



## Developing the Intermediate Term Concept

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### Introduction

Few modern decisions have captured the imaginations of contract lawyers as much as *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*.<sup>1</sup> That decision gave birth to the concept and doctrine of the 'intermediate' term or 'innominate' term. It was welcomed with open arms by most scholars frustrated by the division of the world of contractual terms into merely two categories, namely, conditions and warranties. It is perhaps not surprising that the *Hongkong Fir* decision should have had such an impact. The dispute was considered by four of the most influential judges of the twentieth century, Salmon J, Sellers LJ, Upjohn LJ and Diplock LJ. With the exception of Lord Justice Sellers all went on to become Lords of Appeal in Ordinary. Indeed, during the 20 years following the decision, Lord Diplock, amongst other things, re-wrote the law of discharge for breach.<sup>2</sup>

Yet it has not all been plain sailing. Some scholars have been critical of the approach. For example, the authors of an Australian contract text lamented<sup>3</sup> the adoption of the *Hongkong Fir* decision by the High Court of Australia.<sup>4</sup> An influential English scholar thought it promoted inefficiency by rewarding the incompetent promisor. In his words<sup>5</sup> 'designed to repress sharp practice, it operates to reward incompetence and promote inefficiency'. At various times attempts have been made to limit the intermediate term analysis. And in some contexts application of the decision has proved to be very controversial. A recent controversy is the subject of this article.

In several recent cases, mainly English decisions on insurance contracts, the question has been raised whether the intermediate term concept operates in relation to steps which a promisor may be required to take to enjoy rights under a contract. For example, is the analysis applicable where an insured must advise its insurer of a loss, or make a declaration under the policy?

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1 [1962] 2 QB 26 (hereafter '*Hongkong Fir*').

2 Culminating in his speech in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827.

3 D W Greig and J L R Davis, *The Law of Contract*, 4th Cumulative Supplement, Law Book Co Ltd, Sydney, 1992, p 252 (referring to p 1213 of the text).

4 In *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549; 70 ALR 641.

5 Tony Weir, 'Contract — The Buyer's Right to Reject Defective Goods' [1976] *CLJ* 33 at 35 (note of *Cehave NV v Bremer Handelsgesellschaft mbH (The Hansa Nord)* [1976] QB 44). Contrast G H Treitel, *Doctrine and Discretion in the Law of Contract*, Clarendon Press, Oxford, 1981, pp 7–8.

The law is somewhat confused and there is a tension with the conventional wisdom that a contract cannot be terminated as to part only. It is therefore appropriate to return to first principles.

### What Did Hongkong Fir Decide?

In the *Hongkong Fir* case the question was whether charterers under a time charterparty were entitled to terminate the performance of the contract on the basis of a breach by the shipowners of the seaworthiness 'warranty' stated in cl 1 of the contract. The clause referred to the vessel the subject of the charter as being 'in every way fitted for ordinary cargo service'. Due to the presence of an incompetent and inefficient engine room staff, the charterers experienced fairly significant delays when the vessel was off-hire for repairs. However, affirming the decision of Salmon J, their decision to terminate the contract was unanimously held by the English Court of Appeal to be wrongful.

Given that the seaworthiness term is described as a 'warranty' it would have been sufficient for the court to apply the rule that breach of warranty does not give rise to a right to terminate. In other words, if the conception of the condition-warranty distinction enshrined in the Sale of Goods Act 1893 (UK)<sup>6</sup> was applied, the charterers were not entitled to terminate. But it would also follow that a charterer would *never* be entitled to terminate for breach of the seaworthiness term. Given that the seaworthiness term is a standard clause, found in every time charterparty,<sup>7</sup> that proposition was clearly untenable. Equally untenable was the view that breach of the term should always give rise to a right of termination.<sup>8</sup> Accordingly, the court was conscious of the fact that in some contexts breach of the warranty would be serious, and ought to justify termination of the contract.

Two different ways around that problem were suggested.<sup>9</sup> Upjohn LJ refused to accept the sale of goods dichotomy.<sup>10</sup> In his view,<sup>11</sup> it was 'unsound and misleading to conclude that, being a warranty, damages is necessarily a sufficient remedy' for breach of the term. He therefore concluded:<sup>12</sup>

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6 See now Sale of Goods Act 1979 (UK).

7 In *Hongkong Fir* the contract was on the *Baltimex* 1939 form.

8 Yet, in the charterparty context 'warranty' often meant 'condition' — as in *Behn v Burness* (1863) 3 B & S 751; 122 ER 281 ('now in the port of Amsterdam').

9 Cf *Stanton v Richardson* (1875) 45 LJQB 78 (vessel could not be made fit for cargo prior to expiry of frustrating delay).

10 Sellers LJ took the traditional approach first determining that the provision was a warranty and then turning to see whether there was evidence of a repudiation of the contract. He referred to the formulae of the breach having to go to the root of the contract and in the case of delay it had to frustrate the contract, see [1962] 2 QB 26 at 60–1. This approach was taken to answer directly the two arguments put by charterers, namely, '(1) Is the seaworthiness obligation a condition the breach of which entitles the charterers to treat the contract as repudiated? (2) Where in breach of contract a party fails to perform it, by what standard does the ensuing delay fall to be measured for the purpose of deciding whether the innocent party is entitled to treat the contract as repudiated. Is the standard . . . such delay as is necessary to frustrate the contract or is it, as the charterers contend, unreasonable delay' ([1962] 2 QB 26 at 56).

11 [1962] 2 QB 26 at 64.

12 [1962] 2 QB 26 at 64.

In my judgment the remedies open to the innocent party for breach of a stipulation which is not a condition strictly so called, depend entirely upon the nature of the breach and its foreseeable consequences.

This was a somewhat heretical conclusion, at least in terms of the modern distinction between conditions and warranties. However, there is no doubt that it was historically sound.<sup>13</sup> But Diplock LJ's more elaborate analysis captured greater attention. In a very famous passage he said:<sup>14</sup>

No doubt there are many simple contractual undertakings, sometimes express but more often because of their very simplicity ('It goes without saying') to be implied, of which it can be predicated that every breach of such an undertaking must give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract. And such a stipulation, unless the parties have agreed that breach of it shall not entitle the non-defaulting party to treat the contract as repudiated, is a 'condition'. So too there may be other simple contractual undertakings of which it can be predicated that *no* breach can give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract; and such a stipulation, unless the parties have agreed that breach of it shall entitle the non-defaulting party to treat the contract as repudiated, is a 'warranty'.

There are, however, many contractual undertakings of a more complex character which cannot be categorised as being 'conditions' or 'warranties', if the late 19th century meaning adopted in the Sale of Goods Act 1893, and used by Bowen LJ in *Bentsen v Taylor Sons & Co* [1893] 2 QB 274 at 280 be given to those terms. Of such undertakings all that can be predicated is that some breaches will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract; and the legal consequences of a breach of such an undertaking, unless provided for expressly in the contract, depend upon the nature of the event to which the breach gives rise and do not follow automatically from a prior classification of the undertaking as a 'condition' or a 'warranty'.

The idea which unifies the judgments, and what may legitimately be described as the '*Hongkong Fir* doctrine', is that unless the breach relates to a term which has been characterised by the parties as a condition, the question whether the promisee is entitled to terminate depends on whether the breach is sufficiently serious.

In the *Hongkong Fir* case it was because the breach by the shipowners did not make 'further commercial performance of the contract impossible',<sup>15</sup> or deprive the charterers of 'substantially the whole benefit which it was the intention of the parties as expressed in the contract that [they] should obtain as the consideration for performing those undertakings',<sup>16</sup> that the charterers' termination of the contract was wrongful.<sup>17</sup>

13 Even in the context of sale of goods. See J W Carter, *Breach of Contract*, 2nd ed, Law Book Co Ltd, Sydney, 1991, §121. See also J L Montrose, 'Conditions, Warranties and Other Contractual Terms' (1937) 15 *Can BR* 309.

14 [1962] 2 QB 26 at 69–70.

15 [1962] 2 QB 26 at 64 per Upjohn LJ.

16 [1962] 2 QB 26 at 66 per Diplock LJ. See also [1962] 2 QB 26 at 69.

17 For the details see J W Carter, *Breach of Contract*, 2nd ed, Law Book Co Ltd, Sydney, 1991, §§422, 616. For discussion of the case see M P Furmston (1962) 25 *MLR* 584; F M B

## Terminology

In none of the statements quoted above, nor indeed in the judgments of Salmon J and Sellers LJ, is there any mention of ‘intermediate’ or ‘innominate’ terms. In fact, Diplock LJ was critical of attempts to rationalise the approach which he explained in terms of categories of terms. Thus, after noting that the event which must flow from the breach in order for a party to be entitled to terminate is of the same character as an event which is necessary to frustrate a contract, he said:<sup>18</sup>

Now that the doctrine of frustration has matured and flourished for nearly a century and the old technicalities of pleading ‘conditions precedent’ are more than a century out of date, it does not clarify, but on the contrary obscures, the modern principle of law where such an event has occurred as a result of a breach of an express stipulation in a contract, to continue to add the now unnecessary colophon ‘Therefore it was an implied *condition* of the contract that a particular kind of breach of an express *warranty* should not occur.’ The common law evolves not merely by breeding new principles but also, when they are fully grown, by burying their progenitors.

The only hint of intermediate term is to be found in the catchwords in the *Queen’s Bench* report which include the expression ‘intermediate stipulation’. Yet in the 40 odd years since *Hongkong Fir* the decision has become synonymous with a tripartite classification of contractual terms as conditions, warranties and intermediate (or ‘innominate’)<sup>19</sup> terms. However, it was never adopted by Lord Diplock. Instead, he preferred to focus on the breach and in *Photo Production Ltd v Securicor Transport Ltd*<sup>20</sup> used the description ‘fundamental breach’ to encapsulate the type of breach which it is necessary for the promisee to prove. Some judges have also tried to turn back the tide of the sale of goods legislation and to treat some breaches of warranty as conferring a right of termination independently of the repudiation concept. Thus, in *Cehave NV v Bremer Handelsgesellschaft mbH (The Hansa Nord)*<sup>21</sup> Ormrod LJ said:

I doubt whether, strictly speaking, this involves the creation of a third category of stipulations; rather, it recognises another ground for holding that a buyer is entitled to reject, namely, that, de facto, the consideration for his promise has been wholly destroyed.

Nevertheless, because most applications of the *Hongkong Fir* doctrine concern the breach of terms which are capable of being breached in various ways, sometimes with minor consequences and sometimes with major consequences, the expression ‘intermediate term’ is convenient. It encapsulates the idea that the parties have neither reached agreement that any

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Reynolds, ‘Warranty, Condition and Fundamental Term’ (1963) 79 *LQR* 534; J L Montrose, ‘Some Problems About Fundamental Terms: Part 1’ [1964] *CLJ* 60 at 75–82.

18 [1962] 2 *QB* 26 at 71.

19 The innominate term expression appears to have originated in M P Furmston (1962) 25 *MLR* 584.

20 [1980] *AC* 827 at 849.

21 [1976] *QB* 44 at 84.

breach of the term is to give rise to a right of termination nor agreed that no breach can ever justify termination.<sup>22</sup>

There is another (more substantive) aspect of the terminology issue. Some learned scholars have seen the *Hongkong Fir* doctrine as involving the application of the repudiation concept.<sup>23</sup> In their view reliance on breach of an intermediate term is a way of proving repudiation of obligation. Although in particular contexts termination for breach of an intermediate term and termination for repudiation may overlap, or be alternative analyses of the same facts, they are conceptually different. As has been said:<sup>24</sup>

the focus of the repudiation doctrine is on the intention and acts of the promisor, whereas under the *Hongkong Fir* doctrine the focus is on the consequences of the breach.

Proof of repudiation requires proof of an express or implied refusal to perform the contract. While it would be possible to deem a sufficiently serious breach of an intermediate term to be an implied refusal to perform the contract, that would fail to acknowledge the significance of the evidential differences prompted by the differing focal points of the two concepts. Therefore, although it is too late to adopt Lord Denning MR's suggestion<sup>25</sup> of reserving 'repudiation' for cases of anticipatory breach, it seems desirable not to equate breach of an intermediate term with a refusal to perform a contract.

### Policy

There is a very clear policy dimension to the *Hongkong Fir* doctrine. It does not lie simply in the rejection of the condition-warranty distinction as being an incomplete statement of the law or tool of analysis. A more important aspect of policy is that unless the parties have agreed that a term is a condition the performance of the contract may not be terminated unless the consequences of the breach are dire indeed.

This aspect of the *Hongkong Fir* doctrine is not universally liked.<sup>26</sup> Indeed, it is hardly ever referred to and has probably been misunderstood.<sup>27</sup> The symmetry between the breach of an intermediate term which is required to justify termination and satisfaction of the test of commercial frustration gives effect to a very specific policy. In the absence of agreement that a particular term is a condition, termination of a commercial contract is a matter of last resort. The promisee must be content with damages unless the event which

22 In theory this gives rise to two separate construction questions. See *Bunge Corp v Tradax Export SA* [1980] 1 Lloyd's Rep 294 at 309 (aff'd sub nom *Bunge Corp New York v Tradax Export SA Panama* [1981] 1 WLR 711). However, in practice once a term is found not to be a condition it is assumed to be intermediate. See *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109 at 113. Cf *Bunge Corp New York v Tradax Export SA Panama* [1981] 1 WLR 711 at 717.

23 It was the focus for Greig and Davis's criticism. See D W Greig and J L R Davis, *The Law of Contract*, Law Book Co Ltd, Sydney, 1987, pp 1209–10.

24 J W Carter, *Breach of Contract*, 2nd ed, Law Book Co Ltd, Sydney, 1991, §643. See *Honner v Ashton* (1979) 1 BPR 9478 at 9491–4.

25 See *Cehave NV v Bremer Handelsgesellschaft mbH (The Hansa Nord)* [1976] QB 44 at 59.

26 It was the focus for Weir's criticism. See above, text at n 5.

27 Perhaps by those who drafted of Art 25 of the United Nations Convention on Contracts for the International Sale of Goods 1980.

results from the promisor's breach makes further performance impossible, futile or extremely onerous.

It may be argued that application of this policy is rather unbalanced. Where a term is a condition, a promisee may terminate the performance of the contract even if the consequences of the breach are not (objectively) detrimental at all. But if the term is not a condition there is generally no right of termination. It is argued that this promotes certainty. Of course, the policy in favour of certain results must be balanced with concerns for the apparent lack of good faith shown by parties whose termination has been upheld on the basis of breach of condition when their real motive was an adverse movement in market prices. There is always a price to pay for certainty and the *Hongkong Fir* doctrine does not prohibit the use of concepts such as election and estoppel; and if the need is felt to place further controls on termination for breach of condition, good faith and unconscionable conduct are available.<sup>28</sup>

Perceptions of the need for rigorous adherence to the policy of the *Hongkong Fir* doctrine have varied over time. In a series of decisions in the 1970s, including three decisions of the House of Lords,<sup>29</sup> application of the *Hongkong Fir* doctrine could arguably be seen as involving the use of a general construction preference, perhaps even a construction rule, in favour of terms being construed as intermediate in character. Such a preference or rule would apply to any term not expressly made a promissory condition. Thus, in *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA*<sup>30</sup> Lord Wilberforce referred to the relevance of 'general considerations of law' as including 'the approach, which modern authorities recognise, of treating' the provision there at issue<sup>31</sup> 'as having the force of a condition . . . or of a contractual term . . . according to the nature and gravity of the breach'. However, it was made clear in *Bunge Corp New York v Tradax Export SA Panama*<sup>32</sup> that no such general preference exists. Arguably, however, the same result is being achieved in the recent cases discussed below by means of a different construction preference, namely, a preference for promises rather than conditions.

## Scope

### Introduction

At various times it has been suggested that the *Hongkong Fir* doctrine is subject to certain limitations. Apart from the obvious limitation that it does not apply if excluded by the parties, four possible limitations have been discussed in the cases:

- (1) it is restricted to particular categories of contracts;

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<sup>28</sup> See generally J W Carter, 'Problems in Enforcement' (1992) 5 *JCL* 199, (1993) 6 *JCL* 1; Elisabeth Peden, *Good Faith in the Performance of Contracts*, Butterworths, Sydney, 2003, para 7.7.

<sup>29</sup> See *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235; *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904; *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109.

<sup>30</sup> [1978] 2 Lloyd's Rep 109 at 113.

<sup>31</sup> Clause 21 of GAFTA form 100 (see below, text at n 56 and text above, n 68).

<sup>32</sup> [1981] 1 WLR 711.

- (2) it does not apply to the breach of a time stipulation;
- (3) it is restricted to promissory terms; and
- (4) it must be applied to the contract as a whole.

Since the fourth of these limitations is the context of the recent cases, it is more appropriately dealt with under a separate heading.

### Particular Categories of Contracts

Prior to the decision in *Cehave NV v Bremer Handelsgesellschaft mbH (The Hansa Nord)*<sup>33</sup> it was unclear whether the *Hongkong Fir* doctrine could be applied to contracts for the sale of goods. However, in that case it was held that the saving in the sale of goods legislation of the 'rules of the common law' provided a sufficient basis for the application of the doctrine. The point is no longer controversial.<sup>34</sup> As Roskill LJ said<sup>35</sup> it is 'desirable that the same legal principle should apply to the law of contract as a whole and that different legal principles should not apply to different branches of that law'.

Accordingly, it is not arguable that the *Hongkong Fir* doctrine is limited to particular categories of contract. Nevertheless, it may be debated whether the doctrine remains applicable throughout the life of a contract. Once a contract has been fully executed by one party, as where a creditor has lent money to a debtor, or a seller has delivered conforming goods, it might be argued that the idea of termination simply does not arise because there is no obligation from which the promisee (creditor or seller) may seek to be discharged by termination. In this connection it is sometimes forgotten that in *Hongkong Fir* Diplock LJ began his judgment with the statement:<sup>36</sup>

Every synallagmatic contract contains in it the seeds of the problem: in what event will a party be relieved of his undertaking to do that which he has agreed to do but has not yet done?

No doubt most scholars reach for their trusty law dictionary when they see the word 'synallagmatic'. But they should turn instead to the later decision of the English Court of Appeal in *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd*.<sup>37</sup> In that case Diplock LJ explained:<sup>38</sup>

The insertion of this qualifying adjective [ie 'synallagmatic'] was widely thought to be a typical example of gratuitous philological exhibitionism; but the present appeal does turn on the difference in legal character between contracts which are synallagmatic (a term which I prefer to bilateral, for there may be more than two parties), and contracts which are not synallagmatic but only unilateral, an expression which, like synallagmatic, I have borrowed from French law (Code Civil, art 1102 and art 1103). Under contracts of the former kind, each party undertakes to the other party to do or to refrain from doing something, and, in the event of his failure to

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33 [1976] QB 44. See F M B Reynolds (1976) 92 *LQR* 17; J W Carter and C Hodgekiss, 'Conditions and Warranties: Forebears and Descendants' (1977) 8 *Syd LR* 31.

34 See also Sale of Goods Act 1923 (NSW), s 4(5) (express provision to give effect to the tripartite classification).

35 [1976] QB 44 at 71 (approved *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 at 998).

36 [1962] 2 QB 26 at 65.

37 [1968] 1 All ER 104; [1968] 1 WLR 74.

38 [1968] 1 All ER 104 at 108-9; [1968] 1 WLR 74.

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

Under contracts which are only unilateral — which I have elsewhere described as ‘if’ contracts — one party, whom I will call ‘the promisor’, undertakes to do or to refrain from doing something on his part if another party, ‘the promisee’, does or refrains from doing something, but the promisee does not himself undertake to do or to refrain from doing that thing. The commonest contracts of this kind in English law are options for good consideration to buy or to sell or to grant or take a lease, competitions for prizes, and such contracts as that discussed in *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256. A unilateral contract . . . may never give rise to any obligation on the part of the promisor; it will only do so on the occurrence of the event specified in the contract, viz, the doing (or refraining from doing) by the promisee of a particular thing. It never gives rise, however, to any obligation on the promisee to bring about the event by doing or refraining from doing that particular thing . . .

One aspect of this statement<sup>39</sup> is the view that the *Hongkong Fir* doctrine applies only if the promisee has executory or continuing obligations. Otherwise, there is no obligation from which the promisee needs to be discharged by termination. There is considerable support for this idea in United States law,<sup>40</sup> at least in relation to obligations to pay money. There is also support for the idea in some Australian cases.<sup>41</sup> It is, moreover, consistent with classic statements of the effect of termination for breach, often expressed in terms that the ‘injured party . . . is discharged from further performance’.<sup>42</sup>

However, it is now well accepted that *both parties* are discharged by termination for breach or repudiation. Thus, in *Photo Production Ltd v Securicor Transport Ltd*<sup>43</sup> Lord Diplock referred to the ‘coming to an end of the primary obligations of both parties’. And the decision in *Moschi v Lep Air Services Ltd*<sup>44</sup> shows that, under English law, it is no longer possible to restrict the *Hongkong Fir* doctrine to cases where the promisee has executory or continuing obligations. In *Moschi* a guarantor failed to make instalment payments due under a contract of guarantee. Although the contract was fully executed from the creditor’s perspective, the creditor was nevertheless entitled to terminate.<sup>45</sup> Lord Diplock said<sup>46</sup> the ‘cumulative effect of these

39 For a second aspect see below, text at n 52.

40 See J W Carter, ‘The Breach of Unilateral Contracts’ (1982) 11 *Anglo-American L Rev* 169.

41 See J W Carter, *Breach of Contract*, 2nd ed, Law Book Co Ltd, Sydney, 1991, §§696ff, 781.

42 *Heyman v Darwins Ltd* [1942] AC 356 at 399 per Lord Porter.

43 [1980] AC 827 at 850. See also *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 at 476–7.

44 [1973] AC 331.

45 It was conceded that the guarantor had repudiated the contract.

failures . . . was to deprive the creditor of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract’.

### Time Stipulations

For historical reasons, time stipulations in contracts are generally analysed by reference to whether or not time is of the essence, rather than the condition-warranty distinction. Where time is not of the essence the presumption is that neither party is entitled to terminate without first serving a notice to perform.

In *Bunge Corp New York v Tradax Export SA Panama*<sup>47</sup> in the context of a nomination term in an FOB contract on GAFTA form 119, Lord Wilberforce appeared to say that the intermediate term idea is inapplicable to time stipulations. The hallmark of a term to which the *Hongkong Fir* doctrine applies is that the term may be breached in various ways. But Lord Wilberforce said that for time stipulations ‘there is only one kind of breach possible, namely, to be late’.<sup>48</sup> However, the fact that the term may be breached in various ways is merely a guide to the likely intention of the parties. This should not be confused with the more general question of intention, namely, whether the parties intended that a serious delay should give rise to a right of termination independently of the notice procedure. To restrict the doctrine to substantive terms, or to ignore the fact that there may be ‘degrees of lateness’ in relation to the late performance of a substantive obligation, would be formal and limiting. Thus, in recent cases<sup>49</sup> the courts have accepted that where time is not of the essence, and no notice to perform has been served, a promisee may — albeit rarely — justify termination of the contract by reference to delay having sufficiently serious adverse consequences.<sup>50</sup> This also now seems uncontroversial.<sup>51</sup>

### Promissory Terms

In relation to promissory terms, there is no doubt that it is an ongoing restriction on the *Hongkong Fir* doctrine that it does not apply unless the promisor has breached the contract. Accordingly, where a condition precedent fails it is not open to a party to allege that the failure may be ignored because the consequences of the failure are not serious for the party for whose benefit

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46 [1973] AC 331 at 349.

47 [1981] 1 WLR 711.

48 [1981] 1 WLR 711 at 715. But cf his approach in *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd’s Rep 109 at 113.

49 See *Phibro Energy AG v Nissho Iwai Corp (The Honam Jade)* [1991] 1 Lloyd’s Rep 38; *Glencore International AG v Ryan (The Beursgracht)* [2002] 1 Lloyd’s Rep 574 at 581. Cf *Universal Cargo Carriers Corp v Citati* [1957] 2 QB 401 (delay from perspective of inability to perform).

50 Arguably, the point had been rejected in the infamous *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904. Certainly, Lord Diplock rejected it. See [1978] AC 904 at 927.

51 In *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549 at 562; 70 ALR 641 the point was left open for future decision.

the condition precedent operates. Thus, the *Hongkong Fir* decision left untouched the operation of non-promissory terms in the nature of conditions precedent.<sup>52</sup>

This is another — and more persuasive — implication of Diplock LJ's reference to 'synallagmatic' contracts in the *Hongkong Fir* case. It explains why the doctrine does not usually apply to essentially unilateral contracts such as options to purchase land. In the *United Dominions Trust* case Diplock LJ went on to explain, after the passage quoted above:<sup>53</sup>

Two consequences follow from this. The first is that there is no room for any inquiry whether any act done by the promisee in purported performance of a unilateral contract amounts to a breach of warranty or a breach of condition on his part, for he is under no obligation to do or to refrain from doing any act at all. The second is that, as respects the promisor, the initial inquiry is whether the event, which under the unilateral contract gives rise to obligations on the part of the promisor, has occurred. To that inquiry the answer can only be a simple 'Yes' or 'No' . . . It is not for the court to ascribe any different consequences to non-compliance with one part of the description of the event than to any other part if the parties by their contract have not done so.

The idea is appropriately illustrated by the decision in *United Dominions Trust*. Eagle sold a Viking aircraft to UDT (a finance company) which then let it out on hire-purchase terms to Orion Airways Ltd. The agreement between Eagle and UDT included an option. Thus, it provided that Eagle would repurchase the aircraft if called upon by UDT to do so following termination of the contract with the hire-purchaser. Orion defaulted under the hire-purchase contract which was terminated by UDT. However, UDT did not call upon Eagle to repurchase the aircraft under the agreement until more than six months later. By that time the aircraft was of little use and it was eventually sold for scrap value. The English Court of Appeal held that UDT could not enforce Eagle's obligation to repurchase because the latter's obligation was subject to an implied term in the nature of a condition precedent that UDT would call upon Eagle to repurchase within a reasonable time which had, in the circumstances, expired.

Had the court in the *United Dominions Trust* case interpreted the contract as including an implied *promise* by UDT to call upon Eagle within a reasonable period of time, the *Hongkong Fir* doctrine would have required an inquiry into the nature of the term or the significance of UDT's breach.<sup>54</sup> This inquiry was not possible, or relevant, because the promise to repurchase was not subject to a reciprocal promise of that kind.

The decision highlights the importance of the construction question whether the term in question is a promise or states a condition. In cases of doubt, Anglo-Australian law recognises a construction preference in favour of a promise rather than a condition. Although the preference is seldom overtly

<sup>52</sup> See, eg *Tricontinental Corp Ltd v HDFI Ltd* (1990) 21 NSWLR 689.

<sup>53</sup> [1968] 1 All ER 104 at 109–10; [1968] 1 WLR 74.

<sup>54</sup> Arguably, the term would have been a promissory condition. Cf *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549; 70 ALR 641.

stated,<sup>55</sup> it can be seen in decisions such as *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA*.<sup>56</sup> So far as is material, cl 21 of GAFTA form 100 provided:

In the event of shipment proving impossible during the contract period by reason of any of the causes enumerated herein, Sellers shall advise Buyers without delay with the reasons therefor. If required, Sellers must produce proof to justify their claim for cancellation.

The House of Lords held that the notice element of the term was promissory and that it was properly characterised as intermediate (or innominate) in nature. Lord Wilberforce stated:<sup>57</sup>

In my opinion the clause . . . should be regarded as . . . an intermediate term: to do so would recognise that while in many, possibly most, instances, breach of it can adequately be sanctioned by damages, cases may exist in which, in fairness to the buyer, it would be proper to treat the cancellation as not having effect. On the other hand, always so to treat it may often be unfair to the seller, and unnecessarily rigid.

Of course, it does seem a little odd that a seller should be regarded as having promised to comply with a term which operates for its own benefit.<sup>58</sup> Indeed, the same comment may be made of *United Scientific Holdings Ltd v Burnley Borough Council*.<sup>59</sup> In that case certain rent review provisions were interpreted as embodying promises of timely compliance by the lessors even though the review would invariably operate to their benefit. But Lord Wilberforce's statement in *Bremer v Vanden* indicates the 'justice' of the approach. It is simply that any detriment occasioned by failure to comply can be addressed through an order for compensation.

## Termination of Part of a Contract

### Introduction

Nearly all the ideas discussed above are relevant to the recent cases which discuss whether the *Hongkong Fir* decision permits 'termination' of part of a contract. There is no doubt that under any conventional analysis of the law the *Hongkong Fir* doctrine is applicable only where the question is whether the promisee may terminate the contract as a whole.<sup>60</sup> Nevertheless, it is absolutely clear that the contract need not be wholly executory on both sides. Decisions such as the *Hongkong Fir* case itself show that partial performance by either or both parties does not prevent the application of the doctrine. Moreover, although doubts have been raised in cases where the promisee has fully performed, the better view, as explained above, is that breach of an

55 In the United States the approach is more overt. See *Restatement (Second) Contracts* (1979), §227(2).

56 [1978] 2 Lloyd's Rep 109. See also *P Kruse v Ralli MacLaine Ltd* [1982] 1 Lloyd's Rep 162.

57 [1978] 2 Lloyd's Rep 109 at 113.

58 See comments J W Carter (1981) 97 *LQR* 195; F M B Reynolds (1981) 97 *LQR* 541 at 548.

59 [1978] AC 904. See also *Metrolands Investments Ltd v J H Dewhurst Ltd* [1986] 3 All ER 659.

60 See, eg *Direct Acceptance Finance Ltd v Cumberland Furnishing Pty Ltd* [1965] NSWLR 1504 at 1511.

intermediate term justifies termination where only the promisor is subject to executory obligations. But that must be rare in practice.

In addition, the strictness of the criterion applied under the *Hongkong Fir* case serves to ensure that if the contract has been substantially performed, so that there is little left which can be termed 'executory', termination does not often relate to part only of the contract. For example, the doctrine will rarely apply if the promisee has received the 'main consideration'<sup>61</sup> for which the promisee bargained.

It is, in any event, a little misleading to state a general principle in terms that the *Hongkong Fir* doctrine applies only if the 'whole' contract is terminated. It is of the very essence of discharge for breach that only the executory part of the contract is 'terminated'. The proper statement of termination is that the obligation of the parties to perform or to be ready and willing to perform unperformed obligations is discharged. It is only where the contract is wholly executory that the doctrine applies to the whole contract.

Nevertheless, it is correct to say both that in order to justify termination the breach must have a very serious impact on the promisee and that the promisee cannot 'pick and choose', that is, seek to terminate part but not all of the executory obligations to which the breach relates.

## Exceptions

There appear to be four exceptions to the rule that termination for breach of an intermediate term must relate to the whole contract (so far as it is executory).

First, there may be an express agreement between the parties that a single contract is to be treated as several separate contracts. For example, in *The Hansa Nord*<sup>62</sup> the dispute related to a shipment of the citrus pulp pellets which were the subject of the contract. Although shipment was made in part fulfilment of two contracts, cl 7 — the provision which was breached by the sellers — provided 'each shipment shall be considered a separate contract'. Accordingly, the discussion of intermediate terms in that case proceeded on the basis that termination could relate to part only of the contracts.

Second, a contract may contain provisions which, because of their subsidiary but reciprocal nature, in effect operate as 'contracts within a contract'. For example, in *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd*<sup>63</sup> Lord Diplock said that an arbitration clause 'constitutes a self-contained contract collateral or ancillary' to the contract in which it appears. It is consistent with the 'synallagmatic contract' idea that the intermediate term analysis should be applied to such a clause because of the mutual obligations which it involves.<sup>64</sup> Accordingly, for a sufficiently serious breach of an intermediate term it is conceivable that a party may terminate the arbitration clause, at least in its operation to a particular dispute.<sup>65</sup>

61 *Direct Acceptance Finance Ltd v Cumberland Furnishing Pty Ltd* [1965] NSW 1504 at 1511 per Walsh J.

62 [1976] QB 44.

63 [1981] AC 909 at 980.

64 But cf *Food Corp of India v Antclizo Shipping Corp* [1988] 1 WLR 603 at 605–6.

65 See *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd* [1981]

Third, where the contract is severable in the sense that the agreed return for performance is divisible, the *Hongkong Fir* doctrine applies. For example, a contract for the sale of goods may provide for payment and delivery in instalments. The element of apportionment in the contract means that there are reciprocal obligations in relation to each severable part. The intermediate term analysis may be applied to each severable part of the contract.<sup>66</sup>

Where a contract is severable in the sense that performance of the contract is apportioned, there is still only one contract. The position is simply that the contract applies to each severable part. Thus, in *Steele v Tardiani*<sup>67</sup> Dixon J, in explaining the operation of contracts which are severable, referred to 'each divisible application of the contract'. This suggests a fourth category, namely, any *application of the contract* to circumstances which are the subject of a promissory obligation. Take, for instance, the decision in *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA*. As noted above, the House of Lords was concerned with whether the seller under a sale of goods contract could rely on cl 21 of GAFTA form 100 as a defence to an action for breach of contract. The clause stated:

In case of prohibition of export, blockade or hostilities or in case of any executive or legislative act done by or on behalf of the Government of the country of origin or of the territory where the port or ports of shipment named herein is/are situate, preventing fulfilment, this Contract or any unfulfilled portion thereof so affected shall be cancelled. In the event of shipment proving impossible during the contract period by reason of any of the causes enumerated herein, Sellers shall advise Buyers without delay with the reasons therefor. If required, Sellers must produce proof to justify their claim for cancellation.

The sellers failed to deliver and the buyers claimed damages for non-delivery. Although the sellers relied on cl 21, the question was raised whether advice 'without delay' was a condition precedent. Treating the clause as embodying a promise, the House of Lords analysed this by reference to the intermediate term concept and the *Hongkong Fir* doctrine. But, clearly, there was no question of the buyers terminating the contract. All that was at issue was the application of the contract to the circumstances. So far as cl 21 was concerned, those circumstances included the prohibition on export which was associated with the 1973 Mississippi floods.<sup>68</sup> Since the buyers had produced no evidence of loss or detriment the sellers' breach of the intermediate term did not prevent them from relying on the prohibition clause and the cancellation therefore took effect.

The decision in *United Scientific Holdings Ltd v Burnley Borough Council* may be another example — again in the House of Lords. The case involved the interpretation of rent review clauses contained in certain leases. The clauses specified a timetable which the lessors should have followed in

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AC 909 at 980 per Lord Diplock ('repudiatory breach'). Cf J W Carter, *Breach of Contract*, 2nd ed, Law Book Co Ltd, Sydney, 1991, §646. As a contract within a contract, a discharge of the contract in which it is contained would not discharge the contract to arbitrate.

<sup>66</sup> Cf *Benjamin's Sale of Goods*, 6th ed, Sweet & Maxwell, London, 2002, §8-083.

<sup>67</sup> (1946) 72 CLR 386 at 401.

<sup>68</sup> See generally M G Bridge, 'The 1973 Mississippi Floods: "Force Majeure" and Export Prohibition' in Ewan McKendrick, ed, *Force Majeure and Frustration of Contract*, Lloyd's of London Press Ltd, London, 1991, p 195.

seeking a review of the rent payable by the lessees. In fact the lessors were late in applying for a review and the lessees argued that this prevented the lessors from invoking the procedure. The House of Lords held that time was not of the essence. Therefore, the time stipulations present in the clauses were not conditions and the lessors' failure to follow the timetables set out did not prevent them invoking the procedure. Lord Diplock clearly regarded the facts as raising the same issues as those which arose in *Hongkong Fir*.<sup>69</sup> In Lord Diplock's view:<sup>70</sup>

I see no relevant difference between the obligation undertaken by a tenant under a rent review clause in a lease and any other obligation in a synallagmatic contract that is expressed to arise upon the occurrence of a described event, where a postponement of that event beyond the time stipulated in the contract is not so prolonged as to deprive the obligor of substantially the whole benefit that it was intended he should obtain by accepting the obligation.

Although this might suggest that serious breach by the lessor would entitle the lessee to terminate the lease, that was not the intention. There was no question of the lessees being entitled to terminate the leases, or even their obligations in relation to *future* rent reviews. Instead, a sufficiently serious breach would merely enable the lessees to terminate their obligation to join in the particular rent review to which the breach related. All that was at issue was whether the fact of breach affected the entitlement of the lessors to rely on the procedure. Thus, Lord Diplock said:<sup>71</sup>

The absence of any serious detriment to the tenant if the determination of the new rent is postponed until some time after the commencement of the 10 year period to which it will relate is to be contrasted with the detriment to the landlord if strict adherence to the date specified in the review clause is to be treated as of the essence of the contract. If it were determined even slightly late the landlord would lose his right to the additional rent for the whole period of 10 years until the next review date.

In other words, as in *Bremer v Vanden*, the dispute related to an application of the contract.

## The Recent Cases

By now it should be clear that any suggestion that the intermediate term idea and the *Hongkong Fir* doctrine are limited to cases where the promisee seeks to terminate the whole contract is false. However, that is to some extent at least the context of a recent debate which has arisen, chiefly, in relation to insurance contracts.

The leading case is *Friends Provident Life & Pensions Ltd v Sirius International Insurance*.<sup>72</sup> Prior to that decision, in several cases the English courts had applied the intermediate term concept and the *Hongkong Fir* doctrine to what is described above as 'application of the contract'. For

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69 [1978] AC 904 at 928.

70 [1978] AC 904 at 931.

71 [1978] AC 904 at 932.

72 [2005] 2 Lloyd's Rep 517.

example, in *Alfred McAlpine Plc v BAI (Run-Off) Ltd*,<sup>73</sup> although not amounting to repudiation, it was held that a breach might be sufficiently serious to entitle an insurer to reject a claim where the breach related to a notice provision. A term requiring the insured 'as soon as possible [to] give notice . . . to the Company in writing with full details' of the occurrence of an event which might give rise to a claim was construed as an intermediate ('innominate' term). Waller LJ said:<sup>74</sup>

It seems to me that the payment of individual claims are severable obligations and that where an insured is bound to carry out one obligation in order to receive the benefit of the insurer's obligation by implication the insured is accepting that if he fails in a serious way to carry out his part of that bargain he will not receive what he has bargained for.

In *Glencore International AG v Ryan (The Beursgracht)*<sup>75</sup> the question was whether underwriters were relieved from liability in relation to the declaration of a vessel under an open cover charterers' liability policy. It was held that although there was an implied term requiring a declaration to be made within a reasonable time, the failure to do so did not relieve the insurers. Because the implied term was intermediate, the question was whether the breach was sufficiently serious. In the circumstances it was not.

The approach in these cases was questioned in *Friends Provident Life & Pensions Ltd v Sirius International Insurance*. The defendants provided professional indemnity insurance. The plaintiffs were financial advisors in relation to pension schemes. As a result of certain investigations the plaintiffs were required to pay some £9m by way of compensation to various clients. They claimed on their insurers, including the defendants. The defendants declined liability. Their defence was that the policies only covered claims actually made within the policy period. Alternatively, even if the policies extended to claims arising out of circumstances which had been notified during the policy period, the plaintiffs had failed to notify them of any such circumstances within that time. Clause 5 provided:

Any claim(s) made against the assured or the discovery by the assured of any loss(es), or any circumstances of which the assured becomes aware during the subsistence hereof which are likely to give rise to such a claim or loss, shall, if it appears likely that such claim(s) or loss(es) may exceed the indemnity available under the policy/ies of the primary and underlying excess insurers, be notified immediately by the assured in writing to the Underwriters hereon.

Certain preliminary issues arose. In relation to issue 5, the trial judge (Moore-Bick J) held that there was an obligation to give notice of claims and circumstances in accordance with cl 5. The relevant issues are issues 6 and 8.<sup>76</sup>

<sup>73</sup> [2000] 1 Lloyd's Rep 437. See also *Trans-Pacific Insurance Co (Australia) Ltd v Grand Union Insurance Co Ltd* (1989) 18 NSWLR 675 (claims co-operation obligation held to be a promissory term rather than a condition precedent). See further *K/S Merc-Scandia XXXXII v Certain Lloyd's Underwriters Subscribing to Lloyd's Policy No 25T 105487 (The Mercandian Continent)* [2001] 2 Lloyd's Rep 563.

<sup>74</sup> [2000] 1 Lloyd's Rep 437 at 444. Buxton and Peter Gibson LJJ agreed.

<sup>75</sup> [2002] 1 Lloyd's Rep 574 at 581.

<sup>76</sup> See [2005] 2 Lloyd's Rep 517 at 523–4.

*Issue 6:* Whether any such further requirements [sic] as to the giving of notice as may be identified in answer to question 5 above was:

- (1) a condition precedent to liability under the excess policies;
- (2) an innominate term, breach of which might if sufficiently serious excuse the insurers subscribing to the excess policies from liability; or
- (3) a term breach of which gives rise to a right to damages only.

*Issue 8:* Whether, in the event that clause 5 of the Co-insuring policy was an innominate term and assuming that LMA (or the claimant) had committed a repudiatory breach of clause 5 by failing to notify claims to the defendants in accordance with its provisions:

- (1) the defendants had a defence to the claims the subject of such repudiatory breach irrespective of whether or not they had accepted such breach; or
- (2) the defendants had a defence to the claims the subject of such repudiatory breach provided that they had accepted such breach; or
- (3) the defendants had a defence to the claims the subject of such repudiatory breach provided that they had accepted such breach and that the losses the subject of such claims occurred after such acceptance.

The trial judge held<sup>77</sup> that the obligation to give notice to the excess layer underwriters was an innominate term ('intermediate' term). Moore-Bick J also held that the breach was not sufficiently serious to entitle the defendants to reject liability for the relevant claim.

The English Court of Appeal agreed that breach of the obligation to give notice to the excess layer underwriters did not entitle the defendants to reject the claim. However, Mance LJ (with whom Sir William Aldous agreed) disagreed with the approach taken in the earlier cases, including those briefly summarised above. He said that even if it was correct to say that the term in question was an intermediate term, breach of the provision could not entitle the defendants to deny the claim. He described<sup>78</sup> cl 5 as 'an ancillary provision' and went on:

Breach of such a provision is capable of sounding in damages. But I am unable as a matter of construction or implication to find in clause 5 any provision that insurers will be free of liability in the event of a serious breach and/or a breach with serious consequences . . . A test of 'serious breach' and/or 'serious consequences' might have some drastic and unfair consequences.

Mance LJ pointed out that the contract was not 'severable'. In Mance LJ's view<sup>79</sup> the insurance was a composite contract under which the 'primary quid pro quo for insurers' obligation to pay claims under the insurance is the premium, which is incapable of being severally allocated to any particular risk or claim'.

Waller LJ strongly disagreed. Adhering to the views expressed in *Alfred McAlpine Plc v BAI (Run-Off) Ltd*, he considered the obligation in question to be 'severable' in nature. He said:<sup>80</sup>

Conceptually there is, as I would see it, no difficulty in construing an obligation to pay a claim as a severable obligation. Strictly the obligation on the insurer is to pay

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<sup>77</sup> See [2005] Lloyd's Rep IR 135.

<sup>78</sup> [2005] 2 Lloyd's Rep 517 at 530.

<sup>79</sup> [2005] 2 Lloyd's Rep 517 at 530.

<sup>80</sup> [2005] 2 Lloyd's Rep 517 at 532.

damages, but it is precisely to that severable obligation that a 'condition precedent' provision applies. It is precisely to that obligation that the suspensive effect of the clause applies. Conceptually accordingly, I can see no difficulty in construing a notice provision as being an innominate term which provides the insurer with a right to reject the claim if there is a breach of sufficient gravity ie a breach which has seriously prejudiced the insurer.

As the above analysis of cases such as *Bremer v Vanden* and *United Scientific* shows, the fact that a contract is not severable in the sense that the consideration is apportioned to performance does not prevent the application of the *Hongkong Fir* doctrine to particular aspects of the contract. That is one reason why we prefer the concept of application of the contract to severability. The point in the recent cases is the same as in the earlier authorities, namely, that where a contract has a distinct application to a particular event, a promise in relation to that event may be subject to the *Hongkong Fir* doctrine. Accordingly, we see no reason why it should not be possible to deny the benefit of the application of the contract on the basis of a sufficiently serious breach. We therefore respectfully agree with Waller LJ's analysis. There is, nevertheless, a very simple rationalisation for construction given by Mance LJ to cl 5. The fact that a particular term is promissory, but does not operate as a condition precedent, does not require a court to conclude that the term must be intermediate in character. If the intention of the parties — which must ultimately be the test — is that no breach of a provision in an insurance contract, no matter how serious the breach, should give the insurer the ability to deny the claim in question, the term is a warranty.

On that basis, the difference of opinion between Waller LJ and Mance LJ could be rationalised in terms of classification of the term. However, Mance LJ clearly put it on a broader basis. He did not envisage the application of the *Hongkong Fir* doctrine. We can see no reason in principle to support that approach and in our view the circumstances of the recent cases on insurance contracts are sufficiently analogous to cases such as *Bremer v Vanden* and *United Scientific* to say that Waller LJ's conclusions are supported by those decisions of the House of Lords.

## Conclusions

It is arguable that each category of exception to the rule that discharge operates on the whole contract referred to above should be rationalised in terms of the fourth category, that is, application of the contract. What really determines the application of the *Hongkong Fir* doctrine to the whole or part of a contract is whether there is a promissory obligation which has been breached. In *United Scientific* much was made of the distinction between the rent review procedure and a contractual option. Although more complex explanations can be given, what stands out in relation to options is the absence of any promise to exercise the option in accordance with its terms. What determines the efficacy of the exercise of an option still depends on an application of the relevant terms of the contract to its exercise but without the feature of there being a promise to exercise it in accordance with those terms.

Accordingly, the distinctive feature of both *United Scientific* and *Bremer v*

*Vanden* is the fact of breach.<sup>81</sup> In each, timely notice could have simply been seen as a limitation on the rights which were sought to be invoked. In other words, the distinctive feature was not the classification of the terms as intermediate but rather that the terms were regarded as embodying promises. Although it has taken some time to filter through, the recent cases illustrate the extension of that approach to other contexts such as insurance contracts where failure to comply with terms relating to matters such as timely notice of a claim would traditionally be regarded as involving the failure of a non-promissory condition precedent.<sup>82</sup>

The proper statement of termination is that the obligation of the parties to perform or to be ready and willing to perform unperformed obligations is discharged. There is no question of the contract being terminated. Accordingly, in a situation where application of a contract to a certain fact situation attracts a promissory obligation, the question may arise whether the promisee should be discharged from the obligation to perform or to be ready and willing to perform the unperformed obligation which would arise on application of the contract. In the recent insurance cases the question was whether the insurer was discharged from the obligation to meet a claim. Therefore, on the occurrence of a sufficiently serious breach of an intermediate term the insurer would be entitled to treat itself as discharged from the obligation to meet the claim. Exercise of that right would not discharge the unperformed part of the insurance contract as a whole.

An alternative analysis, which in our view leads to the same result, is that particularly in cases such as *Bremer v Vanden*, the issue is whether a promisor is entitled to enjoy a particular right — in that case, the benefit of cl 21 of the contract. Since, by definition, the promisor has breached a promise made in relation to the right, the first question is always whether due performance was intended by the parties to operate as a condition precedent to the enjoyment of the right. The purpose of analysis in terms of the *Hongkong Fir* doctrine is to permit the promisor to enjoy the right even though in breach of contract. That analysis carries with it the conclusion that in some situations the breach by the promisor will be so serious that the promisee is entitled to deny to the promisor the benefit of that right. It follows that even if the ability of an insured to make a claim on the occurrence of an insured event is viewed simply as a right conferred by the contract, the *Hongkong Fir* doctrine may still be applied. The fact that the right may be enjoyed on more than one occasion is irrelevant since the question is whether the right is available on a particular occasion. But just as the mere fact of breach should not be enough to deny the benefit of the right to the insured on that particular occasion, there is no reason to doubt that the insurer may — albeit rarely — be able to show that the breach is so serious that the insurer should be entitled to treat itself as

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<sup>81</sup> See also above, text at n 58.

<sup>82</sup> Whether the requirement of notice under an insurance was a condition precedent or involved a contractual promise was always a question of construction but historically there was a 'tendency' to construe them as conditions precedent, see K C T Sutton, *Insurance Law in Australia*, 3rd ed, LBC Information Services, Sydney, 1999, para 15.26. See also M A Clarke, *The Law of Insurance Contracts*, 4th ed, LLP, London, 2002, para 26.2G. But see *Shinedean Ltd v Alldown Demolition (London) Ltd* [2006] 1 WLR 2696 (promissory condition precedent).

discharged from the obligation which is reciprocal to the right.