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SO WHAT IF TIME IS OF THE ESSENCE?

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This article is concerned with the remedies available for delay in the performance of contractual obligations, and in particular with the proper analysis of the question whether time is of the essence. The law in this area is both difficult and complex, not only with regard to whether time is of the essence in any given case, but also with regard to what this entails. It is argued that many of the difficulties arise from the ambiguous and inconsistent way in which the courts have approached the question whether time is of the essence, the concept being used in several distinct, albeit related, senses. The article seeks to demonstrate that the law relating to the topic is unnecessarily complicated, and to suggest ways in which it might be simplified.

I. INTRODUCTION

Given that it is much easier to make a promise than to keep it, delay in performance is a common difficulty in contracts of all kinds, from the charterer whose cargo is not ready to load on time to the plumber who has yet again failed to put in an appearance; from the major construction project that is many months behind schedule to the debtor whose cheque is always "in the post". The law gives various remedies for delay; in particular, it is now well established that a promisor who fails without good excuse to perform on time will be liable in damages for the delay.[1] However, for the promisee to obtain damages, he or she must go to court, and this will not be worth doing unless there is a lot of money at stake. What is of more practical interest to the promisee in the normal run of cases is the remedy of termination. In broad terms, the promisee will want to know whether he or she can "cancel the contract" and find someone else to do the job.

The crucial question here is whether or not time is "of the essence".[2] If time is of the essence, termination is possible in the event of any undue delay in performance by the promisor, however slight;[3] as well as this, the promisee can recover damages on the basis that the contract has been repudiated by the promisor.[4] In other cases the promisee can still claim damages for the delay,[5] but can only terminate performance

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1 *Raineri v Miles* [1981] AC 1051.

2 HG Beale, ed., *Chitty on Contracts*, 28th ed. (London: Sweet and Maxwell, 1999) at paras. 22-010–22-018.

3 *Bunge Corporation v Tradax Export SA* [1981] 1 WLR 711; *The Scaptrade* [1983] 2 AC 694 at 703 (Lord Diplock); *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514.

4 *Lombard North Central plc v Butterworth* [1987] QB 527, discussed further below at *infra* notes 83-89.

5 *Raineri v Miles*, *supra* note 1 above.

if the delay is a "frustrating" one—that is to say, a delay that "goes to the root of the contract".[6] So far, so good; stated at this level, the law is not hard to understand.

However, as Chitty points out, a number of difficulties surround the law in this area.[7] What is the difference, for instance, between saying that time is of the essence of the contract as a whole and that time is of the essence of a particular term of the contract?[8] What does it mean to say that time was generally of the essence at law but not in equity, and does the distinction still have relevance in the modern law?[9] Why should the breach of an essential time stipulation necessarily give the promisee the right to claim damages for repudiation?[10] How can time be made of the essence by notice when it was not of the essence to begin with?[11] And how can time be of the essence in relation to something that is not an obligation under the contract in the first place?[12]

This article seeks to argue that many of these difficulties arise from the ambiguous and inconsistent way in which the concept of time being of the essence has been used by the courts. It is the purpose of the pages which follow to sort out some of these ambiguities and inconsistencies. We shall not be concerned with the factors which go to make time of the essence, or with the extent to which the law should allow this to be done; rather, we shall be analysing precisely what the courts have meant and now mean when they say that time is of the essence, so as to help our understanding of the concept. The problem is that the courts have used the words "time is of the essence" to denote no less than five different legal situations.

First of all, the courts have in the past used the words to mean that the promisor is under an obligation to perform at the time set by the contract and no later. The corollary of this proposition was that the promisee had no remedy for delay in performance where time was not of the essence. As we shall see, this proposition was eventually exposed as a fallacy, and the courts therefore no longer use the words in this way.

Secondly, the courts say that time is of the essence when they mean that the timely occurrence of a certain event, which may or may not be the performance of a contractual term, is a condition precedent to a person's obligation to perform a promise. This analysis has a long pedigree, and is arguably the most useful and logical of those presently under discussion; however, as we shall see, its use is now largely confined to the context of unilateral contracts and options.

Thirdly, the courts use the words to mean that a time stipulation in the contract is a promissory condition in the *Sale of Goods Act* sense: that is to say, breach of such a stipulation entitles the promisee to "treat the contract as repudiated". This is perhaps the usual way in which the concept is used in the courts nowadays, but as we shall see it carries a certain amount of undesirable baggage which has given rise to some rather awkward results.

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6 *Hongkong Fir Shipping Co v Kawasaki Kisen Kaisha* [1962] 2 QB 26.

7 *Chitty*, s*upra* note 2 at para. 22-011.

8 *Ibid.*; *British and Commonwealth Holdings plc v Quadrex Holdings Inc* [1989] QB 842 at 856-857 (Sir Nicolas Browne-Wilkinson V-C).

9 *Chitty*, *ibid.*; Maitland, Frederick William, *Lectures on Equity*, 2nd ed., revised by John Brunyate (Cambridge: Cambridge University Press, 1947) at 307.

10 *Lombard North Central plc v Butterworth*, *supra* note 4.

11 *Chitty*, *supra* note 2 at para. 22-014.

12 *United Dominions Trust (Commercial) v Eagle Aircraft Services Ltd* [1968] 1 WLR 74.

Next, the courts have said that time is of the essence when they mean that the promisor's delay has barred the possibility of him or her obtaining a decree of specific performance against the promisee. This is what used to be meant by saying that time was of the essence in equity.

Finally, to say that time is of the essence can now denote a situation where delay in performance by the promisor can be taken as evidence of repudiation on his or her part. This situation arises when time is made of the essence by notice.

We shall now examine each of these situations in more detail, before coming to some conclusions on the matter.

II. Time of the Essence as a Contractual Obligation

Judges and textbook writers in the past have sometimes said that time was of the essence to mean that timely performance was an obligation under the contract. The corollary of this was that damages could only be recovered for untimely performance where time was of the essence; where it was not, the promisee had no remedy.

This proposition, which amounted to saying that time stipulations did not mean what they said, was first expressed in 1906 by Cyprian Williams in the following terms.

> [E]xcept where time is of the essence of the stipulation, a breach of contract is only committed in the case of unreasonable delay in the performance of any act agreed to be done. For example, where time is not essential, a party failing to complete a sale of land on the day fixed therefor by the agreement does not then complete a breach of contract either in equity or at law; it is only on failure to complete within a reasonable time after that day that the contract is broken.[13]

Though several other cases were cited in support of the proposition,[14] it seems to have its basis in a misunderstanding of some remarks of Fry LJ in the case of *Howe v Smith*, decided by the Court of Appeal in 1884.[15] This was a case where a purchaser of land had paid a deposit and then failed to complete. The vendor having eventually sold the property to a third party, the purchaser sought a decree of specific performance, or failing that the return of his deposit. It was held that it was now far too late for specific performance, but did this debar the purchaser from getting his deposit back? It was conceded by the court that time was not of the essence, and that loss of the right to specific performance did not necessarily entail forfeiture of the deposit; however, the purchaser's delay was found to have been sufficiently protracted as to amount to an abandonment of the contract, and the case was duly dismissed on that ground.

So far there is nothing in the case to suggest that damages could not have been recovered by the vendor as soon as the completion date had passed. However, at one

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[13] Williams, *A Treatise on the Law of Vendor and Purchaser*, (London: Sweet and Maxwell, 1906) vol II at para. 934. To be fair to Williams, it should be pointed out that the passage in question appears in the chapter entitled "On the Discharge of the Contract".

[14] In this connection, Williams, *ibid.*, cites *Mackreth v Marlar* (1786) 1 Cox 259, *Lloyd v Collett* (1793) 4 Bro CC 469, *Venn v Cattell* (1872) 27 LT 469, *Patrick v Milner* (1877) 2 CPD 342 and *Cornwall v Henson* [1900] 2 Ch 298, but none of these contain authority for the proposition as it stands.

[15] (1884) 27 Ch D 89.

point Fry LJ commented on the effect of section 25 of the *Judicature Act*, saying:

> The 25th section of the *Judicature Act*, 1873, enacted that stipulations in contracts as to time, which would not before the passing of the Act have been deemed to be of the essence of such contracts in a Court of Equity, should receive in all courts the same construction and effect that they would theretofore have received in equity. The effect of this clause is, in my opinion, that the purchaser seeking damages is no longer obliged to prove his willingness and readiness to complete on the day named, but may still recover if he can prove such readiness and willingness within a reasonable time of the stipulated day.[16]

He added however that the purchaser in the present case was unable to surmount this hurdle, and was accordingly not entitled to the relief sought.

Now it is quite clear from this that Fry LJ was not saying that the purchaser would not have been liable in damages to the vendor for failure to complete on time. He was making a totally different point: the *vendor* would have been liable in damages to the *purchaser* for his refusal to perform the contract in response to that failure. To put it another way, he was not denying the vendor his right to damages; he was denying him the right to terminate. Be that as it may, Cyprian Williams got the wrong end of the stick and cited the relevant passage in *Howe v Smith* as authority for the former proposition rather than the latter. The effect of this was to make a clause fixing the date of completion equivalent, in the words of Maugham J, to a clause stating that completion was due on that date or within a reasonable time thereafter.[17] The proposition in question was subsequently repeated in subsequent editions of *Williams* and was cited with approval by several judges.[18] It was also used to support the doctrine that a notice making time of the essence could not be served as soon as the promisor had failed to perform on time, but only after a further reasonable period of time had elapsed.[19]

However, it eventually became apparent that the proposition was based on a misunderstanding of the equitable doctrines appealed to, and on a failure to read the relevant cases in their true context.[20] It was never true to say that equity disregarded time stipulations, or treated them only as an approximate guide. In this connection, the point was made that law and equity did not differ in their approach to the construction of contractual terms.[21] A time stipulation, like any other, was a term of the contract, and action could be taken in the event of its breach. Where the common law and equity differed was not in their approach to construction of the contract, but in the matter of remedies.[22] The common law, or so it was thought, would generally allow

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16 *Ibid.* at 103.

17 *In re Sandwell Park Colliery Co* [1929] 1 Ch 277 at 282.

18 *Jamshed Khodaram Irani v Bunjorji Dhunjibai* (1915) 32 TLR 156 (Lord Haldane); *In re Sandwell Park Colliery Co* [1929] 1 Ch 277 at 282 (Maugham J); *Williams v Greatrex* [1956] 3 All ER 705 at 708 (Denning LJ); *Babacomp v Rightside Properties Ltd* [1975] 3 All ER 873 at 875 (Goff J).

19 *Smith v Hamilton* [1951] Ch 174. This case was overruled by the Court of Appeal in *Behzadi v Shaftesbury Hotels Ltd* [1992] Ch 1, it now being settled that such a notice can be served as soon as the promisor is in default.

20 Oliner, "Sale of Land—Reasonable Time for Completion" (1951) 17 Mod. L. Rev. 211; Emery, "The Date Fixed for Completion …" [1978] Conveyancer 144.

21 *Parkin v Thorold* (1852) 16 Beav 59 at 66-67 (Lord Romilly MR).

22 See *infra* notes 90-95.

the promisee to terminate in the event of late performance by the promisor. Equity, however, would relieve against the harshness of this in suitable cases by granting a decree of specific performance to the promisor, coupled if necessary with a common injunction to restrain the promisee from taking steps to have the contract set aside at law. To that extent, and that extent only, was the time stipulation ignored by equity. In *Thomas v Monaghan*[23] the New Zealand Court of Appeal expressly disapproved of the passage in *Williams*, saying that in the conveyancing context, the vendor was in default as soon as he or she failed to settle on the due date. The same approach was taken by Barwick CJ and Jacobs J in the High Court of Australia in *Neeta (Epping) Pty Ltd v Phillips*,[24] where it was pointed out that failure to observe a non-essential time stipulation was undoubtedly a breach of contract, albeit one which would not deprive the party in default of the right to specific performance.

The matter was finally cleared up by the House of Lords in *Raineri v Miles*,[25] a case involving a chain of property transactions. Because of the delay of one Wiejski in completing the sale of his house to Miles, Miles in turn became unable to complete the sale of his own house to Raineri, and was accordingly held liable in damages. Subsequently Miles brought third party proceedings seeking to be indemnified by Wiejski. The contract between Miles and Wiejski had provided for completion "on or before" 12th July 1977, but it was agreed that though Wiejski had failed to meet this date, time was not of the essence and completion had eventually taken place. So the question arose directly whether a party who failed to perform at the set time was liable in damages in a case where time was not of the essence.

The House of Lords, by a majority of four to one,[26] held that Miles had a valid claim. Whether time was or was not of the essence did not affect the promisee's right to damages, and any statements to the contrary should be disregarded. In the words of Lord Edmund-Davies:

> The former courts of equity did not rewrite contracts, nor did they hold that a man who had broken his word had kept it. No case has been cited to your Lordships where they denied all relief to the petitioner who proved that the respondent had delayed in the due performance of his contract. But what they did in proper circumstances to ameliorate the asperities of the common law. They differed from the common law in the granting of remedies and not in the recognition of rights, and, so far from altering the substantive common law, they followed it and applied it in their own courts when they thought it right to do so.[27]

The effect of *Raineri v Miles*, which has been followed around the common law world,[28] was to eradicate an heretical doctrine from the law. The position is now

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23 [1977] 1 NZLR 1; *O'Sullivan v Moodie* [1977] 1 NZLR 643.

24 (1974) 131 CLR 286 at 298-299; *Winchcombe Carson Trustee Co Ltd v Ball-Rand Pty Ltd* [1974] 1 NSWLR 477; *Louinder v Leis* (1982) 41 ALR 187.

25 [1981] AC 1050.

26 Lord Edmund-Davies, Lord Fraser, Lord Russell and Lord Keith, Viscount Dilhorne dissenting.

27 [1981] AC 1050 at 1081. See also the remarks of Lord Fraser at 1090.

28 The case was subsequently cited with approval in various jurisdictions including New Zealand (*Morris v Robert Jones Investments Ltd* [1994] 2 NZLR 275), New South Wales (*Park v Brothers* [2001] NSWSC 88), Hong Kong (*Tsang Cheung Kit & Ors v Hong Kong Housing Authority* [1982] 1 HKC 268, *Man Sun Finance (International) Corpn v Lee Ming Ching Stephen* [1993] 1 HKC 113) and Singapore (*Lie Kie Sang v Han Ngum Juan Marcus* [1992] 1 SLR 476).

affirmed that where a time is set for the performance of a contractual obligation, failure to keep to that time is a breach of contract, and the promisee is accordingly entitled to damages. Whether time is of the essence or not is totally irrelevant to this issue, and it is therefore no longer correct, if it ever was, to say that time is of the essence when one means only that there is an obligation to perform at a set time. This aspect of the issue does not need any further discussion in this context, but before passing on, it is worth noting how what was originally no more than a simple misunderstanding was taken up and repeated by others until it became elevated into a dogma, with unfortunate effects on the development of the law. As we shall see, this is not the only occasion on which the law in this area has gone astray.

III. Time of the Essence as a Condition Precedent

Though the contractual doctrine of discharge by breach or non-performance exists in a variety of guises, it all depends ultimately on the notion of a conditional promise.[29] The promise "I will do X if Y happens" is very different from the promise "I will do X"; in the former case, the promisor is not obliged to do X if Y does not happen. The event ("Y") on which the obligation to perform depends can be of various types. First of all, it can be an external event;[30] in an insurance contract, for instance, the obligation of the insurer to pay up on the policy depends on the occurrence of the contingency insured against. Secondly, it can be something to be done by the promisee without the promisee being under any obligation to do it, as in the classic unilateral contract situation where A promises to pay B a sum of money if he or she finds a lost dog, or walks to York, or whatever. Finally, the event in question can be a counter-promise in the contract, as where a seller promises to deliver goods on a certain date and the buyer promises to accept and pay for them provided that they are delivered in time.

We can say time is of the essence in the present context where the promisor's obligation to perform depends on something being done by the promisee within a certain time scale—I will do X if you do Y by time Z. In this situation, if the promisee does not do Y by time Z, the promisor's obligation to perform is discharged; indeed, it would be more accurate to say that it never arises in the first place.[31] To ask for performance when the promisee is guilty of delay is to ask the promisor to do something that he or she never agreed to: *non haec in foedera veni*—it was not this that I promised to do.[32]

This analysis of time being of the essence straddles the second and third of the situations outlined above, in the sense that it can apply whether or not the thing to be done by the promisee is a counter-promise under the contract. However, we shall see that in the latter case the analysis presently under discussion has largely been

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29 Reynolds, "Discharge of Contract by Breach" (1981) 97 Law Q. Rev. 541.

30 In the words of Judson J in *Turney v Zhilka* [1959] SCR 578 at 583, "an external condition upon which the existence of the obligation depends"; *Carlson, Carlson and Hettrick v Big Bud Tractor of Canada Ltd* (1981) 7 Sask R 337. This is its normal meaning in the civilian context: see Burchell, "'Condition' and 'Warranty"' (1954) 71 South African Law Journal 333.

31 Though see Shea, "Discharge of Performance of Contracts by Failure of Condition" (1979) 42 Mod. L. Rev. 623.

32 Words from Virgil, *Aeneid* IV, quoted in the context of the doctrine of frustration by Lord Radcliffe in *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 at 729.

abandoned by the courts in favour of one based on the notion of "breach of condition", in the sense that is found in the *Sale of Goods Act*. We shall be discussing this in the next section. In the meantime, however, we need to look more closely at the way in which the courts have used this basic notion of a conditional promise to make time of the essence.

A convenient starting point for the doctrine of conditional promises in the common law is the great case of *Kingston v Preston* decided in 1773.[33] In this case the defendant had agreed to convey his business to the plaintiff, the plaintiff agreeing in his turn to provide good security. The question in the case was whether the defendant was bound to convey the business if the plaintiff had not given the security. According to Lord Mansfield, the answer to this depended on the mutual relationship of the promises or covenants in the contract. These could be of three kinds.[34] First of all, covenants could be "mutual and independant" [*sic*]; here, either could be sued on without proof of performance of the other. Secondly, they could be "conditions and dependant" [*sic*]; here the obligation to perform one depended on prior performance of the other. Thirdly, they could be "concurrent", or "mutual conditions to be performed at the same time"; here one party could not sue without being ready and willing to perform his or her own side of the agreement. Since in the present case it was inconceivable that the defendant would have been willing to hand over his business without good security first being forthcoming, the promises were to be construed as dependent, and accordingly the plaintiff's action failed.

Though *Kingston v Preston* was mainly concerned with the order of performance,[35] the doctrine of dependency of promises could also lead to discharge in a case where the obligation in question depended on performance of another promise which the party in question was no longer able or willing to perform. This is exactly what happened in the famous case of *Cutter v Powell*,[36] where the plaintiff agreed with the defendant to serve as second mate on the defendant's ship the *Governor Parry*, the defendant agreeing in his turn to pay a lump sum of 30 guineas to the plaintiff on completion of the voyage "provided he proceeds, continues and does his duty as second mate in the said ship from hence to the Port of Liverpool". The plaintiff having died before the ship arrived at her destination, it was held that the plaintiff's widow and executrix could recover nothing; the agreement was to pay on condition that the voyage was completed, and this had not happened. As Ashhurst J

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[33] (1773) Lofft 194, cited in *Jones v Barkley* (1781) 2 Dougl 684 at 689. Though *Kingston v Preston* provides a good starting point for the purposes of the present discussion, the history of the doctrine of dependent promises is much more complex and stretches back far into the Middle Ages: see Stoljar, "Dependent and Independent Promises" (1957) 2 Sydney L. Rev. 217.

[34] (1781) 2 Dougl 684 at 690-691. The question generally arose in the context of the pleadings, the crucial issue being whether one party could sue for the other's failure or refusal to perform without averring proper performance on his or her own part: see Stoljar, *ibid*. See further Stoljar, *A History of Contract at Common Law* (Canberra: Australian National University, 1975) at 147-163; Carter and Hodgekiss, "Conditions and Warranties: Forebears and Descendants" (1976) 8 Sydney L. Rev. 31.

[35] This is evident from the comment of Lord Mansfield that the dependence or independence of the covenants was to be collected from the evident sense and meaning of the parties, and that "however transposed they might be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance" (1781) 2 Dougl 684 at 691. The rules for the order of performance were difficult and complex: see the famous commentary of Serjeant Williams on *Pordage v Cole* (1669) 1 Wms Saund 319.

[36] (1795) 6 TR 320.

put it, the defendant's promise to pay depended on a condition precedent to be performed by the other party, which had to be performed before the plaintiff was entitled to receive anything under the contract.[37]

Though neither *Kingston v Preston* nor *Cutter v Powell* involved a time stipulation, the doctrine of dependent promises was used to make time of the essence by saying that one party's obligation was dependent on prompt performance by the other side. This line of reasoning can be seen in a trio of cases decided in the first half of the nineteenth century. The first of these is *Busk v Spence*,[38] where a contract for the sale of flax to be shipped from St Petersburg contained a stipulation obliging the seller to notify the buyer of the vessel as soon as it was known. The seller having failed to make timely notification, it was held that the buyer was entitled to reject the goods whether or not he had been prejudiced by the delay; timely notification of the vessel, it was held, was a condition precedent to the buyer's obligation to accept and pay for the goods. Similarly, in *Alewyn v Pryor*,[39] where a contract for the sale of oil provided for delivery no later than a certain day, it was held that the buyer was entitled to reject the oil when it was delivered late, the court accepting that timely delivery was a condition precedent to the sale. In *Maryon v Carter*,[40] the defendant agreed to purchase a house from a builder at a certain price, and to pay an extra bonus of £80 provided that the work was completed by a certain day. The builder was held not to be entitled to claim the £80 where he had failed because of bad weather to complete the job on time, the court agreeing with the defendant that timely completion of the work was a condition precedent to the builder's right to recover the bonus.

The analysis used in these cases is strict but logical; timely performance by the promisee being a condition precedent to the obligation of the promisor to perform in return, the promisor need not perform if timely performance is not rendered by the promisee. In none of the three cases just mentioned did this cause any great problem; in *Busk v Spence* and in *Alewyn v Pryor,* the defaulting seller was free to sell the goods elsewhere, whilst in *Maryon v Carter,* all that was at stake was the extra bonus payment, the obligation of the purchaser to pay the main contract price being unaffected. However, as *Cutter v Powell* shows us, the doctrine of dependent promises was capable of working great injustice where the contract was partly executed on one side, and in other cases where releasing the innocent party from the obligation to perform was out of all proportion to any loss caused by the party in default.[41] In bilateral or synallagmatic contracts, delays and other breaches of contract can be compensated for by damages, and as we shall see, the courts were therefore reluctant to construe performance of an obligation as a condition precedent unless it was of crucial importance or "went to the whole consideration".[42] We are not really concerned in the present context with cases where time was not of the essence, but even where it was, the tendency as we shall see—at least after the

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37 *Ibid*. at 324-325.

38 (1815) 4 Camp 329.

39 (1826) Ry & M 406.

40 (1830) 4 C & P 295.

41 Stoljar, "The Great Case of *Cutter v Powell*" (1956) 34 Can. Bar Rev. 288.

42 *Boone v Eyre* (1777) 1 Hy Bl 273n. For this reason the courts tended to shy away from construing time as being of the essence in such cases: *Constable v Cloberie* (1627) Palmer 397; *Havelock v Geddes* (1809) 10 East 555; *Davidson v Gwynne* (1810) 12 East 381; *Lang v Gale* (1813) 1 M & S 111.

middle of the nineteenth century—was to construe the situation in terms of "breach of condition" rather than failure of condition precedent in the old fashioned sense.

One situation where the old analysis is still used is in relation to unilateral contracts and options, the reason no doubt being the absence of any remedy in damages for delay in such cases. In *Dibbins v Dibbins*,[43] an option for a surviving partner to purchase a deceased partner's share had to be exercised within three months of the death. The surviving partner being of unsound mind, his solicitors purported to exercise the option on his behalf, but were told that this could not be done without a court order. An order in lunacy having been obtained, a fresh notice was given, but by now the three months set for the exercise of the option had expired. It was held by Chitty J that the option could only be exercised in accordance with its terms, and that the second notice was accordingly equally ineffective. In *Hare v Nicoll*,[44] a contract for the sale of shares gave the seller an option to repurchase by notice given before 1st May 1963, payment to be made before 1st June. The seller purported to exercise the option a day late, and then failed to tender the price until 7th June. It was held by the Court of Appeal that the option had not been validly exercised, one reason given being that such options were a species of privilege for the benefit of the party on whom they were conferred, it was for that party to comply strictly with the conditions stipulated for the exercise of the option.[45]

The same reasoning was used by the Court of Appeal in *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd*,[46] a case involving a tripartite hire purchase transaction in which an aeroplane was sold to a finance company and then let out on hire purchase to an airline company. The contract contained a "recourse agreement" whereby the finance company could call upon the sellers to repurchase the aircraft in the event of premature termination of the hire purchase agreement with the airline company; it also provided that the finance company should notify the sellers within seven days of all defaults on the part of the airline company. The airline company soon got into difficulties with its payments, and the agreement was duly terminated; but the finance company failed to give prompt notice of the default, and did not call upon the sellers to repurchase the aeroplane until some five months after the termination. It was held by the court that it was now far too late for the option to be exercised, one of the reasons given being that it was in the nature of a unilateral offer that could only be accepted in accordance with its exact terms. In this context, the judgement of Diplock LJ is of particular interest. It had been held at first instance that the delays on the part of the finance company did not constitute a breach of "condition", and that accordingly the sellers were not discharged from their obligation to repurchase the aeroplane when called upon to do so.[47] But Diplock LJ held this reasoning to be inappropriate in the context of a unilateral obligation of this sort, where one party (the promisor) undertook to do or to refrain from doing something if the other (the promisee) did or refrained from doing something, but

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43 [1896] 2 Ch 398.

44 [1966] 2 QB 130.

45 *Ibid*. at 141 (Willmer LJ) and 148 (Winn LJ). In such cases, compliance with the stipulated condition is "an external condition upon which the existence of the obligation depends": see *Turney v Zhilka* [1959] SCR 578 at 583 (Judson J); *Carlson, Carlson and Hettrick v Big Bud Tractor of Canada Ltd* (1981) 7 Sask R 337.

46 [1968] 1 All ER 104.

47 *Ibid*. at 107.

the promisee did not undertake to do or to refrain from doing that thing.[48] Since the promisee did not undertake anything on this hypothesis, it made no sense to ask whether his or her conduct amounted to a breach of condition or of warranty.[49] The only question was whether the event specified in the contract as giving rise to the promisor's obligation had occurred. Either it had or it had not.[50] In the present case it had to be implied that the option to invoke the "recourse agreement" be exercised within a reasonable time after the termination of the hire purchase agreement, and it was therefore not open to the finance company to call upon the sellers to repurchase the aeroplane at such a late stage. A similar situation arose in the Singapore case of *Seah Kiat Seng v Amtel Exports Pte Ltd*,[51] where an option to purchase was to be exercised within a certain time by signing an acceptance form and sending it to the vendor along with the deposit. On the last available day the purchaser signed the form and sent it to the vendor with a cheque enclosed. The cheque having been dishonoured, it was held by Rubin J in the High Court that it was not open to the purchaser to come back with the money four days later. Time was of the essence, and equitable principles had no application in this context.

One of the reasons for the courts being willing to construe timely performance as a condition precedent in the context of options is, as we have seen, the absence of a remedy in damages for the delay. In *United Scientific Holdings Ltd v Burnley Borough Council*,[52] it was held that a rent review clause in a lease was not an option in the strict sense, and that it was therefore open to the landlords to initiate a review despite the passage of the deadline set in the clause. The main reason given for this was that the exercise of the rent review procedure did not involve the creation of any new contractual relationship between the parties,[53] but it was also said that a tenant who felt prejudiced by the delay could always serve on the landlord a notice making time of the essence.[54] This is a topic to which we shall return later on.[55]

There are good reasons for the reluctance of the courts to construe time as of the essence, but where they decide that it is appropriate to do so, saying that performance by the promisor is intended to be conditional on something being done promptly by the promisee, this would seem to provide a clear and logical analysis of the situation both for bilateral and unilateral contracts. However, as we have seen, where time is

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48 *Ibid*. at 109.

49 *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 70 ALR 641 (Deane J); *Baughman v Rampart Resources Ltd* (1995) 124 DLR (4th) 252.

50 The rule that the conditions set out for the exercise of an option must be strictly adhered was said to be "settled and invariable" by Nourse LJ in *Di Luca v Juraise (Springs) Ltd and Others* (1998) 79 P&CR 193, but this is not necessarily so. In particular, where the exercise of an option is made conditional on the due performance of the obligations under another contract, the courts will not allow the option to be barred by proof of the occurrence of trivial breaches in the past that have now been rectified: see *Bass Holdings Ltd v Morton Music Ltd* [1988] 1 Ch 493; *Sail Labrador v The Challenge One* [1999] 1 SCR 265.

51 [1997] 1 Sing, L.R. 311; *Bank of British Columbia v Turbo Resources Ltd* (1983) 148 DLR (3d) 598; *St John Shipbuilding and Dry Dock Ltd v National Harbours Board* (1983) 48 NBR (2d) 27; *Rajani v Davis Wire Industries Ltd* (1995) 59 ACWS (3d) 666.

52 [1978] AC 904; see *infra* notes 101-104.

53 *Ibid*. at 930 (Lord Diplock), 939 (Viscount Dilhorne), 945-946 (Lord Simon), 951 (Lord Salmon) and 962 (Lord Fraser).

54 *Ibid*. at 934 (Lord Diplock) and 962 (Lord Fraser); see also *Amherst v James Walker Goldsmith and Silversmith Ltd* [1983] Ch 305 at 315 (Oliver LJ), 318 (Ackner LJ) and 319 (Lawton LJ).

55 See *infra* notes 117-133.

of the essence in a bilateral or synallagmatic contract, the courts have for a long time preferred to use the language of "condition" in the *Sale of Goods Act* sense. It is to this analysis that we must now turn.

IV. Time of the Essence as a Promissory Condition

The foregoing analysis in terms of dependency of promises and conditions precedent has the merit of clarity and logic, but is rather crude in its effects and proved unsuitable for dealing with complicated contracts with their multitude of overlapping representations, warranties, covenants and conditions.[56] For this reason, it became superseded in most cases by the more modern analysis in terms of conditions, warranties and innominate terms. The traditional analysis of time being of the essence at common law is stated in these terms by *Chitty*: where time is made of the essence by agreement (as opposed to subsequent notice), the effect is to elevate the term in question to the status of a "condition", with the consequences that a failure to perform by the stipulated time will entitle the innocent party: (1) to terminate performance of the contract and thereby put an end to all the primary obligations of both parties remaining unperformed, and (2) to claim damages from the contract breaker on the basis that he or she has committed a fundamental breach (a breach going to the root of the contract) depriving the innocent party of the benefit of the contract (damages for the loss of the whole transaction).[57] This approach, which has been applied in many common law jurisdictions,[58] reflects the terminology of section 11(3) of the *Sale of Goods Act 1979*, where a breach of "condition" is said to give rise to the right to "treat the contract as repudiated". Or, in the words of Fletcher Moulton LJ in his famous dissenting judgement in *Wallis, Son and Wells v Pratt and Haynes*,[59] "conditions" are terms of the contract "so essential to its very nature that their non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all", so that the innocent party can treat the contract as being "completely broken", and can sue the other party for "total failure to perform the contract".[60]

This approach has its roots in the one discussed in the previous section in that it uses the concept of a condition, and in that delay by one party entitles the other to refuse further performance. However, there are several ways in which the newer analysis differs from the older one, all of which have given rise to a number of problems.

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[56] A helpful discussion of the relationship between the older dependency analysis and the more modern condition/warranty analysis is given by the Alberta Court of Appeal in *Herron v Hunting Chase Inc* (2003) 124 ACWS (3d) 487; see also *First City Trust Co v Triple Five Trust Corporation Ltd* (1989) 57 DLR (4th) 554 at 562-566 (Stratton JA); *Transcontinental Corporation v HDFI Ltd* (1990) 21 NSWLR 689 at 703 (Samuels JA); *African Minerals Ltd v Pan Palladium Ltd* [2003] NSWSC 268; *Colliers McClocklin Real Estate Corporation v Lloyd's Underwriters* [2003] SKQB 383.

[57] *Chitty, supra* note 2, para. 22-015.

[58] See *Bunge Corporation v Tradax Export SA* [1981] 1 WLR 711 (England and Wales); *Bisley v Thompson* [1982] 2 NZLR 696 (New Zealand); *Hartley v Miller* (1987) NSW LEXIS 6587, BC8700871 (New South Wales); *Crozon v Choquette* [2004] SKQB 314 (Saskatchewan); *Mohd Said Hassan Kamouna v Ferrari (M) Sdn Bhd* [1998] 3 MLJ 640 (Malaysia); *Univeral Cable (M) Bhd v Bakti Arena Sdn Bhd and others* [2000] 106 MJLU 1 (Malaysia).

[59] [1910] 2 KB 1003. The decision of the Court of Appeal was reversed, and the dissenting judgement of Fletcher Moulton LJ affirmed, by the House of Lords at [1911] AC 394.

[60] [1910] 2 KB 1003 at 1012-1013.

A. *Condition Precedent and Condition*

We now speak not of "condition precedent" but simply of "condition". According to Denning MR,[61] the use of the word "condition" in this sense goes back at least to the case of *Glaholm v Hays* in 1841,[62] but it did not become settled until it was adopted by Sir Frederick Pollock in 1876[63] and was thereafter enshrined by Sir Mackenzie Chalmers in the *Sale of Goods Act 1893*. Though from one point of view the difference is one of terminology only, the change is unfortunate; the word "condition" is already used in a bewildering variety of ways in the contractual context, and the loss of the word "precedent" obscures the essential connection between the relevant contractual obligation and the condition upon the fulfilment of which it depends.

B. *The Condition as Promise*

It is the promise itself that is described as the condition rather than its performance. This shift in meaning can be traced back to the famous plantation case of *Boone v Eyre*,[64] where Lord Mansfield is reported as saying that where mutual covenants go to the whole consideration, they will be construed as conditions precedent, but not where they only go to part. We shall be discussing this case more fully in a moment, but once again, this development was an unfortunate one. As Corbin pointed out, though a term in a contract can function both as a condition and as a promise, the two are very different in their effects.[65] In any event, even where a promise is described as a condition, what matters is not whether it is made but whether it is kept.

C. *The Importance of the Stipulation*

Though the question is still ostensibly one of construction, more emphasis is now placed on the importance of the stipulation within the context of the contract as a whole. In *Boone v Eyre*,[66] the plaintiff covenanted by deed to convey the equity of redemption in a West Indies plantation, together with the slaves on it, in consideration of the payment of £500 and an annuity of £160 for life. When sued for failure to pay the annuity, the defendant pleaded that the plaintiff was not lawfully possessed of all the slaves, and so had no proper title to convey. In his famous judgement Lord Mansfield as we have seen drew a distinction between cases where cases where mutual covenants went to the whole consideration on both sides, in which case they were to be construed as conditions precedent, and cases where they went only to part, in which case the defendant was confined to the remedy of damages.[67] This meant that whether something was a condition precedent to the promisor's obligation

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61 *Wickman Machine Tool Sales Ltd v Schuler AG* [1971] 1 WLR 840 at 851; Carter and Hodgekiss, "Conditions and Warranties: Forebears and Descendants" (1976) 8 Sydney L. Rev. 31.

62 (1841) 2 M & G 257.

63 Pollock, *Principles of the Law of Contract* (London: Stevens, 1876) at 445-449.

64 (1777) 1 Hy Bl 273n, 2 Bl W 1313n.

65 Corbinr, "Conditions in the Law of Contract" (1918) 28 Yale L.J. 739.

66 *Supra* note 64.

67 *Ibid.*

to perform depended at least in part on its importance, and not just on the intended order of performance.

This approach was applied to a time stipulation in *Glaholm v Hays*,[68] where a term in a charterparty to the effect that the ship was to sail on or before a certain day was construed as a condition, not the grounds not only that this was suggested by the wording of the contract, but also that, in the words of Tindal CJ, "the whole success of a mercantile adventure does, in ordinary cases, depend on the commencement of the voyage at a given time".[69] In *Bentsen v Taylor*,[70] decided in the same year as the *Sale of Goods Act*, the question for the Court of Appeal was whether a stipulation in a charterparty that the ship was "now sailed or about to sail" was a condition or a mere warranty. It was held that such stipulations should be construed as conditions. In the words of Bowen LJ:

> Of course it is often very difficult to decide as a matter of construction whether a representation which contains a promise, and which can only be explained on the ground that it is itself a substantive part of the contract, amounts to a condition precedent, or is only a warranty. There is no way of deciding that question except by looking at the contract in the light of the surrounding circumstances, and then making up one's mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability. In order to decide this question of construction, one of the first things you could look to is, to what extent the accuracy of the statement … would be likely to affect the substance and foundation of the adventure which the contract is intended to carry out.[71]

On this reasoning, and on the authority of previous cases,[72] the stipulation in question had to be a condition. As Bowen LJ concluded, "It is obvious that when you are dealing with a voyage, the contemplated date of its commencement may be of the utmost importance."[73] To repeat what was said earlier on, the question is still ostensibly one of construction, but the emphasis is now more on the importance of the stipulation within the context of the contract as a whole.

The trouble with this is that it runs together two completely different rationales for contractual discharge, failure of condition and failure of consideration.[74] Failure of condition, as we have seen, is simply a matter of applying what the parties intended; the promisor only agrees to do X if Y happens, and Y has not happened. Failure of consideration is a rule of policy; the promisor has agreed to do X in return for benefit Y, and benefit Y is not forthcoming. Whilst it may make sense to say to use the likely result of the breach (failure of consideration) as a guide to deciding what

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68 (1842) 2 M & G 257.

69 *Ibid.* at 267.

70 [1893] 2 QB 274.

71 *Ibid.* at 281.

72 *Glaholm v Hays, supra*; *Ollive v Booker* (1847) 1 Ex 416; *Oliver v Fielden* (1849) 4 Ex 135; *Behn v Burness* (1863) 3 B & S 751.

73 [1893] 2 QB 274 at 282.

74 Reynolds, "Warranty, Condition and Fundamental Term" (1963) 79 Law Q. Rev. 534; Reynolds, "Discharge of Contract by Breach" (1981) 97 Law Q. Rev. 541; Bridge, "Discharge for Breach of the Contract of Sale of Goods" (1983) 28 McGill L.J. 867.

the parties intended at the outset (failure of condition), it must not be forgotten that the two are distinct, and do not necessarily boil down to the same thing. Failure of condition looks forward from the time of the contract—did the parties intend that the obligation of the promisor to perform should depend on due performance by the promisee? Failure of consideration looks backwards from the consequences of the breach—should the promisor be excused from performance on the ground that he or she has not received the expected benefit in return? The failure to see that these are separate, albeit complementary, grounds for discharge has led to much unnecessary confusion in the law.[75]

D. *Breach of Condition and the Right to Termination*

Whereas under the older analysis, the issue was whether the promisor was bound to perform a particular covenant or stipulation, the question is now whether he or she is entitled to terminate performance altogether. This follows on logically from Lord Mansfield's analysis in *Boone v Eyre*, for if the defaulting party has failed to perform a covenant or promise that goes to the whole consideration, the innocent party will *ex hypothesi* have received no benefit from the contract and will be entitled to act accordingly. In *Behn v Burness*[76] the Court of Exchequer Chamber had to consider the status of a term in a charterparty which stipulated that the ship was currently in the port of Amsterdam. The approach was set out by Williams J in terms that do not correspond entirely with current usage, but which make it clear that he sees the issue as one of termination rather than simply withholding performance of a particular obligation:

> But with respect to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine, established by principle as well as authority, appears to be, generally speaking, that if such descriptive statement was intended to be a substantive part of the contract, it is to be regarded as a warranty, that is to say a condition on the failure or non-performance of which the other party may, if he is so minded, repudiate the contract in toto, and so be excused from performing his part of it, provided it has not been partially executed in his favour.[77]

Saying that the innocent party may "repudiate the contract in toto" is very different from saying that he or she is not bound to perform a particular obligation in that contract. The problem with the orthodox concept of breach of condition, whether in relation to time or any other kind of stipulation, is that this crucial distinction is often obscured.[78]

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[75] Such as the rather sterile debate as to whether the "gravity of the breach" approach in *Hong Kong Fir Shipping Co v Kawasaki Kisen Kaisha* [1962] 2 QB 26 had rendered the concept of breach of condition obsolete outside the sale of goods. The case of *Bunge Corporation v Tradax Export SA* [1981] 1 WLR 711 finally made it clear that the two approaches existed side by side.

[76] (1863) 3 B & S 751.

[77] *Ibid*. at 755.

[78] Thus where the seller in a contract for the sale of goods by instalments fails to deliver an instalment on time, the buyer will generally be entitled to withhold the price for that instalment, but will not be entitled to terminate the contract as a whole unless the seller's conduct amounts to total repudiation;

E. *Breach of Condition as Constructive Repudiation*

Last but not least, a breach of condition is said, in the words of the *Sale of Goods Act*,[79] to give rise to the right to "treat the contract as repudiated". The terminology here seems to be that of the draftsman of the *Act*, Sir Mackenzie Chalmers himself. Though the *Sale of Goods Act* was meant to be no more than a codification of the existing law, there is nothing in any of the authorities cited by Chalmers in this context to support the notion that a breach of condition is equivalent to a repudiation by the promisor; what they say is that such a breach gives rise to a right of repudiation by the promisee, a very different matter.[80] However, this concept of what might well be called "constructive repudiation" is another corollary of *Boone v Eyre*; if conditions go to the whole consideration, a failure to perform them must amount, in the words of Fletcher Moulton LJ, to a "substantial failure to perform the contract at all".[81]

It has been said that allowing the promisee to treat the contract as repudiated is no more than statutory shorthand for the right to terminate,[82] but this is far from being so, as the case of *Lombard North Central plc v Butterworth*[83] clearly demonstrates. This case involved a hire purchase agreement for the lease of a computer. Clause 2 of the agreement made prompt payment of instalments of the essence. Clause 5 allowed the lessor to terminate the agreement if the lessee failed to pay instalments when due. Clause 6 allowed the lessor in the event of termination to recover not only the outstanding arrears of rental but also a sum in respect of future rentals up to the stipulated end of the lease, together with damages for costs and expenses. The lessee fell behind in his payments and the lessor, having terminated the agreement and recovered the goods, sought to enforce clause 6. The lessee argued that this clause was unenforceable as a penalty. He also argued, on the basis of the previous decision of the Court of Appeal in *Financings Ltd v Baldock*,[84] that the lessor having exercised an express power of termination in the agreement should recover no more than the arrears outstanding at the date of the termination. But the Court of Appeal rejected the lessee's argument, and held that the lessor was entitled to recover the full sum due under the clause. It was conceded by the court that the conduct of the lessee taken in isolation was not sufficient to amount to repudiation, and that in the absence of a repudiatory breach the disputed clause was penal in that it obliged the lessee to pay the same sum irrespective of the seriousness or triviality of the breach committed. However, they went on to say that the effect of clause 2 making time of the essence was that the lessor could recover damages on the footing of a repudiatory breach irrespective of whether such breach had actually

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Freeth v Burr (1874) LR 9 CP 208; *Sale of Goods Act 1979*, s. 31(2); compare *Borrowman, Phillips and Co v Free and Hollis* (1878) 4 QBD 500, and see Beale, *Remedies for Breach of Contract* (London: Sweet & Maxwell, 1976) at 2.

79 S. 11(1).

80 See generally Chalmers, *The Sale of Goods Act 1893* (London: W Clowes and Sons, 1894) at 164-168.

81 *Supra* note 59.

82 Bridge, *supra* note 74 at 869-870.

83 [1987] 1 QB 527.

84 [1963] 2 QB 104.

occurred. In the words of Nicholls LJ, with whom the other members of the court concurred[85]:

> I must now consider … [the] submission advanced by the plaintiff that, time of payment having been made of the essence by this provision, it was open to the plaintiffs, once default in payment of any one instalment on the due date had occurred, to treat the agreement as having been repudiated by the defendant, and claim damages for the loss of the whole transaction, even though in the absence of this provision such a default would not have had that consequence. On this, the question which arises is one of construction: on the true construction of the clause, did the 'time of the essence' provision have the effect submitted by the plaintiffs? In my view, the answer to that question is 'Yes'.[86]

He added that though there was no practical difference whatever between an agreement containing an express power of termination for failure to pay instalments on time and one making time of the essence, the law allowed damages for total failure of performance in the second case but not the first.[87]

Now all of this is highly unsatisfactory, as Nicholls LJ himself conceded. First of all, it allows the party in default to be deprived of the protection given by *Financings v Baldock* by a mere trick of draftsmanship.[88] Secondly, there is no reason in principle why allowing a party to terminate performance for breach of an essential time stipulation should automatically carry with it a particular measure of damages; the right to terminate and the right to damages are separate remedies and raise separate issues.[89] Thirdly, the distinction drawn by Nicholls LJ draws the line in the wrong place. There is nothing magical about saying that time is of the essence. An agreement making time of the essence is not merely practically the same as one containing an express power of termination: it *is* one containing an express power of termination. In both cases, the parties have agreed that the obligation of one of them to perform is to depend on timely performance by the other; discharge here is by way of failure of condition. But where a party terminates for repudiatory breach the rationale is that he or she is not getting the benefit of the contract; discharge here is for failure of consideration. All in all, the doctrine of constructive repudiation by breach of condition is one that does no credit to the law. As we have seen, the foundations on which it rests are decidedly shaky. The sooner it is eradicated from the law, the better it will be.

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85 [1987] 1 QB 527 at 535 (Mustill LJ) and 547 (Lawton LJ).

86 *Ibid.* at 546.

87 *Ibid.*

88 *Ibid.*; *Morris v Robert Jones Investments Ltd* [1994] 2 NZLR 275 at 278 (Hardie Boys J).

89 This was made clear by Diplock LJ (as he then was) in *Financings v Baldock* itself; see [1963] 2 QB 104 at 120-121; just because all repudiatory breaches give rise to a right to terminate does not mean that all breaches that give rise to the right to terminate are repudiatory. For the distinction between repudiation on the one hand and breach giving rise to the right to terminate on the other. see also *Lessors (Aust) Pty v Westley* [1964-5] NSWSR 2091; *Honner v Ashton* (1979) 1 BPR 9478 at 9489-93 (Mahoney JA); *Shevill v Builders Licensing Board* (1982) 149 CLR 620 at 625-626 (Gibbs CJ); *Woodfactory Pty Ltd v Kiritos Pty Ltd* (1985) 2 NSWLR 105 at 144-145 (McHugh JA); *Morris v Robert Jones Investments Ltd* [1994] 2 NZLR 275 at 277(Hardie Boys J). For a general discussion of the relationship between damages and the right to terminate see Carter, "The Effect of Discharge of a Contract on the Assessment of Damages for Breach or Repudiation" (1988) 1 Journal of Contract Law 113, 249.

In sum, though the concept of timely performance as a promissory condition marks a development away from the older concept of timely performance as a condition precedent, the changes involved have not by any means been for the better. Whether the changes were necessary, and whether they are now too firmly embedded in the law to be reversed, are matters to which we shall return in the final section.

V. Time of the Essence as a Bar to Specific Performance

We must now turn to the traditional equitable doctrine whereby time is said to be of the essence in cases where specific performance is refused to a party who is guilty of delay. This is a doctrine that can only be understood in the light of history, and a good starting point is the 1802 case of *Lennon v Napper*,[90] where Lord Redesdale commented on the jurisdiction of equity to relieve against the strict enforcement of time stipulations, using the following words:

> Courts of equity … have enforced contracts specifically, where no action for damages could be maintained, for at law, the party plaintiff must have strictly performed his part, and the inconvenience of insisting upon that in all cases, was sufficient to require the interference of courts of equity. They dispense with that which would make compliance with what the law requires oppressive: and in various cases of such contracts, they are in the constant habit of relieving the man who has acted fairly, though negligently. Thus in the case of an estate sold by auction, there is a condition to forfeit the deposit, if the purchase be not completed within a certain time; yet the Court is in the constant habit of relieving against the lapse of time: and so in the case of mortgages, and, in many instances, relief is given against mere lapse of time, where lapse of time is not essential to the substance of the contract.[91]

It should be noted that this jurisdiction of equity, which was generally confined to the conveyancing context, did not involve interpreting time stipulations in a different way from that which was used by the common law.[92] Rather, it sought to relieve the party in default by restricting the remedies available to the innocent party. This is did in two ways. First of all, whatever the position may have been at common law, the courts of equity were prepared to grant a decree of specific performance to a party who was ready to proceed to completion even though he had failed to observe the set completion date.[93] Secondly, a "common injunction" could be granted to prevent the other party bringing an action at law on the basis that the contract had been lawfully terminated.[94] This difference of approach was sometimes summarised by saying that time was generally of the essence at common law but not in equity.[95]

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90 (1802) Sch & Lef 682.

91 *Ibid*. at 684-685.

92 *Parkin v Thorold* (1852) 16 Beav 59 at 66-67 (Lord Romilly MR)

93 *Seton v Slade* (1784) 7 Ves J 265.

94 As in *Hearne v Tenant* (1807) 13 Ves 287 (action for ejection); *Levy v Lindo* (1817) 3 Mer 84 (action for return of deposit).

95 See further Maitland, *supra* note 9 at 307.

However, though the attitude of equity was traditionally[96] less strict than that of the common law, relief would not be granted where the intention of the parties[97] or the surrounding circumstances[98] showed that timely performance was important. In these cases, time was said to be of the essence in equity as well as at common law. In such cases, equity would refuse to intervene, the parties being left to their position at common law. This meant that while time might often be of the essence at common law but not in equity, the converse could never be the case. Equity proceeded by granting relief against the harshness of the common law, so if time was not of the essence at common law to begin with, there was nothing for equity to relieve against.

Up to 1873, law and equity were administered in separate courts, but following the *Judicature Act* of that year, a unified Supreme Court was set up with full jurisdiction over both areas. At the same time it was provided by section 25(7) of the *Judicature Act*, and later by section 41 of the *Law of Property Act 1925*, that stipulations in contracts, as to time or otherwise, which would not prior to the passing of the *Judicature Act* have been deemed to be or to have become of the essence, should henceforth receive in all courts the same construction and effect that they would have had in equity. The precise effect of this provision was unclear,[99] but it was said by the House of Lords in *Stickney v Keeble*[100] that the crucial question was still whether the party in default would have been given a decree of specific performance. In the words of Lord Parker:

> If since the Judicature Acts the court is asked to disregard a stipulation as to time in an action for common law relief, and it be established that equity would not under the then existing circumstances have prior to the Act granted specific performance or restrained the action, the section can, in my opinion, have no application, otherwise the stipulation in question would not, as provided in the section, receive the same effect as it would prior to the Act have received in equity.[101]

It was not until the decision of the House of Lords in *United Scientific Holdings v Burnley Borough Council*[102] that any real attempt was made to analyse how the

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96 Whether it actually was less strict in practice is a moot point. Even in the field of conveyancing, cases such as *Lang v Gale* (1813) 1 M & S 111, *Stowell v Robinson* (1837) 3 Bing NC 928 and *Sansom v Rhodes* (1840) 6 Bing NC 261 indicate that time was not always of the essence at common law. In the same way, cases like *Mackreth v Marlar* (1786) 1 Cox 259, *Newman v Rogers* (1793) 4 Bro CC 391 and *Lloyd v Collett* (1793) 4 Bro CC 469 demonstrate a fairly strict approach to time by the courts of equity. The crucial point is not that the common law was invariably stricter than equity in this context, but that it was assumed to be so by the Chancery lawyers: see Maitland, *ibid*. In these cases equity always proceeded on the basis that time was of the essence at common law; indeed, in cases such as *Seton v Slade* (1784) 7 Ves J 265 and *Radcliffe v Warrington* (1806) 12 Ves J 326 specific performance was granted despite the other party having previously sued successfully at law on the basis that the contract had been validly terminated.

97 *Reynolds v Nelson* (1821) 6 Madd 18; *Hipwell v Knight* (1835) 1 Y & C Ex 400; *Hudson v Temple* (1860) 30 LJ Ch 251.

98 This might be the case where the property sold was of a wasting nature, or subject to fluctuations in value: see *Newman v Rogers* (1793) 4 Bro CC 391 (reversion); *Withy v Cottle* (1823) Turn & R 78 (annuity); *Doloret v Rothschild* (1824) 1 Sim & St 590 (government stock); *Coslake v Till* (1826) 1 Russ (public house); *Carter v Dean and Chapter of Ely* (1835) 7 Sim 211 (lease).

99 See Lindgren, *Time in the Performance of Contracts*, 2nd ed. (Sydney; Melbourne: Butterworths, 1982) at 16 *et seq*.

100 [1915] AC 386.

101 *Ibid.* at 417.

102 [1978] AC 904.

equitable rules as to time stipulations fitted into the overall scheme of contract law. The issue in the case, which involved two consolidated appeals, was whether failure to keep strictly to the timetable laid down in a rent review clause deprived the landlords of their right to have the rent reviewed, and consequently of their right to charge an increased rent during the period up to the next review date.[103] The landlords sought to rely on section 41 of *the Law of Property Act 1925*,[104] but it was argued by the tenants,[105] and accepted by the Court of Appeal,[106] that the clauses in question were in the nature of a unilateral option,[107] that this was a case in which the equitable doctrines as to time had no application, and that time was accordingly of the essence. On appeal to the House of Lords, it was held that the clauses were not true options,[108] that section 41 was not to be unduly restricted in its application,[109] and that the observations of Lord Parker in *Stickney v Keeble* were to be read as applying only to the facts of that particular case.[110] What is of special interest in the present context is Lord Simon's attempt to analyse the equitable rules relating to time stipulations within the framework of common law doctrine. Pointing out that the aim of the *Judicature Act* of 1873 was to reconcile the differences between common law and equity so that the two systems could form a single coherent code,[111] Lord Simon went on to say:

> The law may well come to inquire whether a contractual stipulation as to time is (a) so fundamental to the efficacy of the contract that any breach discharges the other party from his contractual obligations ("essence"), or (b) such that a serious breach discharges the other party, a less serious breach giving rise to damages (if any) (or interest), or (c) such that no breach does more than give a right to damages (if any) (or interest) ("non-essential"). If this sort of analysis falls to be made, I see no reason why any type of contract should, because of its nature, be excluded.[112]

If we follow Lord Simon's analysis, there is no longer any need to distinguish between the common law and equity in their approach to time stipulations. After all, as we have argued in the previous section,[113] whether timely performance is, in Lord Simon's words, "so fundamental to the efficacy of the contract that any breach discharges the other party from his contractual obligations" is ultimately a question of what the parties intended. If the intention was to make one party's obligations contingent on timely performance by the other, and that contingency has not materialised, it is logically hard to see any room for a decree of specific performance: in effect, the court would be saying that the party in question was not bound to perform whilst at the same time granting a decree of specific performance

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103 *Ibid*. at 923.
104 *Ibid*. at 908, 911.
105 *Ibid*. at 916-921.
106 *Ibid*. at 923-924.
107 See *supra* notes 43-54.
108 [1978] AC 904 at 930-934 (Lord Diplock), 937-940 (Viscount Dilhorne), 944 (Lord Simon), 951 (Lord Salmon) and 959 (Lord Fraser).
109 *Ibid*. at 925-927 (Lord Diplock), 937 (Viscount Dilhorne), 944 (Lord Simon), and 957 (Lord Fraser).
110 *Ibid*. at 926 (Lord Diplock), 937 (Viscount Dilhorne), 944 (Lord Simon), and 957 (Lord Fraser).
111 *Ibid*. at 943; see also at 924-925 (Lord Diplock), 949 (Lord Salmon), and 957 (Lord Fraser).
112 *Ibid*. at 945.
113 See *supra* notes 66-73.

to compel him or her to do just that. For this reason since *United Scientific Holdings v Burnley Borough Council*, the English courts at any rate have denied the possibility of equitable relief to a party in breach of an essential time stipulation.[114] Courts in Australia however have taken a more relaxed view, and have continued to grant such relief in exceptional cases on the basis that courts of equity will not allow a contracting party to exercise his or her legal rights in an oppressive and unconscionable way.[115] To this extent in Australia, if not in England, time may be of the essence at common law but not in equity.

Of course, this does not mean even in England that the common law and equitable remedies for delay are now identical in all cases. In particular, the mere fact that time is not of the essence at common law does not automatically give the defaulting party the right to a decree of specific performance, as there may be other reasons why that remedy is not available in the given case. The attitude of the English courts can now best be expressed by saying that the issue should be approached in two stages. The first question is one of construction: was time intended to be of the essence in the sense that failure by the party in default to perform on time amounted to a breach of condition? If so, the innocent party is discharged from his or her primary obligations under the contract, and there can be no question of a decree of specific performance. If time was not intended to be of the essence in this sense, the innocent party is not discharged, and we must pass on to the second question, which concerns the remedies available to the party in default. Whether these remedies include a decree of specific performance will obviously depend on the circumstances of each individual case.[116]

VI. Time Made of the Essence by Notice

The fifth and final way in which time is said to be of the essence is where it has been made so by notice. This is the procedure, most commonly found in the conveyancing context, whereby in cases of undue delay the innocent party serves a notice on the party in default setting a deadline for performance. Provided that the notice has been validly served, time is then said to be of the essence with regard to the date specified, and the innocent party can then terminate performance if the deadline is not met.[117]

This procedure has its roots in the old equity jurisdiction with regard to time stipulations. As we have seen in the previous section,[118] the courts of equity took a

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[114] *The Scaptrade* [1983] 2 AC 694; *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514.

[115] In particular, specific performance has been granted to a party in breach of an essential time stipulation in order to prevent forfeiture of his or her equitable proprietary interest: see *Legione v Hateley* (1983) 152 CLR 406; *Stern v McArthur* (1988) 165 CLR 489; *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 201 ALR 359; *Romanos v Pentagold Investments Pty Ltd* (2003) 201 ALR 399; see generally Nicholson, "Relief against Forfeiture in Australia" (1990) 106 Law Q. Rev. 39; Heydon, "Equitable Aid to Purchasers in Breach of Time- Essential Conditions" (1997) 133 Law Q. Rev. 385; Abedian & Furmston, "Relief against Forfeiture for Breach of an Essential Time Stipulation in the Light of *Union Eagle Ltd v Golden Achievements Ltd*" (1997-98) 12 Journal of Contract Law 189. There is an element of circularity here, for if the party concerned is in breach of an essential time stipulation, he or she has on Lord Simon's analysis no equitable proprietary interest to protect in the first place: Carter, "Problems in Enforcement" (1993) 6 Journal of Contract Law 1.

[116] *Amherst v James Walker Goldsmith and Silversmith Ltd* [1983] Ch 305 at 315 (Oliver LJ).

[117] This procedure is discussed more fully by the present author in the article "In the Contractual Last Chance Saloon: Notices Making Time of the Essence" (2004) 120 Law Q. Rev. 137.

[118] See *supra* notes 90-95.

more relaxed attitude to time than did their common law counterparts. In particular, even where time was of the essence at common law, they would give relief to the party in default, provided that he or she was still ready and willing to perform the contract. However, the courts would refuse to grant such relief where the delay was so protracted as to indicate that the contract had been "abandoned"[119]—that is to say, that the party in default was no longer interested in performing it. Such abandonment might be indicated either by protracted delays in performance[120] or by laches—that is to say, by undue delay in coming to the courts for relief.[121]

This was all very well so far as it went, but how was one to tell whether the delay in any given case was enough to amount to abandonment? The answer was to serve a notice warning the other party of the default and setting a reasonable deadline for performance. If the deadline was not met, it would be taken as indicating abandonment of the contract by the party in default.[122] It is this practice that evolved into the notice making time of the essence with which we are now familiar.[123]

The authorities establish a number of requirements for the valid service of a notice of this sort. Thus, the party serving the notice must show that he or she is able, ready and willing to perform the contract,[124] and that the other party is guilty of undue delay;[125] the notice must state clearly what needs to be done,[126] must give the recipient a reasonable opportunity to do it,[127] and must give due warning of what the consequences will be if it is not done.[128] These matters have been discussed fully elsewhere,[129] and need not concern us in the present context. What is of interest is how this procedure ties in with what we have previously been discussing. What is the difference between saying that time has been made of the essence by notice and saying that it was of the essence to begin with?

At first sight, the idea that time can be made of the essence by notice in this way seems entirely contrary to principle. As we have seen, where time is of the essence to begin with—in whatever sense—it is because this was the intention of the parties at the time when the contract was made. Normally either time is of the essence or it is not; the status of a contractual term cannot be altered unilaterally by one of the parties.[130] So how can time be made of the essence by notice without doing violence to this fundamental principle?

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119 *Lloyd v Collett* (1793) 4 Bro CC 469.

120 *Harrington v Wheeler* (1799) 4 Ves J 685; *Radcliffe v Warrington* (1806) 12 Ves J 326.

121 *Spurrier v Hancock* (1799) 4 Ves J 667; *Heaphy v Hill* (1824) 2 Sim & St 29.

122 In *Reynolds v Nelson* (1821) 2 Madd 18 at 26 Sir John Leach V-C left open the question whether time could be made essential by subsequent notice in this way, but in *Taylor v Brown* (1839) 2 Beav 180 at 183 the validity of the procedure was affirmed by Lord Langdale MR.

123 See Edward Fry, *A treatise on the specific performance of contracts* (London: 1856) at 318.

124 *Re Barr's Contract* [1956] Ch 551 at 556 (Danckwerts J).

125 *Green v Sevin* (1879) 13 Ch D 589.

126 *Babacomp v Rightside Properties Ltd* [1973] 3 All ER 873.

127 *Ajit v Sammy* [1957] 1 AC 255.

128 *Balog v Crestani* (1975) 132 CLR 289; *Morris v Robert Jones Investments Ltd* [1994] 2 NZLR 275.

129 *Supra* note 117.

130 *Green v Sevin* (1879) 13 Ch D 589 at 599 (Fry J); *Raineri v Miles* [1981] AC 1050 at 1085-1086 (Lord Edmund-Davies); *Behzadi v Shaftesbury Hotels* [1992] Ch 1 at 12 (Nourse LJ) and 24 (Purchas LJ); *Re Olympia and York Canary Wharf (No 2)* [1993] BCC 159 at 171-173 (Morritt J).

The solution to this conundrum was set out by Lord Simon in the *United Scientific Holdings* case.[131] There Lord Simon analysed the procedure in terms of repudiation, saying:

> The notice operates as evidence that the promisee considers that a reasonable time for performance has elapsed by the date of the notice and as evidence of the date by which the promisee now considers it reasonable for the contractual obligation to be performed. The promisor is put on notice of these matters. It is only in this sense that time is made of the essence of a contract in which it is previously non-essential. The promisee is really saying, 'Unless you perform by such-and-such a date, I shall treat your failure as a repudiation of the contract.'[132]

Lord Simon's analysis deals very well with the problem stated above, in that it avoids any suggestion of an alteration in the original status of the terms of the contract. It also ties in remarkably well with the original analysis of the procedure in the courts of Equity, in which as we have seen,[133] failure to comply with the notice was taken as evidence that the contract had been abandoned by the party in default. It is perhaps rather unfortunate that the procedure us called "making time of the essence", for the way in which the contract is discharged in these cases is very different from that where time was of the essence from the outset. Where time is of the essence from the outset, discharge is by failure of condition; the innocent party only agreed to perform on condition that timely performance was rendered by the other party, and this contingency has not come about. Where time is made of the essence by notice, discharge is by failure of consideration; the party in default still not having performed despite having been given one last chance to do so, the innocent party is entitled to conclude that performance will never be forthcoming, and that the expected benefit from the contract will therefore not materialise. However this may be, the label is now probably too well established in the law to be changed even in the interests of clarity.

VII. Some Conclusions

To what extent do these insights help to simplify our understanding of the law? Three suggestions can be made by way of conclusion.

First of all, the law would be clearer and more coherent if it were borne in mind that the question whether time is of the essence is a question about whether there is a right to refuse performance, either of a particular obligation or of the contract as a whole. As *Raineri v Miles*[134] has shown, it is not a question about whether there was an obligation to perform on a certain day. Nor should it be a question about the quantum of damages. *Lombard North Central plc v Butterworth*[135] notwithstanding, the right to terminate performance and the right to damages are distinct issues, and should surely be treated as such.[136]

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131 *Supra* note 102.
132 [1978] AC 904 at 906.
133 See *supra* notes 119-123.
134 [1981] AC 1051.
135 [1987] QB 527.
136 See the comments of Diplock LJ in *Financings v Baldock* [1963] 2 QB 104 at 120-121.

Secondly, leaving aside the anomalous procedure whereby time is made of the essence by notice, the question whether time is of the essence is as we have seen one which depends on the intention of the parties at the time when the contract was made. Though a wide variety of factors may be relevant in determining what that intention was, including the importance of timely performance within the context of the contract, the basic issue for the court has to be whether the promisor's obligation to perform was intended to be conditioned on the timely occurrence of some event, be that an external event or something to be done by the promisee. In other words, though failure of consideration is an important factor, the question is ultimately one of failure of condition.[137]

Thirdly, whatever the historical position may have been, it is surely no longer helpful in this context to talk about time being of the essence at common law but not in equity. Whether or not it is accurate, even in 2004, to say that law and equity generally have been "fused" into a single system is neither here nor there.[138] Nor is it necessary to take sides on whether the Australian courts are right to grant relief against forfeiture in cases where time would otherwise be of the essence.[139] The question in the present context is whether we still have to posit the logical absurdity of a court wearing its equity hat solemnly enforcing the performance of an obligation the existence of which it does not recognise wearing its common law hat. It is hard enough trying to understand one set of rules relating to time: do we really need two?

Though the issue of delay in performance is an important one, and has often been litigated in the courts, the law on the subject has never been easy to set out or to understand. Fifty years ago, Samuel Stoljar quoted Corbin's criticism of academics and judges alike for the inadequate terminology and slipshod analysis used in discussing this issue.[140] The question whether time is of the essence in any given case will often not be easy to determine, but this paper may make it easier to see what the question means in the first place.

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[137] See *supra* notes 74-75.

[138] See Burrows, "We do this in Common Law and that in Equity" (2002) 22 Oxford J. Legal Stud. 1.

[139] *Supra* note 115. It is perhaps worth pointing out in this context that the common law itself recognises that the right to terminate performance for breach of condition is not absolute; for instance it can be lost by such factors as affirmation, acceptance, or waiver. So whilst the Australian approach derives from the old common law/equity dichotomy, it need not be dependent on it.

[140] Stoljar, "Untimely Performance in the Law of Contract" (1955) 71 Law Q. Rev. 527.