Singapore Journal of Legal Studies
[1993] 123 – 143

DISCHARGING AN INSTALMENT SALE CONTRACT FOR BREACH

Additive Circuits (S) Pie Ltd v *Wearnes Automation Pte Ltd*[1]

This article examines the issues to be considered in deciding whether an instalment sale contract can be discharged for breach. It uses the above recent High Court case as a framework for discussion and suggests an alternative analysis of the facts of that case.

WHETHER a party to a contract can treat it as discharged by the breach of the other party is often a difficult factual as well as conceptual question. Where the contract concerned is an instalment sale contract, the issues are even more complex. Both these elements were present in the case *of Additive Circuits (S) Pte Ltd* v *Wearnes Automation Pte Ltd* (hereafter *Additive Circuits*) which came before the Singapore High Court recently. The facts of the case provided an excellent opportunity for the Singapore courts to confirm and clarify the principles applicable to this area of the law, but with the greatest respect to the court in that case, this was not done in *Additive Circuits.* The reasoning in that case shows clearly that there is a need for further discussion of the applicable legal principles. This article aims to provide such a discussion by using the case as a framework, examining the principles used by the court, and venturing an alternative legal analysis of the facts.

I. Case of Additive Circuits

A. *The Decision*

The sellers (plaintiffs) contracted with the buyers (defendants) to sell 20,000 pieces of printed circuit boards. Delivery was to be in four equal instalments of 5,000 pieces each. The first two instalments were satisfactorily delivered. However, the third delivery was short by 1,360 pieces and the fourth instalment was not delivered at all. The buyers then cancelled the undelivered balance of 6,360 pieces. The sellers sued the buyers for breach of contract.

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[1] [1992] 2 SLR 23.

The central issue in the case was whether the buyers were entitled to terminate the contract for the sellers' failure to deliver the third instalment in full and total failure to deliver the fourth instalment; or whether in purporting to terminate the contract, the buyers were themselves in breach of contract.

In the District Court, the plaintiffs were successful in obtaining summary judgment for their claim of $35,934 for loss of bargain, computed by taking the difference between the value of the purchase order ($113,000) and the sum already paid ($77,066) by the defendants by the time of its alleged breach. Execution of the judgment was stayed pending the resolution of the defendants' counterclaim for damages for non-delivery. The defendants appealed against the deputy registrar's decision and the plaintiffs cross appealed against his decision granting a stay of execution of the plaintiff's judgment. Initially, both appeals were dismissed when they came before Lai Siu Chu JC in the High Court. After hearing further arguments, Lai JC reversed the deputy registrar's order and granted the defendants' appeal. Accordingly, the buyers were adjudged to be entitled to terminate the contract.

B. *The Arguments*

Counsel for the sellers argued that the buyers were not entitled to terminate the contract. It was submitted for the sellers that since the contract was an instalment contract, the court would have to consider the ratio which the breach bore to the entire contract and the degree of probability that such breach would be repeated. That again turned on whether the failure to deliver went to the root of the contract.[2] Although the point was not fully expanded in the judgment, from the affidavit in support of the sellers' case, it can be presumed that the sellers' view was that, on the facts, this test would not have been satisfied in the buyers' favour. The affidavit pointed out that the sellers had successfully adhered to three of the four original delivery dates and the total quantities delivered amounted to 68.2% of the purchase order. Further, the sellers were ready and willing to deliver the balance of 6,360 pieces which the buyers had purportedly cancelled.[3] From this, the sellers' position must have been that their breach did not go to the root of the contract, so that the buyers were not entitled to be released from their obligations. Opposing the sellers' arguments, counsel for the buyers argued, on the other hand, that the tests propounded for the sellers had no application in this case as there were no future obligations to be performed by the buyers at the time the contract was terminated.

The Judicial Commissioner accepted the buyers' argument, pointing out

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[2] *Supra,* note 1, at 26.

[3] *Ibid.*

that "the buyers had no unperformed obligations after the last delivery date".[4] She therefore felt that cases such as *Hong Kong Fir Shipping Co Ltd* v *Kawasaki Kisen Kaisha Ltd,*[5] *Freeth* v *Burr*[6] and *Maple Flock Co Ltd* v *Universal Furniture Products (Wembley) Ltd,*[7] which might otherwise have supported the sellers' arguments, had no application.[8] Instead, Lai JC was of the view that the success of the sellers' case turned on whether time was of the essence of the contract as argued by the buyers and disputed by the sellers.[9] She decided that time was indeed of the essence of the contract.[10] The sellers' argument that their admitted breach did not relieve the buyers of the obligation to accept delivery of the 6,360 pieces even if tendered late was therefore rejected and the case decided in favour of the buyers.

II. DISCHARGE BY BREACH

A. *The Concept*

One basic question which must be considered arises from Lai JC's view that there were no further obligations to be performed by the buyers under the contract after the last delivery date. This appeared to be her basis for saying that cases such as *Hongkong Fir* and *Maple Flock* did not apply to the present case.

By their short delivery of the third instalment and their late delivery of the fourth instalment, the sellers in *Additive Circuits* were in admitted breach of contract. Under general law, where one party has breached a contract, the injured party may bring an action for damages against the defaulting party. In addition, the injured party may sometimes be able to treat himself as discharged from his liability further to perform his own unperformed obligations under the contract and to accept performance by the other party if made or tendered.[11] This is the concept of discharge by breach. Various other terms such as "rescission", "termination" and "treating the contract as repudiated" have been also been used to describe this right of the injured party.[12]

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4 *Supra,* note 1, at 28.
5 [1962] 1 All ER 474, hereafter *Hongkong Fir.*
6 (1874) LR 9 CP 208.
7 [1934] 1 KB 148, hereafter *Maple Flock.*
8 *Supra,* note 1, at 28.
9 *Ibid.*
10 *Supra,* note 1, at 29.
11 See *Chitty on Contracts* (26th ed, 1989), at para 1701.
12 For a discussion of the terminology used in this area, see for instance, Treitel, *The Law of Contract* (8th ed, 1991), at 659-661.

In *Additive Circuits,* the buyers reacted to the sellers' breaches by cancelling the order for the remaining 6,360 pieces of circuit boards. Whether they were entitled to do this is a question which will be considered later. A more fundamental question for now is to ask what the buyers were seeking to achieve by their cancellation. The answer must be that they were seeking to be excused from performing their own obligations to accept and pay for the remaining goods by relying on the sellers' breach as a legitimate excuse. If so, Lai JC's finding that there were no more obligations to be performed by the buyers after the last delivery date is surprising.

In connection with this, reference must be made to two passages set out by Lai JC in her judgment. The first is from the speech of Lord Diplock in *United Dominions Trust (Commercial) Ltd* v *Eagle Aircraft Services Ltd*[13] explaining his dicta in the *Hong Kong Fir* case:

> The remedy of the other party [referring to synallagmatic contracts] may be limited to receiving monetary compensation for any loss which he has sustained as a result of the failure, *without relieving him from his own obligations to do that which he himself has undertaken to do and has not yet done,* or to continue to refrain from doing that which he himself has undertaken to refrain from doing. It may, in addition, entitle him, if he so elects, to be released from any further obligation to do or refrain from doing anything. *The Hong Kong Fir case was concerned with the principles applicable in determining what kind of failure by one party to a synallagmatic contract to perform his undertaking releases the other party from an obligation which, ex hypothesi has already come into existence, to continue to perform the undertaking given by him in the contract....* [Emphasis is Lai JC's.][14]

The second was Lord Coleridge CJ's dicta in *Freeth* v *Burr:*

> The question is whether the plaintiffs' refusal to pay ... *was such a refusal on the part of the purchaser to comply with their part of the contract as to set the seller free and justify his refusal to continue to perform it....* [Emphasis is Lai JC's.][15]

Although Lai JC's aim in setting out these passages was to emphasise that they could not apply to the buyers in the present case (presumably because she felt they had no further obligations to perform after the last contract date), the opposite may actually be true. Looking at the unperformed

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[13] [1968] 1 WLR 74.
[14] *Supra,* note 1, at 27.
[15] *Ibid.*

obligations in *Additive Circuits,* it would appear that the question posed in the case is broadly similar to those eontemplated by Lords Diplock and Coleridge in the passages above.

In a situation of discharge by breach, it is important to distinguish between unperformed obligations that have matured and those that are in the nature of future obligations. Rescission for breach is not rescission *ab initio.*[16] Rights and obligations which have already matured are not affected by a rescission for breach. The parties are thus liable in damages for any earlier breaches as well as the breach that has led to the discharge of the contract. Whether to elect to treat a contract as repudiated by the breach of the other party (assuming that the law allows termination in the particular circumstances) is a choice that is available to the injured party. Rescission for breach of contract only terminates the contract for the future as from the moment that the injured party communicates to the defaulting party his decision to treat the contract as discharged. From this point, the parties are excused from further performance of the contract.[17]

From the general principles above, it is clear that rescission would not have excused the buyers in *Additive Circuits* from performing obligations which they should have performed before the breach by the sellers. For instance, if the buyers were to have paid for the satisfactory second instalment on delivery but failed to do so, they could not have relied on the sellers' later breaches in the third and fourth instalments to excuse them from such payment.[18] However, this limitation does not affect the present case. Although any buyer of goods would have an obligation to accept and pay for the goods,[19] such obligation would only mature upon a satisfactory delivery of the relevant goods. Normally, payment and delivery are concurrent conditions unless the contract provides otherwise.[20] In *Additive Circuits,* the buyers' obligations to accept and pay for the goods in question did not mature until the goods had been properly delivered by the sellers.[21] These obligations

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[16] *Johnson* v *Agnew* [1980] AC 367 at 373; *Photo Production Ltd* v *Securicor Transport Ltd* [1980] AC 827 at 844.

[17] See generally, Furmston, *Cheshire, Fifoot and Furmston's Law of Contract* (12th ed, 1991), at 543-546 and *Chitty on Contracts, supra,* note 11, at para 1701.

[18] For a detailed discussion of the consequences of termination, see Carter, *Breach of Contract* (2nd ed, 1991), at 435-490. Carter expresses the point under discussion thus at 439, "Rights of parties which unconditionally accrue prior to an election to terminate the performance of the contract for breach or repudiation are not divested by such election."

[19] Under s 27 of the UK Sale of Goods Act 1979 ("the Act") which is applicable in Singapore by virtue of s 5 of the Civil Law Act (Cap 43, 1988 Rev Ed), it is the duty of the buyer to accept the goods and pay for them in accordance with the terms of the contract. Hereafter, all section references are to the Act unless otherwise stated.

[20] This is the position under s 28 of the Act.

[21] Or, to use the exact terms of s 28, the seller must at least be ready and willing to deliver the goods in exchange for the price.

were therefore in the nature of the buyers' unperformed future obligations from which they could seek to be released upon cancellation of the contract. There may have been naunces in the discussion in court which were not reflected in the report of the case. However, based on a straightforward reading of the report, the judge's finding that the buyer had no obligations after the last delivery date is certainly a puzzle.

B. *When is a Contract Discharged by Breach?*

Not every breach of contract will entitle the injured party to treat the contract as discharged. Much has been written on when the injured party may be so entitled and a full discussion can be found in any contract law textbook. For the purposes of this part of the article, attention can be drawn to the classification of contractual terms. Based on the *Hong Kong Fir* case[22] and later judicial pronouncements on the subject, it is generally agreed that in relation to treating a contract as discharged by breach, there are three categories of terms:[23] first, the condition, breach of which will entitle the innocent party to be released from his further obligations under the contract regardless of the seriousness of the breach;[24] second, the warranty, breach of which sounds only in damages but does not entitle termination of the contract; and third, the intermediate term, breach of which will entitle the innocent party to terminate the contract only if it deprives him of substantially the whole benefit that he expects to derive from the contract. The test to see if the contract can be discharged for breach of an intermediate term is often popularly called the *Hong Kong Fir* test.

In *Additive Circuits,* the *Hong Kong Fir* test of seriousness was rejected as inapplicable because there were no further obligations to be performed by the buyers. As discussed above, this writer has problems with such an analysis. If the focus is on future obligations, then it may broadly be said that the question in *Hong Kong Fir* is not any different from the question in *Additive Circuits:* should the innocent party be released from the performance of his obligations under the contract because of the other party's breach of contract or should he only be entitled to damages? Nevertheless, although the *question* seems to be the same, it is possible to agree that the test propounded in the *Hong Kong Fir* case is inapplicable to the facts *of Additive Circuits,* but for another reason. From the classification of terms above, the *Hong Kong Fir* test only applies to intermediate terms and does not always have to be satisfied before the injured party can treat the contract as discharged for the other party's breach. The injured party may also treat

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[22] See, *eg,* Lord Diplock's judgment, *supra,* note 5, at 487.
[23] See generally *The Law of Contract, supra,* note 12, at 689-704.
[24] See, *eg,* Lord Roskill in *Bunge Corp* v *Tradax Export SA* [1981] 1 WLR 711 at 724.

the contract as discharged as long as the term that is breached is a condition of the contract. Based on the finding of the judge in *Additive Circuits* that time was of the essence of the contract (to be discussed below), the term setting out the time of delivery would have been a condition of the contract. This in turn meant that a breach of the term entitled the buyers to terminate the contract regardless of the seriousness of the consequences of breach. As a result, the *Hong Kong Fir* test was inapplicable, although it may well have been applicable if there had been no finding that time was of the essence of the contract.

III. Discharge of Instalment Contracts

A. *Difference in Treatment for Entire and Severable Obligations*

The contract in *Additive Circuits* was an instalment contract. Although instalment sales are often treated as creating severable obligations, an instalment contract may, on its true construction, be one of entire obligations.[25] An important question to be asked in relation to the discharge of instalment sale contracts is whether the contract is one of entire or severable obligations.[26]

Where the instalment contract is treated as one of entire obligations, the fact that the goods are delivered in instalments is immaterial. In the words of Atiyah, a partial breach in an entire contract is to be treated as a total breach so that, if, for instance, the goods in one instalment are defective, the position is exactly the same as if the whole consignment were delivered at once and part of the goods found defective: the buyer can reject all the goods.[27] The general analysis as to when a contract may be discharged by breach would still apply despite the instalment deliveries as the contract is an entire one.

In contrast, where an instalment contract is one of severable obligations, each instalment is treated separately as a divisible part of the whole contract. This means that a breach, even a serious one, occurring in one part, may not entitle the innocent party to treat the whole contract as repudiated, depending on the effect of the breach on the contract as a whole.[28] To borrow

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[25] A third, but very unlikely, construction may be that the whole transaction is treated as a series of separate contracts each of which is to be independently treated. Such construction will not be further discussed in this article.

[26] This is generally acknowledged. See, *eg, Benjamin's Sale of Goods* (4th ed, 1992), at para 8-066 and especially note 82.

[27] See Atiyah, *The Sale of Goods* (8th ed, 1990), at 489-90 and *Benjamin's Sale of Goods, ibid,* at paras 8-067 to 8-068.

[28] See generally *The Law of Contract, supra,* note 12, at 685-6; *Benjamin's Sale of Goods, supra,* note 26, at para 8-069; and *Chitty on Contracts, supra,* note 11, at para 1733.

Guest's comprehensive analysis as set out in *Benjamin's Sale of Goods,*[29] a breach will only entitle the injured party to treat a severable instalment contract[30] as discharged if (i) the other party renounces his obligations under it, *ie,* if by words or by conduct he makes it quite plain his intention not to perform, or his inability to perform, those obligations, provided that the performance would amount to a fundamental breach of the contract; (ii) one party by his own act or default, finally and completely disabled himself from performing his obligations under the contract, provided the resulting non-performance results in a fundamental breach; or (iii) even in the absence of an express or implied renunciation of the whole contract, where the failure in performance by the defaulting party is fundamental. As to the concept of a breach being "fundamental", which is relevant to all three situations, Guest explains this to mean that the breach goes "to the root or essence of the contract"[31] or deprives the innocent party of substantially the whole benefit which it was intended that he should get from the contract.[32]

This analysis for the discharge of severable contracts may seem very similar to the analysis which is generally used for the discharge of the more common non-severable contracts. Indeed, Reynolds, who writes the section in *Benjamin's Sale of Goods* on "Remedies in Respect of Defects" uses broadly similar headings to describe the general situations where the buyer may treat a contract as discharged by breach.[33] There may be, however, one important difference which is not usually highlighted: Whilst a breach of condition in an entire contract may allow a discharge of the contract even where the breach is not necessarily "serious", this does not apply in a severable contract, where there can only be discharge if the breach in condition has serious effects on the rest of the contract. This could be said to follow from the very nature of a severable contract being one where obligations with respect to the various instalments are divisible, so that what happens in one instalment need not affect the rest of the contract.

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[29] See *Benjamin's Sale of Goods, supra,* note *16,* at paras 8-072 to 8-076.

[30] The analysis does not expressly refer to severable contracts, but it is obvious from the context and the parts of Guest's views enunciated in earlier paragraphs that he means to refer specifically to the discharge of severable instalment contracts.

[31] The phrase "going to the root of the contract" must be treated with caution. It is sometimes used to denote any situation where there is a right to treat the contract as discharged for breach. In this usage, a breach of condition may broadly be said to go to the root of the contract. However, more accurately, a breach which goes to the root of the contract is one which causes the injured party serious prejudice so that he is entitled to be discharged from the contract. In this usage, a breach of condition is not seen to be necessarily a breach going to the root of a contract even though it would allow the injured party to treat the contract as discharged. For a discussion of the meaning of the phrase, see *The Law of Contract, supra,* note 12, at 692-3.

[32] See *Benjamin's Sale of Goods, supra,* note 26, at para 8-075.

[33] See *Benjamin's Sale of Goods, ibid,* at paras 12-018 to 12-023.

Although there is scant direct case authority for this view, it is supported by academic writings. For example in *Benjamin's Sale of Goods,* Guest writes, "A ... breach of condition by the buyer entitles the seller, if he so chooses, to treat himself as discharged from his further obligations under the contract", but qualifies this in a footnote to the effect that in an instalment contract, the breach of a condition will not necessarily give rise to this right.[34] Another instance is when Guest describes the effect of a non-repudiatory breach in an instalment (severable) contract. Here, he contemplates that instances of such non-repudiatory breach (*ie,* where the contract cannot be treated as discharged for breach) could include a breach of condition in respect of any particular instalment.[35] Atiyah appeared to be of a similar view when he posed the question as to what would happen in a contract for the sale of goods by instalments, where one party is guilty of a breach of condition as to one or more instalments. In his analysis, it would seem that he was of the view that it need not necessarily enable the injured party always to treat the contract as discharged.[36] In a similar vein, Carter states, "[i]f the seller tenders an instalment which the buyer can reject, for example because the goods are not of merchantable quality, the buyer can refuse to accept this delivery, but is not usually justified in terminating the performance of the whole contract".[37] As merchantability is made a condition of the contract by statute,[38] Carter must be saying that a breach of condition does not always entitle the injured party to treat the contract as discharged.

Given the difference in treatment between entire and severable contracts, it is unfortunate that the special considerations pertaining to instalment contracts were not discussed in *Additive Circuits.* Although the fact of instalment deliveries was referred to in passing, it was not emphasised. Certainly, the question whether the contract was one of entire or severable obligations was not discussed in the case.[39] At the end of the case, it is

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[34] See *Benjamin's Sale of Goods, supra,* note 26, at para 9-009, note 42. In the footnote, Guest refers the reader to s 31(2) of the Act for support of the proposition. This may well be true if the section, set out at note 40, *infra,* is taken to mean that in a severable contract, a defective delivery in one or more instalment may or may not entitle the injured party to terminate the rest of the contract, so that termination is never automatic. Implicitly, this could in turn be stretched to mean that there is no automatic termination for breach of condition. However, the section may be less conclusive if we read it broadly to mean that a severable instalment contract can be discharged for breach in certain circumstances but not in others, leaving open the possibility that one of the circumstances where discharge by breach is permissible is where there is a breach of condition.

[35] See *Benjamin's Sale of Goods, ibid,* at para 8-079.

[36] See *The Sale of Goods, supra,* note 27, at 489-494.

[37] *Breach of Contract, supra,* note 18, at para 839.

[38] See s 14(2) of the Act.

[39] Lai JC's finding that the buyers were entitled to cancel the remaining deliveries would be consistent with a finding that the contract was severable. If the contract were not severable.

difficult to discern which feature of the contract most heavily influenced the Judicial Commissioner's decision. Because of this, the case has failed to confirm clearly the legal principles to be applied in such a situation and the reasons for their application.

B. *When is a Contract One of Severable Obligations?*

1. Section 31(2)

By statute, certain types of sale contracts are treated as severable contracts. For instance, where goods are to be delivered in stated instalments and each instalment is to be separately paid for, and the seller makes defective instalments in respect of one or more instalments, section 31(2) of the Act applies.[40] Under this section, a breach in one instalment may or may not affect the rest of the contract, depending on the terms of the contract and the circumstances of the case: a very broad direction which is not very helpful in itself.

In *Additive Circuits,* the judge did not mention severability, but she did discuss section 31(2) and felt that it did not apply for two reasons. One reason was because she was of the view that it was not a question of defective deliveries that was in issue, but a question of non-delivery on the sellers' part of the final instalment.[41] Whilst this is true on a literal reading of the section, the point may be made that in a broad sense, a non-delivery or late delivery may well also be described as a defective delivery ("defective" in the sense that the delivery is not in accordance with the terms of the contract). For instance, it is an interesting question whether, if the facts of the *Maple Flock* case (discussed below) were modified such that the breach consisted of a non-delivery of the sixteenth instalment instead of a contamination of the goods, the case then would be taken outside section 31 (2) on the ground that a non-delivery is not a "defective" delivery. Another reason that the judge thought the case was outside section 31(2) was that the purchase order did not provide for payment to be made separately for each instalment.[42]

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there might be a problem with s 11(4) of the Act which prevents a buyer from rejecting goods once he has accepted part of them. The point is discussed later in this article.

[40] S 31(2) provides, "Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalemnts, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not a right to treat the whole contract as repudiated."

[41] *Supra,* note 1, at 29.

[42] *Ibid.*

2. *Other instances of severability*

Although no attempt was made in *Additive Circuits* to link the discussion of section 31 (2) to the concept of severability, for the purposes of the present analysis, it must be pointed out that section 31(2) does not exhaustively set out the situations wherein a sale contract is severable. Severability depends on the construction of the contract.[43] For instance, a provision in the contract for "delivery as required" without any provision for separate payment of instalments has been treated as indicating the parties' intention that the contract should be severable.[44] The finding in *Additive Circuits* that the contract did not fall under section 31(2) does not rule out the possibility that it may still have been a severable contract. As section 31(2) is based on the common law, it is arguable that the same principles should govern the discharge of severable contracts in general, regardless of whether the instalments are to be separately paid for as required under that section.[45] On this argument, that the facts *of Additive Circuits* do not fall within section 31(2) may not be of much significance. As long as the contract is by construction a severable contract, the same principles should apply.

C. *The Maple Flock Factors*

Section 31(2) is closely linked with the *Maple Flock* case, which serves the useful function of identifying the factors to be used when applying the broadly stated section to particular fact situations. These factors could also apply by analogy to severable instalment contracts under the common law. In *Maple Flock,* the contract provided for a total of sixty-six deliveries of rag flock. The buyer was sued by the seller for refusing to accept further deliveries after the eighteenth delivery because the buyer alleged that the tests made on a sample of the flock from the sixteenth delivery showed contamination. The Court of Appeal decided that the factors to be looked at under section 31(2) were the ratio of the breach to the entire contract and the likelihood of its recurrence. Applying these tests, they felt that the seller's breach did not entitle the buyer to terminate the contract as the ratio that the breach bore to the entire contract was small and the likelihood of recurrence was slim.[46]

The case of *Maple Flock* was one of those dismissed by Lai JC in *Additive Circuits* as not being applicable because the buyers had no further obligations

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[43] See Lord Atkin's statement in *Longbottom & Co Ltd* v *Bass, Walker & Co* [1922] WN 245 at 246.

[44] *Jackson* v *Rotax Motor and Cycle Co* [1910] 2 KB 937.

[45] See *Benjamin's Sale of Goods, supra,* note 26, at para 8-072 and *The Sale of Goods, supra,* note 27, at 490.

[46] *Supra,* note 7, at 157-8.

after the last delivery date. This holding has to be further examined. On the facts of *Maple Flock,* the buyers were seeking to get out of their continuing obligations to perform *viv-à-vis* accepting the remaining instalments, *ie,* the nineteenth to sixty-sixth instalments. Although the fault lay with the sixteenth instalment, the buyers in *Maple Flock* were not seeking to be released from their obligations with respect to that instalment. In other words, the question of refusal to accept the goods related not to the instalment where the breach was committed (the sixteenth instalment), but the rest of the contract which had not been tainted with any breach (the nineteenth to sixty-sixth instalments). When these facts are carefully analysed, it seems that the distinction between *Maple Flock* and *Additive Circuits* is not, as suggested by Lai JC's judgment, that *Additive Circuits* did not involve further unperformed obligations. It did. The buyers' unperformed obligations in *Additive Circuits* were their obligations to accept and pay for the rest of the third instalment and the whole of the fourth instalment.[47] Instead, the essential difference between the two cases is that, unlike in *Maple Flock,* the unperformed obligations in *Additive Circuits* did not involve future instalments so far unconnected with any breach of contract by the guilty party. In *Additive Circuits,* the sellers' breach occurred in the third and fourth instalments and the unperformed obligations of the buyers were also in respect of the third and fourth instalments. If there had been a fifth or sixth instalment in *Additive Circuits* and the contract there had been found to have been one of severable obligations, the *Maple Flock* test would have had to be applied to decide whether the buyers were entitled to treat the contract as discharged with respect to those future instalments. However, as the fourth instalment in *Additive Circuits* was the last, there were no future instalments after that to which the *Maple Flock* test had to be applied. It is for this reason that the factors laid out in the case of *Maple Flock* should be inapplicable to the facts of *Additive Circuits.*

IV. Whether Time was of the Essence

Ultimately Lai JC decided the case on the principle that time was of the essence of the contract. She therefore felt that the buyers were entitled to be discharged from their obligation to accept the remaining goods which were delivered late. However, the crucial issue of time being of the essence was discussed only briefly. The reader who has hitherto witnessed the dismissal of principles from *Hong Kong Fir* and *Maple Flock* as being irrelevant because there were no further obligations to be performed by the buyers is left puzzled as to why then the question whether time of delivery was a condition should be relevant. The inter-relationship between the various

[47] The question is, of course, whether they were released from these obligations.

legal principles raised in the case is not made clear.

Sellers' counsel argued that "the question whether time for delivery is of the essence is only relevant when one has to determine whether a breach is a repudiatory breach and is not relevant where there are no unperformed obligations on the part of the innocent party."[48] There was no clear indication of whether Lai JC accepted this assertion. However, her finding that the buyers were entitled to succeed as time was of the essence of the contract could mean one of two things, neither of which sits comfortably. The first possibility is that she rejected the argument. This would mean she took the view that the question whether time of delivery is of the essence is relevant even where there are no unperformed obligations on the part of the innocent party. From first principles, an examination of whether time is of the essence of a contract is directed towards answering the question whether the innocent party is entitled to treat his unperformed obligations as discharged for a breach by the other party. If there were no unperformed obligations by the innocent party, there would be no need to decide whether time was of the essence. The first possibility is therefore an unlikely one. The second possibility is that she may have accepted the argument as a general rule but distinguished the present case from the contemplated scenario as the buyers here had obligations that were yet unperformed. However, like the first, the second possibility is also problematic: it would be inconsistent with Lai JC's earlier conclusion that the innocent party had no unperformed obligations after the last date of delivery.

Although, as noted above, the judge did not explain her reason for applying the principle of time being of the essence, she did explain why she thought that time was of the essence on the facts. The way in which Lai JC reached her conclusion on this point is interesting. She said:

> It was clear on the facts that the buyers had objected to the sellers' earlier attempts to reschedule and deliver later than the delivery dates stipulated. Therefore, even if the parties had been silent on whether time would be the essence of the contract, the buyers' protests would have served to confirm that time would be the essence. I can find nothing on the facts to support the sellers' contention that the buyers had acquiesced to the lateness in delivery.[49]

Lai JC referred to *Bunge Corp* v *Tradax Export SA*[50] where Lord Roskill quoted from *9 Halsbury's Laws of England* (4th Ed) at para 481:

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[48] *Supra,* note 1, at 28.
[49] *Supra,* note 1, at 29.
[50] [1981] 1 WLR 711.

> Time will not be considered to be of the essence unless: (1) the parties expressly stipulate that conditions as to time must be strictly complied with; or (2) the nature of the subject matter of the contract and the surrounding circumstances show that time should be considered of the essence; or (3) a party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence.[51]

On the facts, it would appear that situations (1) and (3) did not apply. Lai JC must therefore have found that situation (2) applied, although she did not elaborate on her finding other than in the passage which has been quoted above.

The nature of the contract and the surrounding circumstances at the time that the contract was made were not expressly examined in the judgment in *Additive Circuits.*[52] This is not a problem, as Lai JC may have had in mind, without expressly mentioning them, decided cases of a similar nature where time of delivery was found to have been of the essence of the contract. Despite the terms of section 10(2) of the Act stating that stipulations as to time other than time of payment may or may not be of the essence of the contract depending on the terms of the contract, there are cases which suggest that more often than not, time of delivery in a commercial contract will be of the essence of the contract.[53] Instead, what Lai JC did expressly refer to was the buyers' objection to the seller's attempts to reschedule the deliveries. These were circumstances which came to light *after* the contract was made. A question may be raised as to whether it is permissible to look at post-contractual events to determine whether a term was intended by the parties to be a condition of the contract. One way in which it may be possible to avoid a finding being ousted by a negative answer to this question may be to decide, as Lai JC did, that the post-contractual circumstances "confirmed" her view that time was of the essence of the contract. Although one may ask what, in the first place, were Lai JC's reasons for holding the view that was being confirmed, one cannot technically object to the reference to later circumstances as being evidence of the parties' contractual intentions. By skilful use of terminology, these later circumstances are put forward not as determining factors, but merely as confirming factors.

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[51] *Supra,* note 1, at 29.

[52] See generally *Benjamin's Sale of Goods, supra,* note 26, at para 8-024 and *The Sale of Goods, supra,* note 27, at 107.

[53] See, *eg, Hartley* v *Hymans* [1920] 3 KB 475 (*per* McCardie J at 484).

V. Relationship Between Damages, Discharge by Breach and Specific Performance

The sellers contended that the buyers' only remedy sounded in damages. Lai JC felt that it would be anomalous for her to accept this contention. In a passage near the end of the judgment, she explained:

> On the one hand, the sellers agreed that for their breach, the buyers had a claim for damages, yet on the other hand, the sellers maintain that their breach did not discharge the buyers from their obligation to accept late delivery of the final instalment after the last delivery date. In other words, the buyers have a remedy both for damages as well as for specific performance by calling for delivery of the balance goods, a situation which is not tenable with accepted principles of law on the availability of specific performance (see *Snell's Principles of Equity* (28th Ed) at 569) which is in lieu of and not in addition to damages and only where the latter would not be an adequate remedy.[54]

Although this writer agrees that the buyers should be allowed to be discharged from the contract and not be confined only to damages, it is not for the reason set out in this passage. There seems nothing wrong in principle with the idea that the buyers could have had a claim for damages from the seller for the short and late deliveries, but at the same time not be released from their obligations to accept the further instalments – if the facts had indeed justified such a conclusion. It is also difficult to understand Lai JC's view above that the sellers' argument (that the buyers had a claim for damages but should not be discharged from the contract) amounted to saying that the buyers had a remedy both in damages as well as for specific performance, and that this was untenable. Of course, the buyers would no longer be entitled to specific performance once they had exercised any available option to be discharged from the contract.[55] However, this does not mean that if the buyers were not entitled to be discharged from their obligations, they would automatically have the remedy of specific performance and could compel the sellers to deliver the rest of the goods against their will. Even in a case where the buyers are not discharged from the contract, specific performance against the sellers would be granted only if damages were not an adequate remedy for the buyers. This limited availability of specific performance is in keeping with the position stated by Lai JC herself in the foregoing passage. The point must also be made

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[54] *Supra,* note 1, at 29-30.

[55] See *Breach of Contract, supra,* note 18, at para 1202; *Johnson* v *Agnew* [1980] AC 367 at 392.

that although specific performance is usually granted in lieu of damages, a remedy of specific performance can sometimes co-exist with one of damages, where the damages compensate for a breach that is not corrected by the order for specific performance. For instance, in a sale of land, if one party refuses to perform his obligations under the contract, he may not only be liable to an order for specific performance but may in addition have to pay damages to the injured party if his eventual performance is late.[56]

In any case, the facts of *Additive Circuits* may not properly lend themselves to a claim for specific performance by the buyers. The seller's breach consisting of the lateness of the deliveries has already taken place and cannot be cured by ordering specific performance after the last delivery date. Delivery on time is thus a matter for damages and not specific performance. In contrast, an order for specific performance compelling the seller to deliver the goods, albeit late, may well have been helpful to the buyers if they had wished to have the remaining goods and the sellers had refused to deliver them at all. However, quite apart from the fact that the buyers might not have succeeded as damages might have been deemed an adequate remedy, on the facts of the case, it was the sellers who wished to deliver and the buyers who wished not to take delivery – not quite a situation where the buyers would be likely to want to claim specific performance, or to succeed if they did.

VI. An Alternative Analysis

Central to an alternative analysis of the case is the question whether the contract was one of entire or severable obligations. The report does not give sufficient details of the precise terms of the contract for a firm conclusion to be made on this point. For instance, the terms of payment are not stated, although we can glean from Lai JC's rejection of the applicability of section 31(2) that each instalment was not to be separately paid for. Both alternatives would have to be considered. If, as is most likely, the contract is severable, the parties' rights and obligations with respect to the third instalment could be considered separately from those under the fourth instalment. On the facts, this might be more efficient than the approach taken in the case, where the third and the fourth instalment appear to have been considered together at all times.

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[56] *Ford Hunt* v *Raghbir Singh* [1973] 1 WLR 738. See also *The Law of Contract, supra,* note 12, at 926.

A. *Severable Contract*

1. *The ignored individual instalment*

In a severable contract, the existence of a breach in one instalment, as discussed earlier, may not allow the injured party to be discharged from future instalments if the breach does not seriously affect the rest of the contract. Regardless of whether the contract can be discharged by breach, however, the injured party may nevertheless be discharged from his obligations in respect of the faulty instalment. Two separate questions thus arise in severable instalment contracts: first, whether the rest of the contract comprising future instalments, if any, is discharged for breach; and second, whether the particular faulty instalment is discharged for breach. If the contract in *Additive Circuits* is construed as a severable contract, the second question is more relevant as there were breaches in each of the third and fourth instalments.

Very little has been written specifically about when an injured party who suffers a breach by the other party in one instalment of a severable contract may be discharged from his obligations in relation to that particular instalment. The very idea of each instalment in a severable contract being a divisible obligation suggests that the same legal principles be applied as in discharge by breach generally, but on a smaller scale within the confines of the particular instalment in question. For instance, a breach of condition in one instalment would entitle the injured party to be discharged from his obligations to accept and pay for the goods forming that particular instalment.[57]

2. *The third instalment*

In *Additive Circuits,* the sellers breached their obligations in the third instalment when they delivered less than the agreed quantity of goods. Under section 30(1), where the seller delivers less than the contracted quantity, the buyer can reject the goods.[58] Although the section is stated generally and is not specially tailored for instalment contracts, the principle that each instalment in a severable contract is treated as a separate delivery would

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[57] This would be the case even if the buyer has accepted earlier instalments as s 11(4) does not apply to severable contracts. See generally *Benjamin's Sale of Goods, supra,* note 26, at para 8-079. See also cases such as *Tarling* v *O'Riordan* (1878) 2 L R Ir 82; *Moiling &Co* v *Dean & Sons Ltd* (1901) 18 TLR 217; and *Rosenthal & Sons Ltd* v *Esmail* [1965] 1 WLR 1117.

[58] S 30(1) states, "Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered, he must pay for them at the contract rate."

suggest that section 30(1) applies equally to each instalment of a severable contract.[59] If so, the shortfall in the third instalment would have allowed the buyers in *Additive Circuits* to reject the goods tendered by the sellers. It is arguable that a seller may sometimes be able to retender the correct quantity after the short instalment is rejected by the buyer if time of delivery is not of the essence of the contract and he does not commit a frustrating delay.[60] However, this option would not have been open to the sellers in *Additive Circuits* because time of delivery was of the essence of the contract. In any case, the buyers in *Additive Circuits* did not reject the third instalment, but instead, accepted the goods despite the shortfall.

Given this situation, could the sellers in *Additive Circuits* later insist on delivering the rest of the goods forming the third instalment? One obstacle to this would be that time of delivery was of the essence of the contract. Another would be the applicability of section 31(1) of the Act. Under this section, the buyer is generally not bound to accept deliveries in instalments unless this has been agreed under the contract. Assuming that the section applies equally to individual deliveries in an instalment contract as it does to entire contracts,[61] the quantity of goods forming each instalment must be delivered all at the same time.[62] As this was not done in *Additive Circuits,* the buyers could be seen to have been forever absolved from having to accept the rest of the third instalment at a later date.[63]

3. *The fourth instalment*

If the breach in *Additive Circuits* had been totally confined to the third instalment, the buyers would not have been able to get out of their obligations for the fourth instalment unless the breach in the third instalment had been serious enough to have entitled them to treat the rest of the contract, *ie,* the fourth instalment, as discharged. Because of the late delivery in the

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[59] Atiyah appears to support this view. See *The Sale of Goods, supra,* note 27, at 117 note 8 and 492-3. This possibility was not considered in the case of *Regent OHG Aisenstadt* v *Francesco of Jerym Street* [1981] 3 All ER 327. The case did, however, confirm that s 30(1) is subject to s 31(2), *ie,* where the goods are to be delivered in instalments, a shortfall in one or more instalments would not entitle the buyer to reject the whole of the goods unless such shortfall is a repudiation of the whole contract. See *Benjamin's Sale of Goods, supra,* note 26, at para 8-043.

[60] See *Benjamin's Sale of Goods, supra,* note 26, at paras 8-046 and 8-079; *Chitty on Contracts, supra,* note 11, at para 4849; *Borrowman* v *Free* (1878) 4 QBD 500.

[61] A similar argument to that raised on the applicability of s 30(1) to individual instalments (see earlier section) can be used here.

[62] See *Benjamin's Sale of Goods, supra,* note 26, at para 8-046.

[63] If the buyers had accepted the short third instalment without any protest, however, this might be seen as a waiver of their right to have all the goods forming that particular instalment delivered in one go. See *Benjamin's Sale of Goods, ibid,* at para 8-059.

fourth instalment, however, there can be a shift from seeing the fourth instalment as "the rest of the contract", to seeing it as an individual instalment wherein a breach has occurred. It becomes possible to focus on the breach in the fourth instalment instead of the breach in the third instalment: could the buyers cancel the fourth instalment because it was late? Using Lai JC's finding that time was of the essence of the contract, the answer to this question is straightforward. The buyers in *Additive Circuits* could cancel the fourth instalment for the sellers' breach of condition.

B. *Entire Contract*

The analysis of the case would be different if the contract in *Additive Circuits* were construed as an entire contract. In this case, any breach of condition would entitle the injured party to terminate the contract. As time of delivery was of the essence of the contract, the fact that the fourth instalment was not delivered on time would have enabled the buyers to treat their unperformed obligations under the contract as cancelled for breach of condition.[64] However, the buyer's right to do this may be affected by section 11(4) of the Act which applies where the contract of sale is not severable.[65] Under this section, if the buyers in *Additive Circuits* could be seen to have accepted the earlier instalments, they would be obliged to treat any breach of condition as a breach of warranty and not as a ground for treating the contract as discharged. Here, the buyers' position in *Additive Circuits* may be compromised by the fact that acceptance of the goods is a technical question governed by the Act[66] and not necessarily a matter of conscious choice on the part of the buyers. For instance, if the buyers in *Additive Circuits* had done any act to the earlier instalments which was inconsistent with the ownership of the sellers, or even if they had merely retained these beyond a reasonable time without intimating that they were rejecting the goods, they might be

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[64] It is unclear whether the shortfall in the third instalment in itself would have had a sufficiently serious effect on the rest of the contract as to enable the buyers to be discharged from their further obligations after the short delivery. Ss 30(1) and 31(1) may not apply to individual instalments where the obligations are entire rather than severable. However, a breach of condition in the third instalment would have entitled the buyers to treat the whole contract as discharged. The finding that time of delivery was of the essence may have had this effect although the position is complicated by the fact that part of the goods forming the third instalment were delivered on time and accepted by the buyers.

[65] S 11(4) provides, "where a contract of sale is not severable and the buyer has accepted the goods or part of them, the breach of condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated...."

[66] Ss 34 and 35 of the Act lay down the circumstances under which a buyer is deemed to have accepted the goods.

deemed to have accepted the goods. Such acceptance would have been fatal to their ability to cancel the rest of the contract.[67]

VII. CONCLUSION

The facts of *Additive Circuits* are straightforward and the relevant legal principles consist of basic tenets of contract law. However, the straightforward facts belie an interesting legal challenge and the basic tenets have to be rediscovered, then put together or discarded in order to reach a legally coherent result. With the greatest respect, the judgment of Lai JC reaches a fair conclusion on the facts but fails to mark out clearly the route taken to arrive at the final destination. The case is therefore limited in the guidance that it provides to the principles applicable to discharge by breach in general. With regard to the discharge of instalment contracts in particular, the judgment failed to discuss the crucial question whether the instalment contract was one of entire or severable obligations. If the obligations had been severable, those obligations relating to each individual instalment should have been distinguished from those in relation to the rest of the contract. If they had instead been entire, the problems of partial acceptance should have been looked at. Although this article has pointed out these and other difficulties with the reasoning in *Additive Circuits,* this writer respectfully agrees with the actual conclusion reached in the case. The contract in *Additive Circuits,* being an instalment contract with no special indications of entirety, seems most likely to have been intended by the parties as a severable contract. On the foregoing analysis of severable contracts, each of the breaches which took place in the third and fourth instalments entitled the buyers to be discharged from their unperformed obligations in relation to the respective instalment. The buyers were therefore

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[67] The question of partial acceptance is a complicated and controversial one. The seeming ease of being deemed to have accepted earlier instalments under s 35 suggests that a buyer in an entire instalment contract will usually be prevented by s 11(4) from treating the contract as discharged for the seller's breach of condition. See *Benjamin's Sale of Goods, supra,* note 26, at paras 8-068 and 12-064. Atiyah makes the interesting suggestion that the buyer's acceptance of prior instalments in an entire contract must be treated as conditional on the later instalments being satisfactory, so that a buyer who wishes to reject later instalments has the right and obligation to reject prior instalments even though he may have already accepted the prior instalments. See *The Sale of Goods, supra,* note 27, at 493. The Law Commission in England and the Scottish Law Commission have recommended a modification of the strict rule in s 11(4) so as to allow the buyer to accept part and reject part of the goods even where the contract is entire, provided that the goods form different commercial units. See *Sale and Supply of Goods* (Law Com No 160, Scot Law Com No 104) (1987), at paras 6.6 - 6.16 and clauses 2 and 3 of Draft Bill setting out the proposed sections 35(6) and 35A. Atiyah provides a discussion of the problems of partial acceptance and sets out the the proposed changes in *The Sale of Goods* at 512-519.

justified in cancelling the undelivered portion of the third instalment and the whole of the fourth instalment.

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