through the demonstration in *BK Tooling* and other cases discussed in this article that reciprocity in the sense of fair exchange is still a central value in contract law worldwide. Thus commutative justice remains a concern for the modern South African legal system, underlining the enduring notion it represents.

²¹⁷ *Barkhuizen v Napier* 2007 5 SA 323 (CC); *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC)

SUMMARY

Most modern contracts are bilateral in nature, implying a mutual exchange of promises in content. This raises the question of when such promises create obligations which can be said to be reciprocal. Furthermore, what remedy will a party have if a reciprocal performance is not forthcoming? This article aims to explore the concept of reciprocity in contracts historically and comparatively to demonstrate its impact on contract law worldwide. This will involve an excursus of the major contract law rules which this principle underlies. The contribution will explore in brief the major problem areas in South Africa (and worldwide) where reciprocity plays a determinative role. The main argument is that reciprocity, in the sense of fairness in exchange, is central to many South African contracts; without it contractual validity may be threatened and enforceability is lost.