

CASE LAW

FUNDAMENTAL BREACH AND THE NATURE OF EXCLUSION CLAUSES

*PHOTO PRODUCTION LTD. v. SECURICOR TRANSPORT LTD.*¹

Introduction

During the 1950s and early 1960s a body of law developed in England known as the "doctrine of fundamental breach". This doctrine held that, as a rule of law, where one party to a contract has committed a "fundamental breach" of the contract then that party could not rely on an exclusion clause to avoid liability for the breach. The House of Lords in *Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale*² considered and, so it was thought at the time, rejected the existence of any such doctrine, holding that the question whether and to what extent a party may rely on an exclusion was to be resolved by construction of the contract.³ A difficult area of the law had apparently been clarified.

This period of clarity was to be short lived. In *Harbutt's "Plasticine" Ltd. v. Wayne Tank and Pump Co. Ltd.*⁴ the English Court of Appeal revived the doctrine, albeit with some modifications. The *Harbutt's* doctrine stated that if the innocent party, consequent to a fundamental breach, elects to terminate the contract or if such an election is, due to the nature and extent of the breach, rendered otiose then the guilty party could not rely on any exclusion clause.⁵ The election of the innocent party to terminate the contract was an essential element of the new doctrine. If the innocent party affirmed the contract then any exclusion clause was, subject to construction, effective.⁶ In coming to this decision the Court of Appeal⁷ purported to rely on the *Suisse Atlantique Case*. Understandably, *Harbutt's Case* caused great confusion and uncertainty. It may be criticized both for its purported reliance on *Suisse Atlantique* and also for the inherent illogicality and arbitrary nature of the doctrine it put forward.⁸ The errors were

¹ [1980] 2 W.L.R. 283. Also reported at [1980] 1 All E.R. 556.

² [1967] 1 A.C. 361.

³ B. Coote, "The Rise and Fall of Fundamental Breach" (1967) 40 *A.L.J.* 336; C. D. Drake, "Fundamentalism in Contract" (1967) 30 *M.L.R.* 531.

⁴ [1970] 1 Q.B. 447.

⁵ *Id.* 467.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ See J. H. Baker, "*Suisse Atlantique* Confounded?" (1970) 33 *M.L.R.* 441; B. Coote, "The Effect of Discharge by Breach on Exception Clauses" (1970) 28 *Camb. L.J.* 221; P. N. Legh-Jones and M. A. Pickering, "*Harbutt's 'Plasticine'*"

compounded in *Wathes (Western) Ltd. v. Austins (Menswear) Ltd.*⁹ where the *Harbutt's* doctrine was applied despite the affirmation of the contract by the innocent party. Thus the wheel had turned full circle and the *Harbutt's* doctrine became indistinguishable from the original doctrine of fundamental breach.

In *Photo Production Ltd. v. Securicor Transport Ltd.*¹⁰ the House of Lords has considered this whole area of law. Lord Wilberforce, in the leading judgment, has overruled both *Harbutt's* and *Wathes*.¹¹ His Lordship rejected the existence of any doctrine of fundamental breach holding that *Suisse Atlantique* is authority for the proposition that the question whether and to what extent an exclusion clause may be relied upon by a party to the contract is to be resolved in all cases by construction of the contract.¹² Lord Diplock agreed with the main points in Lord Wilberforce's judgment and went on to give a detailed analysis of the nature of contractual rights and obligations. Lord Salmon, Lord Keith of Kinkel and Lord Scarman concurred with Lord Wilberforce.

The Facts

Securicor Transport Ltd. provided security services. Securicor entered into a contract with Photo Production Ltd. to provide a patrol service for Photo Production's factory. The contract contained two exclusion clauses. The relevant part of the first clause stated:

Under no circumstances shall the company (Securicor) be responsible for any injurious act or default by any employee of the company unless such act or default could have been foreseen and avoided by the exercise of due diligence on the part of the company as his employer. . . .

The second exclusion clause limited the liability of Securicor if they were held not to be totally exempt from liability by reason of the first exclusion clause.

On the night of October 18/19, 1970, George Musgrove was the duty patrolman employed by Securicor. Musgrove had been employed by Securicor for three months. He had satisfactory references and came from a respectable family. It was not suggested that Securicor was negligent in employing him. However, during the course of his patrol, when inside Photo Production's factory Musgrove deliberately started a fire. The fire spread rapidly as there was a lot of cardboard

Footnote 8 (Continued).

Ltd. v. Wayne Tank and Pump Co. Ltd.: Fundamental Breach and Exemption Clauses, Damages and Interest" (1970) 86 *L.Q.R.* 513, "Fundamental Breach: The Aftermath of *Harbutt's 'Plasticine'*" (1971) 87 *L.Q.R.* 515; J. A. Weir, "Nee Tamen Consumebatur — Frustration and Limitation Clauses" (1970) 28 *Cam.L.J.* 189.

⁹ [1976] 1 *Lloyd's Rep.* 14.

¹⁰ *Supra* n. 1.

¹¹ *Id.* 289-291.

¹² *Id.* 288.

and other stationery in the factory. A large part of the premises was burnt down. Photo Production claimed damages particularized at over £648,000, based on breach of contract and/or for Securicor's vicarious liability for the damage caused by Musgrove in the course of his employment.

MacKenna, J. held that the first exclusion clause absolved Securicor from responsibility for Musgrove's act in setting fire to the factory. The Court of Appeal¹³ reversed this decision holding that the breach was fundamental and thus prevented Securicor from relying on either exclusion clause. Judgment was entered for Photo Production for £615,000 with interest to be agreed.

The Decision of the House of Lords

On appeal to the House of Lords it was necessary to decide what was the correct approach to be taken when one party seeks to rely on an exclusion clause in the contract. The leading judgment was given by Lord Wilberforce who briefly summarized the approach adopted by the Court of Appeal:

The approach of Lord Denning M.R. in the Court of Appeal was to consider first whether the breach was "fundamental". If so, he said, the court itself deprives the party of the benefit of an exemption or limitation clause.¹⁴ Shaw and Waller, L.JJ. substantially followed him in this argument.¹⁵

This mode of analysis was adopted in *Harbutt's Case*, which purportedly relied on the *Suisse Atlantique Case* as authority. In the opinion of Lord Denning, M.R.:

(*Suisse Atlantique*) affirms the long line of case in this court that when one party has been guilty of a fundamental breach of the contract . . . and the other side accepts it, so that the contract comes to an end . . . then the guilty party cannot rely on an exception or limitation clause to escape from his liability for the breach.¹⁶

Lord Wilberforce, with the unanimous approval of the other members of the House of Lords, has rejected this interpretation of the *Suisse Atlantique Case*:

My Lords . . . it is clear to me that so far from following this House's decision in the *Suisse Atlantique* [the doctrine of fundamental breach] is directly opposed to it and that the whole purpose and tenor of the *Suisse Atlantique* was to repudiate the [doctrine].¹⁷

Lord Wilberforce then went on to consider the two short passages in

¹³ [1978] 1 W.L.R. 856.

¹⁴ *Id.* 863.

¹⁵ *Supra* n. 1 at 286-287.

¹⁶ *Supra* n. 4 at 467.

¹⁷ *Supra* n. 1 at 287.

the speeches of Lord Reid and Lord Upjohn in the *Suisse Atlantique Case* upon which Lord Denning, M.R. had relied in *Harbutt's Case*. Firstly he noted that in the *Suisse Atlantique Case* Viscount Dilhorne, Lord Hodson and Lord Wilberforce clearly rejected the existence of "any rule of law by which exceptions clauses are eliminated, or deprived of effect, regardless of their terms. . . ."¹⁸ Thus, on any view, the short passages from two of the speeches upon which Lord Denning, M.R. relied formed a minority. Whilst conceding that the critical passage in Lord Upjohn's speech is somewhat ambiguous, Lord Wilberforce argues that Lord Reid's speech, when read as a whole, does not support the doctrine. Lord Reid specifically rejected statements of the doctrine made by Lord Denning, M.R. in previous cases.¹⁹ However the critical passage in the speech of Lord Reid does introduce a "mote of ambiguity or perhaps even inconsistency".²⁰ The critical passage in Lord Reid's speech is restated:

If fundamental breach is established the next question is what effect, if any, that has on the applicability of other terms of the contract. This question has often arisen with regard to clauses excluding liability, in whole or part, of the party in breach. I do not think that there is generally much difficulty where the innocent party has elected to treat the breach as a repudiation, bringing the contract to an end and sue for damages. Then the whole contract has ceased to exist including the exclusion clause, and I do not see how that clause can then be used to exclude an action for loss which will be suffered by the innocent party after it has ceased to exist, such as loss of the profit which would have accrued if the contract had run its full term.²¹

Despite the mote of ambiguity and inconsistency which Lord Wilberforce reluctantly detects, he feels it necessary, having regard to Lord Reid's great authority in the law, to give an analysis of this passage which presumably is intended to be consistent with an approach based on the construction of the contract and which does not involve the operation of any rule of law. Lord Wilberforce suggests that Lord Reid is restricting his observations to "what is to happen in the future, and (what is said) is not a proposition as to the immediate consequences caused by the breach".²² Allegedly, it was this restriction which Lord Denning, M.R. overlooked in *Harbutt's Case*. This interpretation

¹⁸ *Ibid.*

¹⁹ *Supra* n. 2 at 401-406.

²⁰ *Supra* n. 1 at 288. Note that there is a slight divergence in the two series of reports. In the Weekly Law Reports Lord Wilberforce is reported as saying "note of ambiguity" ([1980] 2 W.L.R. 288) whereas in the All England Law Reports he is reported as saying "mote of ambiguity" ([1980] 1 All E.R. 561). Given Lord Wilberforce's reference to "beams" it is submitted that the All England Law Reports' version is to be preferred. See *Oxford English Dictionary* (1933) Vol. VI L-M at 689.

²¹ *Supra* n. 23 at 98.

²² *Supra* n. 1 at 288.

of Lord Reid's judgment would appear to have the approval of the other members of the House of Lords.²³ However it is submitted that it is open to criticism on two grounds. Firstly, Lord Wilberforce has introduced a completely novel distinction between "immediate" and "future" losses without giving any indication as to the basis on which damages are to be so categorized. This can only further confuse an already uncertain area of law. Secondly, and more importantly, even on this restricted interpretation the passage in Lord Reid's speech is inconsistent with an approach based on the construction of the contract. This criticism will be developed more fully later. In the meantime consider the following example.

Suppose the parties enter into a contract containing an exclusion clause which excludes or limits liability for so-called future damages "such as loss of the profit which would have accrued if the contract had run its full term"²⁴ even in the event of one party committing a fundamental breach of the contract which the innocent party accepts as repudiating the contract. Assume that this clause satisfies all the rules of construction. Suppose such an event happens, then on the basis of the interpretation of Lord Reid's speech the clause cannot be relied upon, yet *ex hypothesis* on the true construction of the contract the clause is effective. To this extent the interpretation of Lord Reid's speech still embodies a rule of law and is inconsistent with an approach based on the construction of the contract.

The error in Lord Reid's reasoning will become more apparent if the whole law discharge of contract by breach is understood. Lord Diplock gives an excellent analysis of this area of the law in his speech in the *Photo Production's Case*.

Lord Diplock's Analysis²⁵

A contract between two parties imposes an obligation on each party to the contract to ensure that whatever he has promised will be done, is done. These obligations may be referred to as *primary obligations*. They may be stated in express words or arise due to implication of the common law. A failure to fulfil a primary obligation is a breach of contract. Such a breach gives rise to *secondary obligations* on the part of the party in default. The most common secondary obligation is the obligation to pay monetary compensation (damages) for the loss suffered by the other party due to the breach of the contract. This secondary obligation, which arises by implication of the common law, may be referred to as the *general secondary obligation*.

²³ *Supra* n. 1 at 292, 298.

²⁴ *Supra* n. 2 at 398.

²⁵ *Supra* n. 1 at 293-296. Space precludes a complete reproduction of Lord Diplock's analysis. However having regard to the clarity of expression and thoroughness of exposition it is thought that the best course to adopt is to give a paraphrased version of Lord Diplock's judgment.

In general, a breach of the contract does not affect the primary obligations of the parties. So far as they have not yet been fully performed they remain unchanged. There are two exceptions. The first exception is where the consequences of a breach of the contract (i.e. a failure to perform a primary obligation) are such as to deprive the innocent party of substantially the whole benefit which it was intended he would receive from the contract. In such a case the innocent party may elect to put an end to all the unperformed primary obligations of both parties. "If the expression 'fundamental breach' is to be retained, it should, in the interests of clarity, be confined to this exception".²⁶

The second exception is where the parties have agreed that any failure by one party to perform a particular primary obligation, irrespective of the consequence of such failure, gives the other party a right to elect to put an end to all the unperformed primary obligations of both parties. This exception has sometimes been referred to as a breach of a fundamental term. "In the interests of clarity . . . 'breach of condition' should be reserved for this exception".²⁷

In either case, if the innocent party elects to put an end to all the unperformed primary obligations then there is substituted, by implication of the common law, for the unperformed primary obligations of the party that is in default, a secondary obligation to pay monetary compensation for losses which will be suffered by the innocent party as a consequence of the non-performance of those obligations. This secondary obligation may be referred to as the *anticipatory secondary obligation*. It is in addition to the *general secondary obligation* referred to above.

Lord Diplock then defines an exclusion clause and discusses its role:

My Lords, an exclusion clause is one which excludes or modifies an obligation, whether primary, general secondary or anticipatory secondary, that would otherwise arise under the contract by implication of law. Parties are free to agree to whatever exclusion or modification of all types of obligations as they please within the limits that the agreement must retain the legal characteristics of a contract; and must not offend against the equitable rule against penalties. . . .²⁸

The court's function is to give effect to the intentions of the parties. This involves a determination of the obligations arising from the contract that each party has agreed to accept. Since exclusion clauses modify these obligations, in order to give effect to the intentions of the

²⁶ *Id.* 294.

²⁷ *Id.* 295.

²⁸ *Ibid.*

parties it is necessary that reference be made to any such clause contained within the contract.

. . . [T]he court's view of the reasonableness of any departure from the implied obligations which would be involved in construing the express words of an exclusion in one sense that they are capable of bearing rather than another, is a relevant consideration in deciding what meaning the words were intended by the parties to bear. But this does not entitle the court to reject the exclusion clause, however unreasonable the court itself may think it is, if the words are clear and fairly susceptible of one meaning only.²⁹

Lord Wilberforce refers to Lord Diplock's analysis as "enlightening".³⁰ He regards the analysis "to state correctly the modern law of contract in the relevant respects. . . ."³¹ Furthermore Lord Diplock's approach is indirectly supported by Lord Salmon,³² Lord Keith of Kinke,³³ and Lord Scarman³⁴ who all agreed with Lord Wilberforce.

The Doctrine of Fundamental Breach Exposed

The fallacies in the doctrine of fundamental breach are seen if the doctrine is tested against Lord Diplock's analysis. The doctrine requires firstly a decision whether the act in question is a "fundamental breach" of the contract. This is to be done without reference to any exclusion. Such an approach completely ignores the effect an exclusion clause may have been intended by the parties to have in modifying the primary obligations which would otherwise have arisen from the contract. As Lord Wilberforce commented in the *Suisse Atlantique Case*:

An act which, apart from the exceptions clause, might be a breach sufficiently serious to justify refusal of further performance, may be reduced in effect, or made not a breach at all, by the terms of the clause.³⁵

The facts of the *Photo Production Case* will be seen later to be a good example of this point.

If, after consideration of any relevant exclusion clause, it is established that a fundamental breach or breach of condition has occurred it is necessary in determining the defaulting party's general and anticipatory secondary obligations to refer to any further exclusion clause which may modify these obligations. The *Harbutt's* doctrine does not allow this if the innocent party has elected, in the light of the fundamental breach or breach of condition, to put an end to all the unperformed primary obligations of both parties.

²⁹ *Id.* 296.

³⁰ *Id.* 290.

³¹ *Id.* 291.

³² *Id.* 298.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Supra* n. 2 at 431.

According to the doctrine the contract has ended and the wrongdoer cannot rely on an exclusion clause as the contract has ceased to exist. This reasoning is spurious. The parties' primary obligations arising from the contract have come to an end but the contract is still relevant in assessing the damages owed to the innocent party. Indeed the general and anticipatory secondary obligations arise, by implication of the common law, from the contract itself.

An exclusion clause may have been intended to modify either or both of what would have otherwise been the implied obligations of the defaulting party and thus must be referred to in determining these obligations in accordance with the intention of the parties. As Lord Wilberforce commented in the *Photo Production Case*:

Damages, in such cases, are then claimed under the contract, so what reason in principle can there be for disregarding what the contract itself says about damages — whether it "liquidates" them, or limits them, or excludes them?³⁶

This fallacy seems to have arisen from the imprecise use of terminology. In the case of a "fundamental breach" or "breach of condition" (as defined by Lord Diplock)³⁷ the election of the innocent party to put an end to the primary obligations of both parties is often referred to as the "discharge", "termination" or "rescission" of the contract. The contract is said to "be at an end" or "to have ceased to exist". The use of such expressions involves a dangerous over-simplification of the position. Lord Porter, in *Heyman v. Darwins Ltd.*, pointed this out:

To say that the contract is rescinded or has come to an end or has ceased to exist may in individual cases convey the truth with sufficient accuracy, but the fuller expression that the injured party is thereby absolved from future performance of his obligations under the contract is a more exact description of the position. Strictly speaking, to say that on acceptance of the renunciation of a contract the contract is rescinded is incorrect. In such a case the injured party may accept the renunciation as a breach going to the root of the whole of the consideration. By that acceptance he is discharged from further performance and may bring an action for damages, but the contract itself is not rescinded.³⁸

This passage in Lord Porter's speech is expressly endorsed by Lord Diplock, Lord Salmon and Lord Wilberforce (and thus indirectly Lord Keith and Lord Scarman) in the *Photo Production Case*.³⁹ It is to be noted that Lord Diplock's analysis is entirely consistent with Lord Porter's statement. The doctrine of fundamental breach is not. Moreover, it is submitted that the critical passage in the speech of Lord Reid

³⁶ *Supra* n. 1 at 290.

³⁷ *Id.* 294-295.

³⁸ [1942] A.C. 356 at 399.

³⁹ *Supra* n. 1 at 290, 295, 298.

in the *Suisse Atlantique Case* is also at odds with Lord Porter's statement and involves the same over-simplification that Lord Porter pointed out.

The interpretation that Lord Wilberforce gave of the passage in Lord Reid's speech was discussed above. Even given this interpretation, it was pointed out that the passage embodied a rule of law. This may be seen clearly if the passage is analysed using Lord Diplock's terminology and if Lord Porter's statement is borne in mind. Lord Reid refers to the effect of an election by the innocent party to "terminate" the contract:

Then the whole contract has ceased to exist including the exclusion clause, and I do not see how that clause can then be used to exclude an action for loss which will be suffered by the innocent party after it has ceased to exist, such as loss of the profit which would have accrued if the contract had run its full term.⁴⁰

It is submitted with respect that the answer is simple. The contract has not ceased to exist. So much is clear from Lord Porter's statement. On Lord Wilberforce's interpretation, the loss which is referred to gives rise to an anticipatory secondary obligation to pay monetary compensation for that loss. That obligation arises directly from the contract. An exclusion may have been intended to modify the obligation which would have otherwise arisen. A failure by the court to refer to any such exclusion clause is a failure to give effect to the intention of the parties. Thus Lord Reid's approach, even on Lord Wilberforce's interpretation, would involve a failure to give effect to the intention of the parties and to this extent it embodies a rule of law.

The English Law in the Light of the *Photo Production Case*

It is apparent from an overall reading of the *Suisse Atlantique Case* and the *Photo Production Case* that the House of Lords wishes to adopt an approach based on the true construction of the contract. Lord Wilberforce makes this clear:

I have no second thoughts as to the main proposition that the question whether, and to what extent, an exclusion clause is to be applied to a fundamental breach, or indeed to any breach of contract, is a matter of construction of the contract.⁴¹

The other members of the House of Lords express agreement with this conclusion.⁴² The doctrine of fundamental breach is inconsistent with such an approach and must be rejected. To the extent that the speeches of Lord Reid and Lord Upjohn in the *Suisse Atlantique Case* embody a rule of law they are also inconsistent with an approach based on the construction of the contract and are to be regarded as a minority decision. It is submitted that Lord Diplock's analysis gives

⁴⁰ *Supra* n. 2 at 398.

⁴¹ *Supra* n. 1 at 288.

⁴² *Id.* 292, 298.

effect to the House of Lords' clear intention to adopt an approach based on the true construction of the contract.

The Australian Position

Fortunately, the doctrine of fundamental breach has never gained acceptance in Australian law. In *Sydney City Council v. West*,⁴³ which was decided before *Suisse Atlantique*, Barwick, C.J. and Taylor, J., in a joint judgment, expressed difficulty in understanding the doctrine.⁴⁴ Windeyer, J. also alluded to difficulties with the doctrine.⁴⁵ All the members of the High Court approached the problem as one of construction. In *Thomas National Transport (Melbourne) Pty. Ltd. v. May & Baker (Australia) Pty. Ltd.*⁴⁶ Windeyer, J. clearly regarded the *Suisse Atlantique Case* as establishing "that there is no doctrine that every exemption clause, however widely expressed, is nullified by a 'fundamental breach'."⁴⁷

Two further points should be made. Firstly, Lord Diplock's analysis of the effect of a discharge of contract by breach on the parties' primary and secondary obligations arising from the contract is in accord with comments of Sir Owen Dixon in *McDonald v. Dennys Lascelles Limited*.

When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. . . . [T]he contract is determined so far as it is executory only. . . .⁴⁸

Secondly, Lord Diplock's analysis of the role of exclusion clauses in modifying the obligations which would otherwise arise under the contract is supported by Kitto, J. in *West's Case* who regarded the exclusion clause in question as "part and parcel of the bargain by which the bailment was created and the reciprocal rights and obligations of the parties as bailor and bailee were regulated".⁴⁹ In *State Government Insurance Office (Queensland) v. Brisbane Stevedoring Pty. Ltd.*⁵⁰ the matter was put succinctly by Barwick, C.J.: "A passenger purchasing an air or rail ticket with exclusion of liability or with limitations of liability never has the 'excluded' rights, or rights extending beyond the limitations".⁵¹

⁴³ (1966) 114 C.L.R. 481.

⁴⁴ *Id.* 488.

⁴⁵ *Id.* 500-501.

⁴⁶ (1966) 115 C.L.R. 353.

⁴⁷ *Id.* 376.

⁴⁸ (1933) 48 C.L.R. 457 at 476-477.

⁴⁹ *Supra* n. 43 at 495.

⁵⁰ (1969) 123 C.L.R. 228.

⁵¹ *Id.* 243.

The Application of the Law to the Facts

Lord Diplock's analysis of the law may now be applied to the facts of the *Photo Production Case*. In entering into the contract Securicor have, in the absence of any exclusion clause, assumed a primary obligation to procure that a night patrol service is provided for Photo Production's factory and that that service is performed with reasonable care and skill. Although not expressly stated as such, this obligation would arise by implication from the contract to provide a security service. If this obligation had not been modified then Securicor would have breached the contract. In setting fire to the building Musgrove did not exercise reasonable care and skill for the safety of the building. Securicor's failure to procure that such skill and care was exercised would have been a failure to fulfil a primary obligation — a breach of contract.

However the primary obligation has been modified by an exclusion. The exclusion clause must be construed against the party relying on it — Securicor. In this case the words are clear and the House of Lords held unanimously, as a matter of construction, that the clause was effective and that Securicor had not breached the contract. The exclusion clause modified the primary obligation so that Securicor were only liable for any "act or default (by any employee) which would have been foreseen and avoided by the exercise of due diligence on the part of the company as his employer". Thus, at the risk of labouring a point, Securicor were only under an obligation to exercise due diligence as the employer of Musgrove.

As Musgrove had satisfactory references and came from a good family, Securicor could not have foreseen that he would set fire to the factory. They were not negligent in employing him. They had fulfilled their primary obligation under the contract — there was no breach of contract. The House of Lords upheld Securicor's appeal on this basis and having so decided it was unnecessary to consider whether the second exclusion clause, which modified the general secondary obligation to pay damages for a breach of contract, was effective.

Miscellaneous Points

There are two further points of interest that arise from the case.

(i) *The "deviation" cases.*

The deviation cases are those cases involving shipping contracts in which the ship deviates or departs from the contractually agreed voyage. In the event of such deviation it has often been held that the defaulting party cannot rely on an exclusion clause in the contract which was only intended to benefit him if he were performing his obligations under the contract. Lord Wilberforce leaves it open whether these can be regarded as proceeding upon the normal rules of contract or whether it is better to regard them "as a body of authority *sui generis* with special rules derived from historical and commercial

reasons. What on either view they cannot do is to lay down different rules as to contracts generally from those later stated by this House in *Heyman v. Darwins Ltd.* ([1942] A.C. 356).⁵²

(ii) *Consumer Contracts.*

Much of the history of the doctrine of fundamental breach can be seen in terms of a conflict between freedom of contract on the one hand and the court's concern to prevent abuses of unequal bargaining power, especially as instanced by standard form consumer contracts, on the other. The doctrine of fundamental breach can be regarded as a device the courts could use to give a remedy to the small consumer whose rights had been excluded by a carefully drafted and wide ranging exclusion clause contained in a standard form contract. To this extent, in spite of its imperfections, Lord Wilberforce conceded that the doctrine of fundamental breach had served a useful purpose.⁵³ It might, however, be argued that by relying on the doctrine the courts were ignoring other principles, mainly of construction, which could have quite properly and effectively been used to give the consumer a remedy. In any case recent legislation now provides the courts with a statutory means by which to find a remedy for the consumer.

The Unfair Contract Terms Act, 1977 (U.K.) is designed to control terms of contracts and of notices which purport to exclude or restrict liability either in tort or for breach of contract. The basic test is that of reasonableness. It applies only to consumer contracts. The Contracts Review Act, 1980 (N.S.W.) is an Act providing for the judicial review of consumer contracts and the grant of relief in respect of harsh, oppressive, unconscionable or unjust contracts. It is submitted that under this Act the courts in New South Wales would have a wide ranging power to give a remedy to the consumer whose rights had been unjustly excluded by an exclusion clause in a standard form contract. As well there has been a considerable amount of other "consumer protection" legislation in both England and Australia.⁵⁴ The effect of these various statutes has not yet been fully determined. Clearly they will provide a remedy for the consumer in a large number of situations. However there will still be a residual area of "small businessmen" unable to rely on any of the statutory remedies but who are clearly in a position of unequal bargaining power when entering into a contract with a large corporation. In finding a remedy for such people the courts should rely on the ordinary principles of the construction of a contract rather than try to resurrect the doctrine of fundamental breach.

Conclusion

In *Photo Production Ltd. v. Securicor Transport Ltd.* the House

⁵² *Supra* n. 1 at 291.

⁵³ *Id.* 289.

⁵⁴ Trade Practices Act 1974 (Cth.), Commercial Transactions (Miscellaneous Provisions) Act, 1974 (N.S.W.), Supply of Goods (Implied Terms) Act 1973 (U.K.).

of Lords has unanimously adopted the proposition that the question whether and to what extent a party may rely on an exclusion clause is to be resolved by construction of the contract. The Court of Appeal decision in *Harbutt's "Plasticine" Ltd. v. Wayne Tank and Pump Co. Ltd.* has been overruled and the doctrine of fundamental breach as a rule of law has been rejected. It is submitted that the critical passage in Lord Reid's speech in the *Suisse Atlantique Case* is inconsistent with the views expressed by their Lordships in the *Photo Production Case* notwithstanding Lord Wilberforce's attempt to reconcile the two. Such an attempt is to be regretted since it may tend to prolong the confusion which surrounds this area of the law. Henceforth it is to be hoped that Lord Diplock's enlightening analysis of the nature of contractual rights and obligations and the effect on them of a discharge of contract for breach will settle once and for all the role which exclusion clauses play in determining such rights and obligations.

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