Spilt Ink? A Critique of the English Law of Classification of Contractual Terms and Repudiatory Breach

Bertilla Chow*

Abstract—This article discusses the trifurcation of promissory terms under English contract law into conditions, warranties and innominate terms, and the seminal test in *Hong Kong Fir Shipping v Kawasaki Kisen Kaisha* for determining whether a breach of an innominate term is repudiatory. In contending that the law requires reform, this paper argues that it: (1) Fails to adequately uphold party intention; (2) Unduly favours the breaching party by compromising sanctity of promise for sanctity of contract; and (3) Fails to deliver adequate certainty. This paper therefore advocates for abolition of the trifurcation, suggesting a two-part reform in its place.

* University College London. I am very grateful to Professor Ben McFarlane and the editorial team of the Oxford University Undergraduate Law Journal for their comments on earlier drafts. Any errors and omissions remain my own.

Introduction

A contract's duration is generally more exciting than its demise; parties accordingly spend little time considering the latter, necessitating a robust default regime to govern the gap. This paper focuses on termination generated by breach of contract. Any failure to perform is a breach, but only certain breaches are repudiatory; in turn, a repudiatory breach entitles the non-breaching party to terminate the contract.[1]

This paper is divided into four sections: Part 1 outlines the law on repudiatory breach; Part 2 then expounds the three grounds on which the current law is deficient (namely its failure to uphold party intentions, its choice to promote sanctity of contract at the expense of sanctity of promise, and its uncertainty); Part 3 proposes reforms which are designed to address the issues previously identified; and Part 4 concludes with the message that reforms are both possible and desirable.

1. The Current Law

Under the common law regime, all contractual terms are *ex ante* classifiable into (1) conditions, (2) warranties, or (3) innominate terms.[2] Whether a breach is repudiatory depends on the term's classification:

---

[1] If he elects to terminate the contract, the contract is terminated from the point when he elected to terminate. In contrast to being void *ab initio*, which operates such that it is as if the contract was never entered into, termination after a breach means that all primary obligations under the contract up until the point of termination will remain enforceable.

[2] This paper focuses on the common law regime of termination for breach, which is the residual regime governing cases where (1) no statutory regime - e.g. Sale of Goods Act 1979, Consumer Rights Act

1. Conditions: *any* breach of a condition is repudiatory, however minor its consequences may be (note, however, that courts are reluctant to find a right to terminate where the breach is merely trivial or 'excessively technical').[3]

2. Warranties: generally, *no* breach of a warranty is repudiatory, however severe the consequences of the breach may be. [4] The non-breaching party will still have an action sounding in damages.

2015 - is applicable (if there were, the statute would govern), or (2) the contract has not provided for an express right to terminate (if it had, the right to terminate would be a contractual right, rather than a common law right). This distinction was noted in *C&S Associates v Enterprise Insurance* [2015] EWHC 3757 (Comm) (Males J). If a non-breaching party seeks to terminate, he should be clear on which of these rights he is basing his termination; if he chooses the contractual right, then he will not be entitled to expectation damages under common law: *Phones 4U Ltd (in administration) v EE Ltd* [2018] EWHC 49 (Comm). As to whether contractual rights should exclude the common law right, this is out of the scope of this paper, but there is an ongoing debate: see Andrew Archer, 'Contractual termination rights and the concurrent exercise or non-exercise of common law termination rights - caught between the Scylla and Charybdis?' (2017) 33(5) Const. L.J. 313.

[3] *Reardon Smith Line Ltd v Hansen-Tangen (The Diana Prosperity)* [1976] 3 All E.R. 570 (HL) 576 (Lord Wilberforce). Within the sale of goods context, see also Sale of Goods Act 1979 s 15A, which provides that the buyer would not have the right to reject goods by reason of breach where the breach is 'so slight that it would be unreasonable for him to reject them'.

[4] This may be a simplistic view of the concept of warranties; Mance LJ's *obiter* statements in *Friends Provident Life & Pensions Ltd v Sirius International Ins* [2005] EWCA Civ 601 may be seen as tentative and indirect acknowledgment that, if the consequences of a breach of a warranty is sufficiently serious, the non-breaching party may still be entitled to terminate. However, 'the weight of authority supports the continued existence of the threefold division of contractual terms': see Edwin Peel, *Treitel on the Law of Contract* (14th ed, Sweet & Maxwell 2015) 18-051.

3. Innominate terms: the court will consider the consequences of the breach. The breach will be repudiatory if it 'deprives [the non-breaching party] of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain'.[5] It is possible to breach innominate terms in a range of different ways, some causing great harm to the non-breaching party and others causing negligible harm.[6] However, any breach generates an entitlement to claim (at least nominal) damages.

Thus, there are two logically distinct questions that must be asked when considering whether a breach of contract is repudiatory:

1. *Classification*: Is the term a condition, warranty or innominate term?

2. *Repudiatory quality*: Is a breach of that term going to be repudiatory?

Whilst the first question can, at least in theory, always yield an *ex ante* answer (in that it is always possible to determine the term's classification before a breach ever occurs), the same cannot be said for the second. The answer for the second question will only ever be *ex ante* if the breach is of a term that is either a condition, always repudiatory, or warranty, never

[5] *Hongkong Fir Shipping Co. Ltd. v Kawasaki Kisen Kaisha Ltd.* [1962] 2 Q.B. 26, 66 (Diplock LJ).

[6] 'If the stipulation is one, which upon the true construction of the contract the parties have not made a condition, and breach of which may be attended by trivial, minor or very grave consequences, it is innominate': *Bunge Corp v Tradax Export SA* [1981] 1 W.L.R. 711 (HL) 717 (Lord Scarman).

repudiatory.[7] Where the term is innominate, the answer to the question will instead be *ex post*. It is impossible to know *ex ante* whether the breach of an innominate term is repudiatory as this question turns on the consequences that flow from the breach.

It should also be made clear that, following a repudiatory breach, is it open to the non-breaching party to *discharge* the contract. The non-breaching party may then elect to either 'accept' the breach (i.e. terminate the contract) or affirm the contract (i.e. the contract remains on foot, and he waives his right to terminate).[8] This paper is concerned with the situation where, if a breach is repudiatory (i.e. the non-breaching party has a right to terminate), he will always elect to exercise this right.

2. Issues with the current law

The current law of repudiatory breach is flawed on three grounds.

A. The law fails to adequately uphold the intentions of the contracting parties

I. The importance of upholding the parties' intentions

Contract law is an institution which has as its jurisprudential basis respect for the 'autonomy of the will of the parties'.[9] The need to uphold the intentions of the contracting parties is both a necessary part and a natural consequence of this foundation. Within the context of termination for breach, respecting the parties' intentions means that courts should not

[7] However, see (n 5).
[8] *Flanagan v Liontrust Investment Partners LLP* [2015] EWHC 2171 (Ch).
[9] *Darlington Borough Council v Wiltshier Northern Ltd.* [1995] 1 W.L.R. 68 (CA) 76E (Steyn LJ).

only uphold the substantive intention of the parties in relation to contractual *terms* (i.e. 'the parties agreed term X under the contract'), but also the *importance* of such terms (e.g. 'the parties agreed that term X under the contract is of the essence'). As will be examined within this section, the parties' intention in relation to *terms* relates to the 'classification' question, whereas their intention regarding *importance* relates to the 'repudiatory quality' question.

In relation to the 'classification' question, the High Court of Australia put the point thus: 'it is the common intention of the parties, expressed in the language of their contract […] that determines whether a term is "essential", so that any breach will justify termination.'[10] In this way, addressing the 'classification' question will be straightforward in situations where the parties have clearly labelled the breached term as a condition/warranty, *and* the court adheres to such labels.[11] However, issues concerning parties' intention become more apparent where the breached term has been classified as an innominate term; the 'repudiatory quality' question becomes relevant in these cases. The critique below, centred around the failure to uphold parties' intention, therefore relates not to the 'classification' question, but to the 'repudiatory quality' question.[12]

---

[10] *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* [2007] HCA 61 [48].

[11] Note the analysis under section II.3.2 of this paper however, which demonstrates that courts do not always adhere to such labels.

[12] Although note that, while this paper does not criticise the 'classification' question within this section (i.e. parties' intention), it will criticise this question under a later section for failing to achieve sufficient certainty; please see analysis regarding *Schuler A.G. v Wickman Machine Tool Sales* [1973] 2 W.L.R. 683 and *Shevill v Builders Licensing Board* (1982) 149 CLR 620, at section II.3.2 below.

In relation to the 'repudiatory quality' question, the intention to unravel legal relations ought to be 'the starting point'[13] in the court's decision as to where a contractual term falls along the condition/innominate term/warranty spectrum.[14] This intention should be as evinced at the point of contract[15] and measured against '[the] benefit the injured party was intended to obtain from performance of the contract'.[16]

II. How the law fails to adequately uphold parties' intention

The current law on repudiatory breach fails to effectively uphold parties' intentions. The courts' approach to the 'repudiatory quality' question does not focus sufficiently on what the parties objectively intended for the non-breaching party to be entitled to expect under the contract. Instead, the courts sometimes fail to focus on relevant factors and consider irrelevant factors. It is submitted that this focus on intention is both implied by, and

---

[13] *Ampurius Nu Homes Holdings Ltd v Telford Homes (Creekside) Ltd* [2013] EWCA Civ 577 at [51].

[14] Whilst courts tend to uphold the parties' classification of particular terms as conditions (subject to Part II.3.2 of this paper), they tend to defy blanket classifications (i.e. where the contract allows termination for any and all breaches) – e.g. in *Rice (T/A the Garden Guardian) v Great Yarmouth Borough Council* [2000] 6 WLUK 829 (CA), where the contract provided that the Council can terminate the contract should Rice commit 'a breach of any of its obligations'. The Court of Appeal was deterred from construing the term literally by the fact that this clause, in effect, makes every obligation under the contract a condition, even trivial obligations.

[15] It is 'well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made': *Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd.* [1970] A.C. 583 (HL) at 603 (Lord Reid).

[16] *Ampurius Nu Homes Holdings Ltd v Telford Homes (Creekside) Ltd* [2013] EWCA Civ 577 at [51].

necessary under, Diplock LJ's seminal test in *Hongkong Fir v Kawasaki Kisen Kaisha Ltd*.[17] Under this test, the 'repudiatory quality' of an innominate term depends on whether it '(1) deprives [the non-breaching party] of substantially the whole benefit which it was (2) the *intention of the parties as expressed in the contract that he should obtain*' (numbering added). The answering of (1) is logically contingent on first answering (2); this paper, therefore, aspires only to reinstate what was expressed to be a central component of Diplock LJ's formulation.

This lack of focus on intention cuts both ways: courts are given too much room to consider irrelevant factors and too little guidance to give adequate weight to relevant factors. This point can be illustrated using the Court of Appeal's judgment in *Telford Homes (Creekside) v Ampurius Nu Homes Holdings*[18] and the High Court's judgment in *C21 London Estates Ltd v Maurice MacNeill Iona Ltd* [19] as case studies. In both cases, the relevant breaches of innominate terms were held *not* be repudiatory. In *Telford*, the relevant breach was a one-year delay by the developer in developing the non-breaching party's property. In deciding that this breach was not repudiatory, Lewison LJ placed decisive weight on the fact that the full length of the lease under the contract was 999 years: his reasoning was that one year was too negligible a part of 999 years for it to be 'substantially part of the benefit'. In *C21 London Estates*, the parties had entered into two franchise agreements more than a year apart from each other. The breaching party (C21) was persistent in failing to comply with his payment obligations under the first agreement. Even so, the non-breaching party (MMI) chose to enter into a second agreement, without first making it abundantly clear as a term of this agreement that C21 must satisfy his payment obligations under

[17] [1962] 2 Q.B. 26, 66
[18] [2013] EWCA Civ 577.
[19] [2017] EWHC 998.

the first agreement (the 'Guarantee' term). When C21 still failed to pay, MMI served a notice to terminate. In deciding that C21's breach was not repudiatory, Klein J took into account various questions, including whether the breach was deliberate, how small the Guarantee sum was, and that since the breach related to non-payment of money, it was compensable in money.[20]

A common theme across these judgments is the language used to describe the balancing exercise that is being undertaken between different factors. Ambiguous phrases such as 'taking all these matters into account' are used, without clarifying why some factors which appear to have little bearing on the parties' objectively manifested intention should carry more weight than those which do have bearing.[21] This may explain why the reasoning in both these judgments seems to fly in the face of how important the parties likely intended the relevant terms to be. In *Telford*, while it was no doubt important to the parties that the interest in question must be 'as good as freehold' or essentially a permanent lease,[22] this intention could just as easily have been expressed as a 2,000-year lease, or a 800-year lease. Therefore, the question of whether a 1-year delay is 0.1% or any other percentage of the total number of years of an essentially permanent lease is unlikely to be what the parties themselves would have considered important. Equally, in *C21 London Estates*, it is not clear why peripheral questions mentioned above should detract from (or how they should interact with) the central fact that MMI had, as Klein J himself identified, objectively manifested the intention for a breach of the Guarantee term to be repudiatory.

This paper is not concerned with expounding the deficiencies of these judgments, but rather seeks to use these deficiencies to illustrate a point of wider import. The very fact

[20] *ibid* [81].
[21] *ibid* [82].
[22] *Raphael Fishing Company v The State of Mauritius* [2008] UKPC 43.

that the current test can be (and has been) interpreted and applied in such a wide spectrum of ways signals a thematic flaw with the test, namely that it is too open-ended.[23] Indeed, judges themselves have sought to constrict this open-endedness through fractions and percentages; one judge stated that failure to perform 50% of one's obligations is not sufficient for a finding of repudiatory breach,[24] and another declared *obiter* that 2/3 would be sufficient.[25] Such numbers are invariably arbitrary and therefore of little utility in such a fact-specific area of law. By contrast, it is submitted that a sharper focus on the parties' objectively manifested intentions (relating to what the non-breaching party is entitled to receive) would proffer a neater way of constricting the open-endedness. It is submitted that this black-box approach ought to give way to one that is more intention-centric, such that 'sufficiently serious' under the seminal test becomes synonymous with 'sufficiently serious as per the parties' intentions'. This approach is advocated in this paper and implemented in the proposals below. This is preferable for inspiring a less opaque process of weighing different factors, placing more weight on factors that have direct relevance to the parties' objectively manifested intention, and ultimately producing judgments that are more in line with upholding such an intention. As explained earlier, this intention-centric approach leads back to Diplock LJ's seminal test, which refers to the intentions of the contracting parties. This paper therefore aspires merely to refocus judicial

[23] Commentators have observed that judges at different appellate levels can often apply the same test and achieve opposing results: see Chinyere Ezeoke, 'Assessing seriousness in repudiatory breach of innominate terms' (2017) 3 JBL 198, 199.

[24] *Dominion Corporate Trustees Ltd v Debenhams Properties Ltd* [2010] EWHC 1193 (Ch); [2010] N.P.C. 63.

[25] *Playup Interactive Entertainment* [2011] EWHC 1980 (Comm); [2011] Info. T.L.R. 289 at [264].

attention onto what was originally expressed to be a central part of the *Hongkong Fir* formulation.

B. The law compromises sanctity of promise for sanctity of contract

I. The consequences of compromise

Pacta sunt servanda (i.e. that agreements which are legally binding must be performed[26]) is a 'universally agreed principle fundamental to all legal systems'.[27] English contract law considers this maxim largely interchangeable with the phrase 'sanctity of contract'[28] (i.e. placing the emphasis on the non-breaching party honouring his promise by continuing with the contract despite the breaching party's breach). Sanctity of contract insists that, once parties enter into an agreement, they must generally remain steadfast in their commitment to that agreement, even if circumstances change. Within the context of repudiatory breach, sanctity of contract has been employed as a tool to prevent unscrupulous and opportunistic non-breaching parties from being granted the right to use the other party's breach as such an excuse to escape from a bad bargain.[29] However, as will later be

---

[26] Anthony Aust, 'Max Planck Encyclopedia of Public International Law', *Max Planck Encyclopedias of International Law* (2007) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1449> accessed 10 January 2020.

[27] *ibid.*

[28] David H Parry, *The Sanctity of Contracts in English Law* (Stevens & Sons 1959).

[29] '*Pacta sunt servanda*. If he contracts for the supply of that which he thinks serves his interests […] then if that which is contracted for is not supplied by the other contracting party I do not see why, in principle, he should not be compensated […], *subject to the proviso, of course, that he is seeking compensation for a genuine loss and not merely using a technical breach to secure an uncovenanted profit.*': Oliver J in the 'seminal case' of *Radford v De*

discussed, 'sanctity of contract' is not the only possible interpretation of *pacta sunt servanda*; 'sanctity of promise' (i.e. placing the emphasis on the breaching party honouring *his* promise by accurately performing what he promised to perform – and, if he fails, allowing the non-breaching party to terminate) is at least an equally valid interpretation.[30]

The preoccupation of English courts to prevent escapes from bad bargains has encouraged a bias towards the first reading of *pacta sunt servanda*. This, in turn, engendered a lofty threshold for the non-breaching party to satisfy when establishing that a breach of an innominate term is serious enough to be repudiatory (the 'substantiality threshold'). This is a manifestation of the 'anti-termination bias', as coined by Andrews.[31] I will focus below on critiquing the current substantiality threshold for being too high – and therefore too difficult to meet from the non-breaching party's perspective. I will then develop what is intended to be a generally lower and more principled test to *supplement* it, but not to take its place entirely.

II. How the law is biased against the non-breaching party

The breach of an innominate term is only repudiatory if it deprives the non-breaching party of 'substantially the whole

---

Froberville [1977] I WLR 1262, cited with approval in *Giedo van der Garde BV v Force India Formula One Team Ltd (formerly Spyker F1 Team Ltd (England))* [2010] EWHC 2373.

[30] Daniel Friedmann, 'The performance interest in contract damages' (1995) 111(Oct) L.Q.R. 628, 632, commenting on the court's decision to award damages calculated by reference to the non-breaching party's performance interest instead of his expectation interest in *Ruxley Electronics and Construction Ltd v Forsyth* [1995] UKHL 8: 'Needless to say, this development is predicated on the approach that *pacta sunt servanda* and that the plaintiff's performance interest should be respected.'

[31] See also Neil Andrews, 'Breach of contract: a plea for clarity and discipline' (2018), 134 (Jan) L.Q.R. 117, 129.

benefit' under the contract; this is sometimes referred to as the 'root of the contract' test.[32] But how is 'substantial' defined? A more concrete answer can be found by visiting an oft-overlooked aspect of Diplock LJ's judgment in *Hongkong Fir*, where he opines that the test for whether a breach is sufficiently serious to give rise to a right to terminate is the same as the test for whether an event is sufficiently serious to constitute a frustrating event.[33] In other words, breaches of innominate terms can only be repudiatory if the consequences of the breach are at least as serious as an event that qualifies as 'frustrating'. 'Frustrating' events are those which '*so significantly [change] the nature*… of the outstanding contractual rights and/or obligations from what the parties could reasonably have *contemplated* at the time of its execution that it would be *unjust* to hold them to the literal sense of its stipulations in the new circumstances'.[34] It is generally accepted in judicial and academic[35] commentary that this is

[32] *The Nanfri*, 779 (Lord Wilberforce).

[33] *Hongkong Fir*, 69r (Diplock LJ): 'The test whether the event relied upon has this consequence is the same whether the event is the result of the other party's breach of contract or not.'

[34] *National Carriers v Panalpina (Northern) Ltd* [1981] A.C. 675.

[35] The doctrine of frustration is to be applied 'within very narrow limits': *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] A.C. 93, 115; it is 'not to be lightly invoked': *Pioneer Shipping v BTP Tioxide (The Nema)* [1982] A.C. 724, 752. 'There is now a marked judicial reluctance to apply the doctrine [of frustration] in [circumstances where performance had merely become more onerous for the party alleging frustration]': Guenter Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014), Section IV. - Trends Affecting the Development of the Doctrine, 2-037. However, see also Michele De Gregorio, 'Impossible Performance or Excused Performance? Common Mistake and Frustration after Great Peace Shipping' (2005), 16(1) K.L.J. 69: it was argued that, whilst the doctrine of frustration insisted on 'strict' impossibility at its genesis, courts have now significantly relaxed the requirement to be 'diluted' impossibility.

notoriously difficult to satisfy. [36]

Despite the issues with assimilating the tests for frustration and repudiatory breach (which will constitute a major focus of my critique below), it has often been accepted without significant challenge in modern authorities.[37] The Law Commission importantly stated that Diplock LJ's seminal 'deprivation of substantially the whole benefit' formulation is 'so severe a test' that it is in substance 'the same as that for frustration'.[38] It has not been immune from criticism however, most notably from Treitel[39] who pointed to cases in which the facts would satisfy the threshold for repudiatory breach but not that for frustration.[40]

In this vein, two arguments will now be made. First, the current substantiality threshold is too high, as it gives undue weight to one potential reading of *pacta sunt servanda* over the other. This overly high threshold operates unfairly to the detriment of the non-breaching party. Second, the assimilation between the test for frustration and that for discharge by breach

---

[36] Law Commission, *Sale and Supply of Goods* (Law Com No 160, 1987) paras 2.25 and 4.17.

[37] *Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd* [2016] EWCA Civ 982, [78]; *Great Peace Shipping Ltd v Tsavliris Salvage (International)* Ltd [2002] EWCA Civ 140. See also Donal Nolan, '*Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd, The Hongkong Fir* (1961)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Contract* (Hart 2008) 269, 295.

[38] Law Commission, *Sale and Supply of Goods* (n 37)

[39] See Treitel (2014), 5-061. See also Andrews (2018) (n 32). Other common law jurisdictions have also moved towards lower tests: 'serious and substantial' (Australia: *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* [2007] HCA 61), and 'sufficiently serious' (Singapore: *Sports Connection Pte Ltd v Deuter Sports GmbH* [2009] SGCA 22).

[40] *Tamplin SS Co v Anglo-Mexican Petroleum Co* [1916] 2 A.C. 397, and *Tully v Howling* (1877) 2 Q.B.D. 182.

(which contributes to an overly high substantiality threshold in the first place) is grounded in opaque and refutable jurisprudence.

II(a). The current substantiality threshold is unfairly biased against the non-breaching party

It is submitted that the current substantiality threshold gives undue weight to one potential reading of *pacta sunt servanda* (i.e. the 'sanctity of contract' reading[41]) at the expense of another potential reading (i.e. the 'sanctity of promise' reading). The first reading undeniably carries strong normative appeal, since the jurisprudential basis of contracts is rightly their honouring, not unmaking. That being said, a rather radical preference for the second reading of *pacta sunt servanda* can be observed in continental commentators: in keeping with the Kantian notion of the categorical imperative (i.e. that promises must in principle be kept), 'a legal regime should not grant a breaching promisor an option either to perform or to pay damages'[42], as 'the party in breach should not be allowed to buy itself free of a contract that it has violated'.[43] In English law by contrast, the current substantiality threshold for breach promotes sanctity of contract at the expense of sanctity of promise. This is because the assimilation of the tests for repudiatory breach and frustration means that the substantiality threshold is notoriously difficult to satisfy. The difficulty of fulfilling the test means that non-breaching parties are often left only with the inadequate remedy of delayed monetary compensation for relatively serious breaches.

---

[41] 'A very sacred principle': *James Scott & Sons Ltd v R&N Del Sel* (1922) S.C. 592, 596 (Lord Sands).

[42] Shael Herman, 'Specific performance: a comparative analysis: Part 1' (2003) 7(1) Edin. L.R. 5, 11.

[43] *ibid*, quoting Peter Schlechtriem and Ingeborg Schwenzer (eds), *Commentary on the UN Convention on the International Sale of Goods* (Geoffrey Thomas tr, 2nd edn, OUP 1998) 199 (n 3).

A stark illustration of the under-observance of sanctity of promise can be found in *Sabic UK Petrochemicals Ltd v Punj Lloyd Ltd.*[44] Under a construction contract, the contractor was to design, procure and construct a plant. The contractor's deliberate and serious breaches by way of significant delays and missing multiple revised target dates prompted the non-breaching party to terminate the contract. The court acknowledged that 'there were aspects of [the contractor's] conduct which amounted to deliberate decisions not to comply with [the contract]', citing the contractor's instructions to demobilise its sub-contractors as the 'most obvious example'. However, the court nonetheless held that, since the contractor did not display an 'absolute refusal' to perform its side of the contract, the non-breaching party did not have the right to terminate. Regarding the implications of this decision, one commentator remarked that repudiation was difficult to establish if 'there was anyone on site even though the pace of the work was snail-like'.[45] This outcome is baffling for two reasons. First, it requires the non-breaching party to adhere to a contract under which his counterparty has himself failed to adhere to what he promised to perform. Second, it insists that the non-breaching party holds on to the unrealistic hope that his counterparty would someday perform and, when it inevitably becomes unequivocal that he never will (at which point the non-breaching party may have already wasted much time and incurred much expense), insist that he accepts monetary compensation after a drawn-out litigation battle.

The focus in English law on the first reading is lamentable. Whilst this paper does not put the point quite as high as postulating that the second reading of *pacta sunt servanda* is necessarily better than the first, it does postulate that there is no

---

[44] [2013] EWHC 2916 (QB).

[45] David Chappell, *Construction Contracts: Questions and Answers* (2nd edn, Spon Press 2010) 81.

reason why the first is necessarily preferable to the second.[46] Indeed, given that scholars often use *pacta sunt servanda* as shorthand for both readings interchangeably, the ecclesiastical, philosophical and moral underpinnings of the first reading,[47] as well as the celebrated commercial merits of certainty and predictability commonly attributed to it,[48] apply equally to the second reading. A logical and necessary consequence of these readings being diametrically opposing is that the *over-recognition* of the first by English courts has accordingly resulted in an *under-recognition* of the second.[49] This is misguided; sanctity of promise should not be compromised for sanctity of contract.

---

[46] Within the context of contract law generally, the courts have interpreted *pacta sunt servanda* in both ways – see for example *CH Giles & Co Ltd v Morris* [1972] 1 W.L.R. 307, 318 for the first reading, and *Radford v De Froberville* (1977)1270 for the second reading. However, the anti-termination bias inherently favours the first reading, as it favours the preservation of the contractual relationship even when the breaching party has not strictly complied with his obligations.

[47] Roscoe Pound, 'Promise or Bargain?' (1959) 33 Tul. L. Rev. 455, 455: 'From antiquity the moral obligation to keep a promise had been a cardinal tenet of ethical philosophers, publicists, and philosophical jurists.'

[48] Charles Y.C. Chew, 'Changes in approach to unjust contracts effected with financial institutions: a search for certainty or radical reform' (2014) 29(11) JIBLR 672 at 678: 'The question of certainty is closely related to the question of "freedom to contract". Sanctity of contract stresses the need for certainty and predictability which is essential to the efficacy of the transactions in business circles.'

[49] In *Rice v Great Yarmouth BC* [2000] 6 WLUK 829, the contract contained a clause which gave the non-breaching party the right to terminate for 'breach of any of [Rice's] obligations under the contract'. The Court of Appeal held that the word 'any' did not in fact mean 'any at all'; instead, it was construed as an ellipsis for 'any repudiatory breach'. Andrews (2018) (n 37) expressed the concern that 'such construction in favour of the party in default, rooted in a bias against termination, is difficult to reconcile with the principle of freedom of contract.'

II(b). The assimilation between the tests for discharge by frustration and discharge by breach is logically problematic

Diplock LJ's assimilation in *Hongkong Fir* of the tests for discharge by frustration and discharge by breach has perpetrated the anti-termination bias, which in turn has carried through into more modern cases at all levels of the judiciary.[50] It is submitted that Diplock LJ's reasoning behind the assimilation is opaque jurisprudence, the logic of which can be expounded and refuted as follows:

1. There are two potential and mutually exclusive bases behind why the non-breaching party might be relieved of further performance of his obligations when the breaching party commits a repudiatory breach:

    a. *Either* the fact that the event resulting in breach, which destroyed the foundations/purpose of the contract,[51] was caused by the breaching party,

    b. *Or* the fact that the consequences of the breaching event destroyed the foundations/purpose of the contract, without regard to who caused such an event.[52]

---

[50] (n 25).

[51] Imagery adopted from Stephen Smith, *Contract Theory* (OUP 2004), 9.4.1; this is reflective of Diplock LJ's reasoning in *Hongkong Fir*.

[52] *Hongkong Fir* [66] (Diplock LJ): 'This test is applicable whether or not the event occurs as a result of the default of one of the parties to the contract, but the consequences of the event are different in the two cases.'

2. The correct basis is Option (b);[53]

3. Option (b) is the same as the basis underlying why parties may terminate in frustration cases;[54]

4. Therefore, the substantiality threshold for discharge by breach and the test for discharge by frustration must be identical.[55]

This logic can be refuted *a priori*: the distinction between 1(a) and 1(b) is not meaningful, as 1(b) is simply an actor-neutral manner of expressing 1(a). This alleged distinction is equivalent to that between the statements 'this is a cake baked by me', as opposed to 'this is a cake'. This illustrates two points. First, this presents a false dichotomy: 1(a) and 1(b) are not mutually exclusive. Quite the opposite: 1(a) is a *subset* of 1(b). Second, 'this is a cake' is logically identical to 'this is a cake baked by me', save for the removal of a piece of information (i.e. that I was the baker). In Diplock LJ's logic, the removed information is that the breaching party had assumed contractual risk for the occurrence of the breaching event. The key question, therefore, becomes whether this removal is justified. I submit that it is not, since this piece of information constitutes a key differentiator between the two doctrines. In cases of discharge by frustration, the risk of the

---

[53] *Hongkong Fir* [69] (Diplock LJ): '…it is the event and not the fact that the event is a result of a breach of contract which relieves the party not in default of further performance of his obligations…'

[54] Implied by Diplock LJ in this statement: 'The fact that the emphasis in the earlier cases was upon the breach by one party to the contract of his contractual undertakings, for this was the commonest circumstance in which the question arose, tended to obscure the fact that it was really the event resulting from the breach which relieved the other party of further performance of his obligations': *Hongkong Fir* [68].

[55] *Hongkong Fir* [69]r (Diplock LJ): 'The test whether the event relied upon has this consequence is the same whether the event is the result of the other party's breach of contract or not.'

event materialising has ***not*** been assumed by either party:[56]; hence why a statutory scheme for allocation of losses is required in the first place.[57] The event could not be induced,[58] or even have been so much as reasonably foreseeable by the parties .[59] Instead, it must be 'extraneous', such that the courts cannot point their finger at whoever assumed the risk; by definition, no one did.[60] By contrast, in cases of discharge by breach, the finger is pointed at the breaching party, since the risk is internalised into the contract by him assuming the risk of the event materialising. Under (3), the equation between the nature of breach and the nature of frustration is thus artificially produced by wrongly defining breach to be 1(b), to the exclusion of 1(a). If breach were defined to include 1(a), Proposition 3 would not be true. Given that the boundary between the two doctrines relies on this piece of information, its removal requires stronger justification than its proponents provide so far.

These internal inconsistencies translate into injustices within this area of law: the overly high substantiality threshold perpetrated by this logic, which works against non-breaching parties, conversely works to the favour of breaching parties. Holding breaching parties (in termination by breach cases) to the same low standard as defendants (in frustration cases) neglects the fact that breaching parties themselves agreed to assume the risk of the breaching event materialising during contract

---

[56] *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] A.C. 524. See also *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675: the frustrating event must be one for 'which the contract makes no sufficient provision'.

[57] ss1(2) and 1(3) Law Reform (Frustrated Contracts) Act 1943.

[58] *Ocean Tramp Tankers Corp v V/O Sovfracht (The Eugenia)* [1964] 2 Q.B. 226.

[59] *Walton Harvey Ltd v Walker & Homfrays Ltd* [1931] 1 Ch. 274.

[60] *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep. 1.

negotiations. Lowering the substantiality threshold in termination by breach cases is only fair in order to reflect the fact that, especially in commercial contracts, the contract price was likely adjusted in favour of the breaching party to make his assumption of this risk commercially sensible (unlike defendants in frustration cases, since such risks have, by the very definition of frustration, not been allocated or even considered). [61]

Alternatively, frustration is also *a posteriori* fundamentally different from repudiatory breach, such that the non-breaching party in discharge by breach cases should need only to satisfy a lower test than that of frustration. The material difference concerns discharge of obligations: under frustration cases, both parties[62] are discharged of further performance, 'without more and automatically'.[63] By contrast, under termination by breach, the consequences depend on whether the non-breaching party chooses to exercise it; he is entitled to terminate or affirm the contract as he pleases. Given Diplock LJ himself identified that this is an application of the 'fundamental legal and moral rule that a man should not be allowed to take advantage of his own wrong', it seems illogical that the breaching party should be allowed to force the non-breaching party to stay in the contract by virtue of a test that is too difficult for the him to satisfy.

---

[61] This is illustrated by the concept of 'risk premium' in microeconomics, which suggests a positive correlation between the likelihood of a risk materialising and the minimum amount of money that the person assuming the risk would be willing to contract for.

[62] *Krell v Henry* [1903] 2 K.B. 740

[63] *Denny Mott & Dickson Ltd v James B Fraser & Co Ltd* [1944] 1 All E.R. 678, 683. See also *Hirji Mulji v Cheong Yue Steamship Co Ltd* [1926] AC 497.

C. The law fails to provide certainty

I. The importance of certainty in the undoing of contracts

Certainty is a 'constant theme' within English law.[64] Within the law of repudiatory breach, certainty calls for the entitlement of the non-breaching party to exit from the contract upon serious breach, without being impeded by undue obstructions or years of litigation.[65] Even if contracting parties themselves fail to provide for a clear 'exit sign' in the contract, it is submitted that the common law regime, which governs such situations, should still provide a swift, certain exit route for the non-breaching party where it is clear that the term was important enough to him such that, if a reasonable person in his position had known before the point of contracting that the breach would occur, he would not have entered into the contract in the first place (see Step 2b under the 'dual threshold' proposal, discussed later in this paper).

II. How the law fails to deliver certainty

As it stands, English law is inadequate in serving the interests of certainty in cases of termination by breach, as the *ex ante* classification of terms (the 'trifurcation') does not provide as much certainty as is orthodoxically assumed.[66] The

[64] *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] UKHL 12 at [23] (Lord Bingham).

[65] Andrews (2018), 125 (n 37).

[66] See, for example, Tony Weir, 'Contract—the buyer's right to reject defective goods' [1976] C.L.J. 33, 35. He commended the condition/warranty distinction for the certainty it delivers: 'Under the old dispensation, when the right to reject depended on the nature of the term in the contract which was broken, the innocent party simply had to go to the filing-cabinet, consult the contractual document and then decide whether the term broken was a very serious one or not'.

Schuler[67]/*Shevill*[68] line of authority illustrates the argument that the *ex ante* classification of terms as conditions, warranties or innominate terms may, in some cases, breed uncertainty. In these cases, although the contract labelled the term breached as a 'condition' (in *Schuler*), or specified that the breach of the term should be repudiatory (in *Shevill*), the court decided, contrary to these explicit labels, that the non-breaching party should not have the right to terminate. In Lord Reid's judgment in *Schuler*, [69] the parties' express labelling of the term as a condition was assigned a merely *evidential*[70] role (i.e. the court considered the labels as merely one factor in determining whether the term was a condition), as opposed to a *dispositive* role (i.e. the label in itself made the term a condition). In this way, the court in effect created the normative ground necessary to reach a conclusion that *prima facie* appeared contrary to what the parties explicitly expressed in the contract. Armed with the evidential/dispositive distinction, two points can now be made.

Conversely, he condemned the ascendancy of the innominate term under *Hongkong Fir* for '[operating] to reward incompetence and promote inefficiency'.

[67] *Schuler A.G. v Wickman Machine Tool Sales* [1973] 2 W.L.R. 683

[68] *Shevill v Builders Licensing Board* (1982) 149 CLR 620; see also *Esanda Finance Corporation Ltd v Plessnig* (1989) 166 CLR 131, 144.

[69] 'Sometimes a breach of a term gives that option to the aggrieved party because it is of a fundamental character going to the root of the contract, sometimes it gives that option because the parties have chosen to stipulate that it shall have that effect'. See also John Carter, Carter's Breach of Contract (1st edn, Hart 2011), 5-51. Finding support in pre-*Hongkong Fir* case law, the term in question in *Bentsen* was found to be a condition on the ground that it was 'of the utmost importance' to the non-breaching party, rather than the parties having labelled the term to that effect: *Bentsen v Taylor, Sons & Co (No.2)* [1893] 2 Q.B. 274, 282 (Bowen LJ)

[70] Use of the word 'condition' is 'strong… but… by no means conclusive': *Schuler*, 251 (Lord Reid).

First, the trifurcation might *in theory* be certain for being *ex ante*, but that is contingent upon courts *retrospectively* accepting the parties' labelling of certain terms as conditions. The courts did so in some cases,[71] but not in the *Schuler* line of cases, where the courts arguably defied such a label *ex post facto.*[72] This result is 'opaque' and 'uncertain'[73] - if the courts may sometimes give the word 'condition' a merely evidential role, this creates the very uncertainty that the condition/warranty dichotomy purports to prevent. Indeed, it may be possible that courts can 'reverse engineer' terms as innominate terms or warranties,[74] or even decline to find a breach at all,[75] in order to prevent the right to terminate from arising. Even the classic judgment of *Bentsen v. Taylor, Sons & Co. (No.2)* divulged such an inclination. [76]

---

[71] *Arcos Ltd v EA Ronaasen & Son* [1933] A.C. 470; *Union Eagle Ltd v Golden Achievement Ltd* [1997] UKPC 5.

[72] On the one hand, since the parties described terms by seemingly unequivocal labels such as 'condition' and 'any', but the court still held that there was no right to terminate, the court defied the parties' intention. On the other hand, it could also be argued (and the courts in these cases held) that they respected the parties' intention, as the parties probably never intended for these terms to be used as terms of art. Both sides have merit, but the argument being presented here cuts across both arguments since, either way, it is uncertain when the courts will hold that the labels are 'terms of art' and when they will not (whether under the guise of respecting parties' autonomy or otherwise).

[73] Simon Whittaker, 'Termination Clauses' in Andrew Burrows and Edwin Peel (eds), *Contract Terms* (OUP 2007), 283. See also John Randall, 'Express Termination Clauses in Contracts' (2014) C.L.J. 113, 124-126.

[74] *Ritchie v Atkinson* (1808) 10 East 295, 310.

[75] Law Commission, Sale and Supply of Goods, 2.26, noting *Cehave NV v Bremer Handelsgesellschaft mbH (The Hansa Nord)* [1976] Q.B. 44, 62–63 (Lord Denning M.R.); similarly, *Reardon Smith Line Ltd v Hansen-Tangen (The Diana Prosperity)* [1976] 1 W.L.R. 989.

[76] [1893] 2 QB 274, *ibid* 281 (Bowen LJ): '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

Therefore, it would better serve the interests of certainty for the courts to be forthright on the reality that, in fact, they treat most terms (unless the contrary intention is clear) as innominate terms[77], the evidential rather than dispositive role attributed to terms of art in the *Schuler/Shevill* line of authority evincing such an unintuitive inclination. It is conceded that this brings with it its own certainty issues. However, the alternative, at worst, might encourage lay non-breaching parties to believe that apparently clear labels such as 'condition' and 'any' will be automatically treated as dispositive. They may then discover after much litigation that the courts have the power to defy with these labels. Being forthright about this position – one that is unintuitive at best and uncertain at worst – is preferable for being the lesser of two evils.

Second, the discourse of trifurcation tends to obfuscate the point that, ultimately, the most *proximate* question when determining a repudiatory breach is whether the performance of the relevant term is intended (as objectively manifested within the contract) by the parties to be what the non-breaching party is entitled to. Although it might be argued that the current system of trifurcation already answers this question (since conditions are considered to be important to the non-breaching party), the complaint here is instead that the trifurcation is unnecessary, and indeed confusing, to the answering of that question. If the trifurcation did not exist, the court's mind would have been focused on the heart of the matter: whether reasonable people in the parties' position would have considered the term sufficiently important to meet what was essentially the *Hongkong Fir* substantiality threshold. The answering of this question indirectly

---

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.'

[77] *Grand China Logistics Holding (Group) Co Ltd v Spar Shipping AS (The Spa Draco)* [2017] 4 All E.R. 124 at [65], [92] and [93] (Hamblen LJ)

– through the 'lens' of interpreting the words 'condition' or 'any' – does more to obfuscate than to clarify. In this sense, the argument that the concept of 'condition' should be truncated into that of innominate terms is one which engenders conceptual clarity.

3. Proposals for Reform

In order to address the three grounds on which the current law is flawed, this paper proposes the following reforms: the classification question should be eliminated altogether, and the repudiatory quality question should be replaced with a two-stage process. To ensure certainty, an external mechanism can then be introduced in the form of a notice allowing some breaches to be 'promoted' by the non-breaching party from potentially repudiatory to definitely repudiatory.

A. The two-stage process

An intention-centric two-stage process can be introduced to address the failure to uphold parties' intention:

1. The court ascertains the *upper limit of the non-breaching party's legitimate contractual expectation* (i.e. the best that he could possibly have expected) as objectively ascertainable from the contract.[78]

2. The court applies the 'dual threshold' proposal:

    a. Is the current substantiality threshold met?

[78] In other words, this part of the proposal adopts the current English objective approach when determining party intention without modification.

b. If not, then a lower threshold can be pleaded: 'Would a reasonable person in the position of the non-breaching party, taking into account only factors that were reasonably known to the breaching party, still have entered into the contract if he knew that the breaching party would commit the breach in question?' – if not (and the burden of proof is on the non-breaching party), then the right to terminate arises.[79]

The first stage functions similarly to a practice direction: it acts as a funnel that filters out any factors that do not have a bearing on the parties' intention under the contract but allows through factors which do. This stage, it is hoped, will rectify the existing issue of courts failing to adequately protect the expectation interest of the non-breaching party. This stage aims to do so by encouraging the court, whenever it allows itself to be influenced by a certain factor, to make explicit how and to what extent exactly this factor impacts what a reasonable person in the shoes of the non-breaching party could reasonably expect.

This proposal could also be applied to areas such as maritime or real estate, where there are established precedents regarding whether breach of certain terms *always* give rise to the right to terminate.[80] For these industries, this first stage makes

[79] It may be of interest to note that a similar test exists within the law of misrepresentation, and under s8 Insurance Act 2015 (which governs remedies available to the insurer for breaches by the insured).

[80] The failure by the seller to have goods ready for delivery at any time within the contract period was held to be a repudiatory breach in *Cie Commerciale Sucre et Denrees v C Czarnikow (The Naxos)* [1990] 1 W.L.R. 1337. Although time breaches are generally regarded in equity as not of the essence, late payments in a sale of land after a 5-day extension of

explicit a point which was previously both obvious and obfuscated: that the binding force of such precedents, although often expressed under the cloak of the term 'condition', ultimately finds its justification in the parties' intentions, namely the fact that the non-breaching party, as a reasonable person within the industry, likely attached great importance to strict compliance with the term. Whilst the current system for repudiatory breach achieves the same outcome as the proposal in this respect, the proposal arrives at the outcome through different *reasoning*. The current system determines that conditions *inherently*, *by definition* give rise to termination. Therefore, a breach may result in the right to terminate *either* if it is a condition *or* if it is a sufficiently serious breach of an innominate term. By contrast, the benefit and utility of this proposal is that it achieves a conceptual unity. Through eliminating the 'classification' question altogether, *all* questions regarding whether a breach should be repudiatory are answered through the 'repudiatory quality' question. The proposal is therefore a jurisprudentially cleaner reframing of the normative force behind the right to terminate by breach as *solely* the parties' intention. In turn, it is hoped that this singular focus on answering the 'repudiatory quality' question through evincing the parties' intentions will curb the courts' tendency to be side-tracked by questions of classification, or indeed other peripheral questions (e.g. deliberateness of breach, as considered in *C21*).

With regards to the second stage, this does not abolish the current substantiality threshold altogether, but merely allows the non-breaching party to plead a lower standard if he cannot prove the higher. Retaining the higher current threshold caters for cases where the market is too small or individuated (such that the non-breaching party would have had no real choice to renegotiate the price with the breaching party, or to contract with someone

---

time was held to be a repudiatory breach in *Samarenko v Dawn Hill House Ltd* [2011] EWCA Civ 1445.

other than the breaching party). In these cases, the non-breaching party may only be able to satisfy the higher threshold. Given that the crux of my criticism earlier was that the first threshold is *too high*, it would be odd if the non-breaching party is denied the right to terminate where he could satisfy the first but not the second.

The dual threshold proposal has two advantages. First, it provides minimal but adequate protection to the breaching party, to the extent that the non-breaching party is barred from using facts not reasonably known to the breaching party to argue that he would not have entered into the contract, but no more. This reduced protection can be justified by the fact that the breaching party chose to assume the risk of performing his obligations, and therefore – when that risk materialises and, in hindsight, he regrets having assumed the risk – he should not be entitled to use the first reading to distract from that fact; in this way, this proposal seeks to temper the existing partiality towards the anti-termination bias, through instead holding the *breaching party* to the standard demanded by the *second* reading of *pacta sunt servanda* as discussed above. Second, this test allows no room for 'bad bargain' considerations, since the relevant time is the time of contracting, which prevents the court from considering factors such as subsequent market fluctuations. This is not to say that the court cannot consider this, but merely that, if they should desire to do so, they must add in a separate third stage to the process. This assumes that the right to terminate has indeed arisen, then asks whether the non-breaching party may exercise it.[81]

[81] This may be achieved by mechanisms such as good faith: *MSC Mediterranean Shipping Company S.A. v Cottonex Anstalt* [2015] EWHC 283 (Comm), although this reasoning was overturned at the appellate level: [2016] EWCA Civ 789. Good faith is beyond the scope of this paper.

B. An external mechanism to 'promote' breaches from potentially repudiatory to definitely repudiatory

In order to address the continued uncertainty present in the regime for termination by breach, an *external* mechanism (the 'promotion proposal') may be introduced for cases where the non-breaching party cannot be sure as to whether the breach meets the dual threshold detailed above. This would afford the non-breaching party more certainty: if the breaching party commits a breach, the non-breaching party may send to him an unequivocal notice (1) stipulating a fixed, reasonable period, and (2) identifying the contractual term that the breaching party must accurately perform within that period. If he fails to perform within this period, the breach is 'promoted' from non-repudiatory to repudiatory upon its expiration.

It must be stressed that not just any breach is eligible for 'promotion' under this proposal: otherwise, the law would be vulnerable to the non-breaching party's 'unilateral decision'.[82] It is proposed that the breach is only eligible if the non-breaching party has *objectively reasonable grounds* to think – but could not be entirely sure – that the breach would be regarded as repudiatory if the case came before a court. This can be contrasted to an *honest* but *unreasonable* belief that he is entitled to terminate.[83] This ensures a level of certainty for the breaching party too: the non-breaching party cannot invoke the device capriciously and has no

[82] A concern expressed by Sellers LJ during counsels' submissions in *Hong Kong Fir*, 43.

[83] 'I have yet to learn that a party who breaks a contract can excuse himself by saying that he did it on the advice of his lawyers: or that he was under an honest misapprehension. Nor can he excuse himself on those grounds from the consequences of a repudiation.' *Federal Commerce & Navigation Co. Ltd. v. Molena Alpha Inc. (The Nanfri)* [1978] Q.B. 927, 979 (Lord Denning M.R).

recourse to inconsistent remedies before the period expires.[84] Whilst this proposed device may breed uncertainty in its own way, it is submitted that the uncertainty arising from objective tests of reasonableness is, whilst unavoidable, a relatively well-defined and familiar standard within English law. In turn, the uncertainty arising under this proposal is preferable to that arising under the *Schuler* uncertainty surrounding the evidential/dispositive distinction.

A similar device already exists in English law: 'notices to complete' in conveyancing.[85] The existence of this device suggests that the principles behind this proposal are at least not incompatible with English law. However, the usage of this device is regrettably slender, and subject to three restrictions. First, it is only used in the conveyancing context.[86] Second, the non-breaching party's right to terminate after the period expires is analysed merely as a *negative* equitable right, rather than a *positive* common law right for the non-breaching party to serve such a

[84] In this way, this device is not dissimilar to promissory estoppel, the non-breaching party being the promisor: (1) he is estopped from relying on inconsistent contractual remedies, and (2) the notice suspends (instead of extinguishes) contractual rights: *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130.

[85] In contracts for sale of land, upon the exchange of contracts, the parties will agree upon a 'completion date'. Ordinarily, time is not of the essence, such that a party completing later than the completion date will not entitle the other party to the right to terminate the contract. However, should the non-breaching party serve a 'notice to complete' on the breaching party (which normally gives the breaching party 10 working days from the date of notice to perform his obligations), time becomes of the essence. See Standard Commercial Property Conditions 8.8.2 for commercial properties, and Standard Conditions of Sale 6.8.2 for residential properties.

[86] *Hakimzay Ltd v Swailes* [2015] EWHC B14 (Ch); *Samarenko v Dawn Hill House Ltd* [2011] EWCA Civ 1445.

notice in vindication of his existing contractual rights.[87] Third, it only allows the non-breaching party to demand correct performance in cases of *time* breaches, but not *quality/quantity* breaches. It is from these three restrictions that the existing English device should be freed, and the current proposal is designed to do that. A positive reason in favour of the 'promotion' proposal is now argued, and potential objections against it rebutted.

First, and to directly address the issue that the current law does not provide adequate certainty, the proposal superimposes an *external* certainty on top of the previous proposals to reduce the residual uncertainty from the previous proposals. This is done by resolving a common problem relating to renunciation: suppose a situation where the breaching party commits a breach, but the non-breaching party is genuinely unsure as to whether this breach is serious enough to satisfy the substantiality threshold. Under the current law, if the non-breaching party is determined to terminate anyway, he takes a gamble: if the case comes before court, and the breach is held to *not* be repudiatory after all, then the breaching party can turn the tables and argue that it was instead the non-breaching party's attempt to terminate that constituted renunciation and therefore repudiatory breach; the non-breaching party therefore accidentally becomes the breaching party. The current proposal resolves this difficulty by allowing the non-breaching party to convert a breach that *cannot* confidently be said to be repudiatory, to one that he can be sure *is* repudiatory.

[87] In that it signifies no more than 'equity's patience' in interfering with the 'time of essence' clause, giving more time to the breaching party, being 'exhausted': *Dalkia Utilities Services Plc v Celtech International Ltd* [2006] 2 WLUK 67. Proposals to move from the first to the second have not been adopted: see John Stannard and David Capper, *Termination for Breach of Contract* (1st edn, OUP 2014), para 1.18.

Second, two counterarguments can be pre-empted and addressed. First, one may argue that this proposal introduces even more uncertainty into this area of law. Whilst this may be true in the short term when the proposal is first implemented, teething issues can quickly be ironed out, as they were within conveyancing; for example, issues with the validity of erroneous notices were simply resolved by importing well-established tests from other areas of contract law, such as the 'reasonable recipient' test in *Mannai*.[88] Implementing notices within the law of repudiatory breach therefore – through focusing on parties' intentions and directly addressing the 'repudiatory' question (as referred to above) – resolves more issues surrounding uncertainty than it may create. Second, this device should not be rejected on the count of being too similar to specific performance (a remedy English courts are reluctant to grant[89]), in that both devices compel the breaching party to perform his obligations, rather than simply to provide monetary compensation by way of damages. This is because, unlike the courts, who wield the force of serious sanctions such as contempt of court when compelling the breaching party to perform via specific performance, the non-breaching party does not have similar tools at his discretion to give 'teeth' to his attempt at enforcement. [90] In this way, the promotion proposal can be distinguished from specific performance, and therefore distanced from traditional arguments against it.

[88] *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] UKHL 19.
[89] *Cooperative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] A.C. 1; grounded in concerns regarding personal freedom: Shael (2003).
[90] *Tito v Waddell (No.2)* [1977] Ch 106.

Conclusion

This paper attempted to expose the conceptual lack of intuitiveness of the English law of termination for breach. First, this paper discussed three ways in which the current law is deficient: it fails to adequately uphold parties' intentions, over-promotes sanctity of contract at the expense of sanctity of promise, and breeds uncertainty through failing to make a predictable distinction between evidential and dispositive uses of terms of art. Then, this paper suggested two reform proposals designed to address these concerns. From this discussion emerges a more optimistic point: the implementation of reforms in this area would bring about a more efficient and streamlined framework within which cases of repudiatory breach are decided. The hope is that, with the ink in this piece, less may be spilt elsewhere on addressing remote questions and defending opaque assimilations.