Cambridge Law Journal, **73(1)**, March 2014, pp. 113–141
doi:10.1017/S000819731400004X

EXPRESS TERMINATION CLAUSES IN CONTRACTS

JOHN RANDALL*

ABSTRACT. *Having set express termination clauses (ETCs) in their legal context, this article's first aim is briefly to explain three significant points concerning their operation which have now been clarified. Other important questions remain unresolved, and the second aim is to explore four of them: the judicial "reading down" of ETCs; whether termination need be immediate; the recoverability of expectation damages; and the avoidance of an unintended repudiation. Respects in which the English law of contract on each of them would benefit from development or change are identified, and it is argued that the Canadian approach to the award of expectation damages following termination pursuant to an ETC is preferable to the established Anglo-Australian position.*

KEYWORDS: *Contracts, express termination clauses, termination, damages, repudiation, Australia, Canada.*

I. INTRODUCTION

Express termination clauses (ETCs) are a common if not universal feature of modern commercial contracts. Yet they are seldom considered in the teaching of contract, attract sparse coverage in the texts,[1] and their operation and effects, and particularly their interaction with rights to terminate at common law, are often not properly understood.

Advantages of ETCs are said to include creating a greater degree of certainty as to whether a right to terminate has arisen, and their ability to confer such a right in circumstances where the breach committed may not, or does not, amount to a repudiation. On the other hand,

* The author is grateful to Denis Harley, Edwin Peel, Andrew Robertson and the two anonymous reviewers for their comments on earlier drafts. Responsibility for accuracy remains entirely his own. Address for correspondence: St Philips Chambers, 55 Temple Row, Birmingham B2 5LS. Email: jrandall@st-philips.com.

[1] The leading practitioners' text, *Chitty on Contracts*, 31st ed. (London 2012), has only eight paragraphs separately devoted to them (vol. 1, paras. 22-048 to 22–055). There is a short consideration of some of the issues relating to ETCs in chapter 9 of N. Andrews, M. Clarke, A. Tettenborn and G. Virgo, *Contractual Duties: Performance, Breach, Termination and Remedies* (London 2011).

advantages of terminating at common law may include greater flexibility as to the facts relied on to justify termination (so long as they are sufficient overall to support an inference of repudiation), greater flexibility as to how the decision to terminate is made and communicated, and the absence of any obligation first to give the other party an opportunity to remedy its breach.

A number of the difficulties and uncertainties which have surrounded ETCs have now been dealt with by decisions of the Commercial Court and, in particular, of the Court of Appeal in *Stocznia Gdynia S.A. v Gearbulk Holdings Ltd.*[2] ("*Gearbulk*") and the Supreme Court in *Société Generale v Geys*[3] ("*Geys*"). The first aim of this article is briefly to explain three of the more significant points concerning ETCs which have now been clarified: that the law only recognises one type of termination; when ETCs cause common law rights to be lost; and the stringency of the law's requirements for communication if the exercise of an ETC is to be effective.

However, other difficulties and uncertainties remain. Four in particular are of real practical importance. Will an ETC of apparently clear application be judicially "read down"? What courses are open to an innocent party for whom it is commercially impractical to terminate a long-term contract with immediate effect? If the innocent party terminates under an ETC rather than at common law, will the right to expectation damages be lost? And if the existence of a right to terminate is a close call, how can an innocent party minimise the risk of being held itself to have repudiated, by the very act of attempting lawfully to terminate? The second aim of this article is to explore and clarify the law with regard to these four important questions, identifying points which remain unresolved or require further judicial development.

Given the potential breadth of the field, this article will consider only the more basic types of ETC: clauses which state that a specified type of breach by one party entitles the other to terminate (sometimes but by no means always accompanied by a provision expressly conferring an entitlement to expectation damages upon the terminating party), and clauses which state that a specified obligation is to constitute a condition in the strict sense. Space does not permit consideration of so-called "material breach" clauses insofar as they do not fall within the former category,[4] nor implied terms rendering terminable otherwise indefinite contracts.[5]

[2] [2009] EWCA Civ 75, [2010] Q.B. 27.
[3] [2012] UKSC 63, [2013] 1 A.C. 523.
[4] For some discussion of the same see Andrews and ors. op.cit. at paras. 9-018 to 9-028.
[5] Of which *Staffordshire Area Health Authority v South Staffordshire Waterworks Co*. [1978] 1 W.L.R. 1387 (C.A.) is the leading example.

II. The Legal Context

In order to achieve its two aims, this article must briefly set ETCs in their legal context. To that end, this Part first reviews the raison d'être of ETCs, and then shortly rehearses three established principles of particular importance for a proper appreciation of the issues concerning ETCs to be discussed in the two Parts which follow.

A. The Raison d'Être of ETCs

As Treitel puts it:

> The question when a failure in performance is sufficiently serious to entitle the injured party to terminate gives rise to very great difficulty. The frequent references in the cases to breaches which "substantially" deprive a party of what he bargained for, or "go to the root" of a contract, or which "frustrate" his purpose in making the contract are not particularly helpful in analysing the law or in predicting the course of future decisions. … the courts … generally classify a failure in performance with an eye on the consequences … If, on balancing [the need to protect the injured party and the prejudice caused to the other by termination] … they conclude that the injured party should be allowed to terminate, they will classify the failure in performance as "substantial" in order to produce the desired result …[6]

Although the purposes for which ETCs are included in contracts are no doubt many and various, one of the most important, to which Treitel draws attention, is "to prevent disputes from arising as to the often difficult question whether the failure in performance is sufficiently serious to justify termination" [at common law].[7] In other words, the inclusion of an ETC achieves the *desideratum* of certainty,[8] by making consideration of Treitel's question of "very great difficulty" unnecessary, at least for the initial purpose of deciding whether or not the promisee is entitled lawfully to terminate the contract. However, for reasons discussed below, this certainty may come at a price to the terminating party, and Treitel's question may end up having to be addressed after all.

Another, less high-minded, purpose for which an ETC is often included in a contract is to entitle the party with its benefit to terminate in circumstances where it is unlikely that s/he would be so entitled at common law. As we shall see, the counterpoint to this is a judicial tendency to construe such clauses narrowly, and (where they are nevertheless held operable) so as to limit the extent of the benefit which they confer.

[6] G. Treitel, *The Law of Contract* (E. Peel ed.), 13th ed. (London 2011) at para. 18-026.
[7] Op.cit. at para. 18-061.
[8] See per Lord Scott of Foscote in *Golden Strait Corpn. v Nippon Yusen Kubishka Kaisha* (*The Golden Victory*) [2007] UKHL 12, [2007] 2 A.C. 353 at [38].

ETCs are of particular practical importance in the context of long-term contracts, and it is no coincidence that several of the leading cases in this area concern contracts intended to operate over a number of years.[9]

B. Established Principles Concerning ETCs

1. Strict Compliance

The general position remains that a party seeking to terminate pursuant to an ETC must strictly comply with the contractual requirements for its exercise.[10] As to substantive requirements, the most fundamental is whether the exact event giving rise to the right to terminate has occurred. *M.M.P. GmbH v Antal International Network Ltd.* illustrates the strict approach taken.[11] There the contract provided that M.M.P. should not "at any time, do anything to affect adversely [Antal's] name, Trade Marks or other Intellectual property". An ETC gave Antal a right of immediate termination for breach of this clause. Flaux J. held that conduct giving rise to a reasonable fear that Antal's name or intellectual property would be damaged was not sufficient, and that only proof of actual damage thereto would suffice.[12]

The contract's procedural requirements are also strictly applied, in particular where questions of time arise. The right to give notice of termination under an ETC must not be anticipated, whether or not it will inevitably arise,[13] and it is well established by cases such as *Maredelanto Compania Naviera S.A. v Bergbau-Handel GmbH* (*The Mihalis Angelos*)[14] and *Afovos Shipping Co. S.A. v R. Pagnan & Fratelli* (*The Afovos*)[15] that where such a notice is given even slightly prematurely, it is of no effect. Further, a frequent feature of ETCs is that the would-be terminator must first give the other party the opportunity to remedy his/her default within a specified period,[16] in which case the prescribed procedure for doing so must be

[9] For examples, see *L. Schuler A.G. v Wickman Machine Tool Sales Ltd.* [1974] A.C. 235 (see further at note 47 below), *Rice v Great Yarmouth Borough Council* (2000) 3 L.G.L.R. 4 (p. 41), and *Dalkia Utilities Services plc v Celtech International Ltd.* [2006] EWHC 63 (Comm), [2006] 1 Lloyd's Rep. 599.

[10] Treitel op.cit. at para. 18-062.

[11] [2011] EWHC 1120 (Comm). See also *Rawson v Hobbs* [1961] HCA 72, 107 C.L.R. 466, esp. at [9], 480 per Dixon C.J. and [1], 491 per Windeyer J. (Kitto J. dissented on this issue).

[12] Ibid. at [77].

[13] There being no equivalent to the common law doctrine of anticipatory breach in the context of an ETC.

[14] [1971] 1 Q.B. 164 (C.A.) per Edmund Davies and Megaw L.JJ.

[15] [1983] 1 W.L.R. 195 (H.L.). See also Chitty op.cit. at para. 24-032; M. Furmston (ed.), *The Law of Contract*, 4th ed. (London 2010) at para. 7.7.

[16] For helpful consideration of what amounts to remedying a default in the context of a commercial contract, see *L. Schuler A.G. v Wickman Machine Tool Sales Ltd.* [1974] A.C. 235, esp. at 249G-250B per Lord Reid, more recently considered in *Force India Formula One Team Ltd. v Etihad Airways PJSC* [2010] EWCA Civ 1051, [2011] E.T.M.R. 10 (p.158) at [100]–[110] per Rix L.J.

strictly followed;[17] in particular the opportunity to remedy must be clearly stated,[18] and, by parity of reasoning with that in *The Afovos*, the full contractual period for remedy must be allowed before any termination in reliance on its expiry will be valid.

Although Chitty suggests at one point that "Strict or precise compliance with the termination clause may no longer be a necessary prerequisite to a valid termination",[19] there would appear to be little English judicial authority for this beyond the general modern approach to formal defects in written notices.[20]

2. Good Faith, Reasonableness and Fairness

Under English law it is not necessary for a party exercising an ETC to do so either reasonably or in good faith.[21] Nor, despite earlier authority apparently to the contrary,[22] is there any wider doctrine whereby a termination notice served under an ETC may be held invalid on the ground that reliance on it would be unfair or unjust: *Glencore Grain Rotterdam B.V. v Lebanese Organisation for International Commerce*.[23]

3. The 'Second Thoughts' Principle

The general rule is that a "promisee may rely on any available ground for termination … the promisee is not usually required to justify an election to terminate on any ground given at the time of the election".[24] As has been pointed out by Lloyd L.J., although this

[17] Furmston, op.cit. at para. 7.29, note 12.

[18] *Western Bulk Carriers K/S v Li Hai Maritime Inc. (The Li Hai)* [2005] EWHC 735 (Comm), [2005] 2 Lloyd's Rep. 389, 406–407 per Jonathan Hirst Q.C. sitting as a deputy High Court Judge.

[19] Para. 22-049; contrast at para. 22-051 and note 227 thereto. See to similar effect J. Carter, "Termination Clauses" (1990) 3 Journal of Contract Law 90, 101 and the (Australian) authorities there cited.

[20] For which see *Ellis Tylin Ltd. v Co-operative Retail Services Ltd*. [1999] B.L.R. 205 per H.H.J. Bowsher Q.C. at 217–220, citing *inter alia Mannai Investment Co. Ltd. v Eagle Star Life Assurance Co. Ltd*. [1997] A.C. 749. For Australian judicial dicta consistent with Chitty's suggestion, see the citation from Kirby J. in the *Pan Foods* case, text to note 64 below.

[21] *Anson's Law of Contract*, 29th ed. (J. Beatson, A. Burrows & J. Cartwright eds.) (OUP, Oxford, 2010) at 470; Carter, op.cit. at 103; Chitty op.cit. at para. 22-048; *Financings Ltd. v Baldock* [1963] 2 Q.B. 104 (C.A.), 115 per Upjohn L.J. See also *Sotiros Shipping Inc. v Sameiet Solholt* (*The Solholt*) [1983] 1 Lloyd's Rep. 605 (C.A.) at 608, where Sir John Donaldson M.R. referred to a party's "unfettered right" to operate or not operate an ETC. The contrary view has been much discussed in Australia ever since the obiter dicta of Priestley J.A. on the point in *Renard Constructions (ME) v Minister for Public Works* (1992) 26 N.S.W.L.R. 234 (NSWCA), without (as yet) decisive resolution: see inter alia *Burger King Corporation v Hungry Jack's Pty. Ltd* [2001] NSWCA 187, (2001) 69 N.S.W.L.R. 558; D. Bennett Q.C. & W. Jocic (both of Melbourne Law School), "Good Faith in the Performance of Australian Contracts" (unpublished); J. Paterson, A. Robertson & A. Duke, *Principles of Contract Law*, 4th ed. (Sydney 2012) at 488–491.

[22] *Panchaud Frères S.A. v Établissements General Grain Co*. [1970] 1 Lloyd's Rep. 53 (C.A.). There is some support for this approach in Australian judicial dicta: see the short discussion of 'Unconscionable Terminations' in Paterson, Robertson & Duke op.cit. at 487–488.

[23] [1997] 4 All E.R. 514 (C.A.), 529a–531c. Of course, the doctrine of promissory estoppel remains available if supported by the facts.

[24] Furmston op.cit. at para. 7.28. See *British & Beningtons Ltd. v North Western Cachar Tea Co. Ltd.* [1923] A.C. 48, 71–72 per Lord Sumner (cited with approval by Lord Denning M.R. in *The Mihalis Angelos* [1971] 1 Q.B. 164 (C.A.) at 193B, and by Dixon J. in *Shepherd* v. *Felt and Textiles*

principle is often used in relation to facts of which the terminating party was unaware until later, there is "no reason why it should not be used in relation to facts which were known to that party at the time".[25]

The principal exception arises where the notice to terminate constitutes an election to proceed on the ground stated, rather than some alternative ground which was available at the time. An example is afforded by *Shell Egypt West Manzala GmbH v Dana Gas Egypt Ltd.* (*"Shell Egypt"*).[26] Tomlinson J. (as he then was) applied passages from a somewhat similar 2006 case, *Dalkia Utilities Services plc v Celtech International Ltd.* (*"Dalkia Utilities"*),[27] where Christopher Clarke J., having recognised that prima facie an innocent party can rely on both a contractual right to terminate and a common law entitlement to accept a repudiatory breach, went on to state that if a notice

> makes explicit reference to a particular contractual clause, and nothing else, that may, in context, show that the giver of the notice was not intending to accept the repudiation and was only relying on the contractual clause; for instance if the claim made under the notice of termination is inconsistent with, and not simply less than, that which arises on acceptance of a repudiation … In the present case markedly different consequences would arise according to whether or not there was a termination under [the ETC] or an acceptance of a repudiation … The same notice cannot operate to produce two … diametrically opposing consequences. In those circumstances it should take effect in, and only in accordance with its express terms, namely as a determination under [the ETC].[28]

The judgment of Moore-Bick L.J. in *Gearbulk* (a case where no such inconsistency was found, leaving the general rule applicable[29]) succinctly summarises the position:

> If the contract and the general law provide the injured party with alternative rights which have different consequences … he will necessarily have to elect between them and the precise terms in which he informs the other party of his decision will be significant, but where the contract provides a right to terminate which corresponds to a right under the general law (because the breach goes to the root of the contract or the parties have agreed that it should be treated as doing so) no election is necessary. In such cases it is sufficient for the injured party simply to make it clear that he is treating the contract as discharged… If he gives a bad reason for

of Australia Ltd. [1931] HCA 21, 45 C.L.R. 359 at 377–378); *Glencore v Lebanese* (note 23 above) at 526f; *Stocznia Gdanska S.A. v Latvian Shipping Co.* (*No. 2*) [2002] EWCA Civ 889, [2002] 2 Lloyd's Rep. 436 at [32] (cited with approval in *Gearbulk* at [44]).

[25] *Reinwood v L. Brown & Sons* [2008] EWCA Civ 1090, [2009] B.L.R. 37 at [51].

[26] [2010] EWHC 465 (Comm).

[27] [2006] EWHC 63 (Comm), [2006] 1 Lloyd's Rep. 599.

[28] Ibid. at [143]–[144].

[29] See *Gearbulk* at [39]–[42].

> doing so, his action is nonetheless effective if the circumstances support it.[30]

III. Points Now Clarified

This Part offers a brief explanation of three of the more significant points concerning ETCs which have now been clarified.

A. Only One Type of Termination

Chitty[31] rightly doubts the case of *Laing Management Ltd. v Aegon Insurance Co. (UK) Ltd*.[32] insofar as H.H.J. Lloyd Q.C. held that after a termination pursuant to an ETC which did not also amount to acceptance of a repudiatory breach, the contract remained alive for the benefit of both parties.[33] Surely the true position is that "in both cases [the party terminating] is electing to terminate the contract for the future (i.e. to bring to an end the primary obligations of the parties remaining unperformed) … 'Termination' is capable of meaning both a termination pursuant to [an ETC] and the acceptance of a repudiation",[34] even though some non-primary clauses (e.g. arbitration clauses[35]) are, or are conventionally construed as, intended to survive the termination of the contract which contains them.

A sounder approach is that of Moore-Bick L.J. in *Gearbulk*:

> it is impossible for a party to terminate a contract, in the sense of discharging both parties from further performance, whether by invoking a term which entitles him to do so or by exercising his rights under the general law, and at the same time treat it as continuing, since the two are inconsistent. Either the primary obligations remain for performance, or they do not.[36]

[30] Ibid. at [44]. The position of an innocent party having to elect between two available legal courses (one of which he has obtained by negotiating for its inclusion in the contract) when–and only when – they are inconsistent with one another is, it is suggested, an unobjectionable feature of commercial life, and not in the nature of a difficulty from which the law should protect him (*cf*. per E. Peel, "The Termination Paradox" [2013] L.M.C.L.Q. 519, speaking of the "obvious dilemma for the innocent party" at 536; C. Langley and R. Loveridge in "Termination as a response to unjust enrichment" [2012] L.M.C.L.Q. 65 at 66, 88 and 92–95).

[31] Op.cit. at para. 22-049.

[32] (1998) 86 B.L.R. 70.

[33] See at 110H-I. In *Gearbulk* at [26]–[35], dicta apparently to like effect in the earlier case of *United Dominions Trust (Commercial) Ltd. v. Ennis* [1968] 1 Q.B. 54 (C.A.) were dismissed by Moore-Bick L.J., who said it was "not altogether easy to understand … particularly in the light of more recent expositions of the principles governing the law on repudiation and the doctrine of election … these were *ex tempore* judgments delivered at a time when the principles of discharge by breach had not received the detailed analysis and exposition provided in the more recent authorities."

[34] *Dalkia Utilities* at [143] per Christopher Clarke J.

[35] See *Heyman v Darwins Ltd*. [1942] A.C. 356.

[36] At [34].

https://doi.org/10.1017/S000819731400004X Published online by Cambridge University Press

However a passage earlier in the same judgment is less clear:

> In my view it is wrong to treat the right to terminate in accordance with the terms of the contract as different in substance from the right to treat the contract as discharged by reason of repudiation at common law. In those cases where the contract gives a right of termination they are in effect one and the same.[37]

The intended scope of the latter dictum is open to debate, and Edwin Peel, writing in the Law Quarterly Review under the intriguing title "Affirmation by termination", has questioned whether this can be said of cases where (unlike *Gearbulk* itself) the breach giving rise to a right to terminate under an ETC is not sufficiently serious to give rise to a right to terminate at common law. He postulates the "paradox" that a termination expressly founded on an ETC may be regarded as a mode of performance, and therefore an affirmation of the contract at common law.[38] Some of the issues which arise are considered more fully elsewhere in this article, under "The 'Second Thoughts' Principle", above, and "The Recoverability Of Expectation Damages", below. In terms of what was meant in *Gearbulk*, however, it is suggested that the answer is to be found later in the judgment, where Moore-Bick L.J. explained his approach to the facts of that case:

> … Gearbulk's letters exercising its right to terminate the contracts … were wholly inconsistent with an election to affirm them, so there can be no doubt that the contract in each case was discharged … the right to recover the instalments of the price, together with the right to obtain payment under the bank guarantee, arose only on and by reason of the termination of the contract … I think the commercial context as well as the terms of the contract make it clear that the obligation to repay the instalments of the price was intended to survive the termination of the contract, whether that occurred by reason of the exercise by Gearbulk of a right to terminate expressed in the contract itself or by its acceptance of a repudiatory breach on the part of the [seller] … [just as, for example, [the parties] intended the arbitration clause to survive].[39]

This reasoning enjoys the powerful support of Sir Anthony Mason, who crisply explained in *Progressive Mailing House Pty. Ltd. v Tabali Pty. Ltd.* that:

> Termination in the exercise of a contractual power is not an affirmation of the contract which debars the innocent party from

[37] At [20].
[38] (2009) 125 L.Q.R. 378 at 380–381, building on the judgments of Lord Denning M.R. in *UDT v Ennis* (note 33 above) and Burton J. at first instance in *Gearbulk* [2008] EWHC 944 (Comm), [2008] 2 Lloyd's Rep. 202. For Peel's subsequent development of this argument see [2013] L.M.C.L.Q. 519 (note 30 above).
[39] At [37].

> suing for damages for breach on the ground of repudiation or fundamental breach. This is because the termination, so far from insisting on performance by the party at fault, brings to an end his obligation to perform his promise *in specie*.[40]

Put shortly, the law only recognises one type of termination.

B. When Common Law Rights Are Lost

"In general, contractual rights of termination are treated as additional rights, not given in substitution for common law rights."[41] Examples of cases applying or recognising this principle abound, and include *Union Transport Finance Ltd. v British Car Auctions Ltd.*,[42] *The Afovos*,[43] and *Progressive Mailing House v Tabali*.[44]

Exceptionally, however, a contractual provision can expressly or impliedly exclude a common law right to terminate in respect of a breach falling within the scope of that provision:

> Whether the procedure laid down for termination in the contract excludes, expressly or impliedly, the common law right to terminate further performance of the contract in respect of a breach which falls within the scope of the clause is a question of construction of the contract. When interpreting [such a termination clause] the court will have regard to the commercial purpose which is served by the termination clause and interpret it in the light of that purpose.[45]

The point is best dealt with by reference to examples where implied exclusion of the common law right in respect of actual breaches has, exceptionally, been found. In *Lockland Builders Ltd. v Rickwood*,[46] the land owner's assertion of a right to terminate at common law was, in effect, an attempt to avoid the opportunity given to the builder by the ETC to rectify its breaches within a specified period of a notice before a termination notice could be served.[47] The ETC in that case was not expressed to be without prejudice to the owner's rights at common law,[48] and was therefore construed as excluding common law rights to

[40] [1985] HCA 14 at [32], 157 C.L.R. 17, 31.
[41] Furmston op.cit, at para. 7.7 (and repeated at para. 7.29).
[42] [1978] 2 All E.R. 385 (C.A.), 392a-b per Bridge L.J.
[43] [1983] 1 W.L.R. 195 (H.L.), 201G-H per Lord Hailsham L.C.
[44] Note 40 above per Mason J. at [28], 30 and per Deane J. at [8], 55–56.
[45] Chitty op.cit. at para. 22-049.
[46] (1996) 77 B.L.R. 38 (C.A.), the example cited in Chitty op.cit., para. 22-049 at note 210.
[47] As to which note *BSkyB Ltd. v HP Enterprise Services UK Ltd.* [2010] EWHC 86 (TCC), per Ramsey J. at [1366], final sentence. *L. Schuler A.G. v Wickman Machine Tool Sales Ltd.* [1974] A.C. 235 can be viewed as another such case, given the presence of the ETC in clause 11(a) of the contract there under consideration, and the view of its impact taken by Lord Reid at 249C-G and 252A-C (Lord Simon of Glaisdale agreeing at 264A-B), Lord Morris of Borth-y-Gest at 260A-B and Lord Kilbrandon at 271C-H.
[48] An equivalent point was made in *Schuler v Wickman* (note 47 above) by Lord Morris at 259G-H: "I would have expected a specific mention in clause 11 of a right in Schuler to determine the

terminate in respect of (only) breaches falling within the scope of the ETC. Both Russell and Hirst L.JJ. added that the clause would not have impliedly excluded the right to terminate if the contract breaker had evinced a clear intention not to be bound by the terms of the contract,[49] in other words a repudiation by a pure renunciation rather than by actual breach(es).

In *Crane Co. v Wittenborg A/S*[50] it was held that a provision in a charterparty which expressly dealt with what the parties were entitled to do in the event of any "substantial breach" – to terminate immediately by notice in the case of a non-remediable "substantial" breach and to give notice triggering a period for remedy where the breach was remediable – provided a complete code for the parties' rights in the event of a repudiatory breach. This was because the court doubted "whether there is any distinction to be drawn between a 'substantial' breach required by the clause and a breach of condition or repudiatory breach."[51]

An ETC may also operate so as, in effect, to set a minimum level of seriousness required before a breach of an intermediate term may be relied on as justifying termination at common law:

> … circumstances otherwise within the scope of [an ETC] but falling short of the precise terms would in my judgment not give rise to the right to terminate at common law … to justify termination at common law something "worse" or not addressed by those provisions would be required;[52]

> … if a breach of a term had to reach a degree of seriousness before [an ETC] could be applied, it is unlikely that a breach which was less serious would, by itself, amount to a repudiatory breach.[53]

The general presumption, however, is that an ETC does not exclude a party's common law right to accept a repudiatory breach of contract as terminating the same unless there are clear words to that effect.[54]

agreement on notice alone for any breach by Wickman of their clause 7(b) obligations had it been the intention of the parties that Schuler would have such a right."

[49] See at 46 and 50 respectively. The same point was made in *Amann Aviation Pty. Ltd. v Commonwealth of Australia* [1990] FCA 55, (1990) 22 F.C.R. 527 (a case better known for the subsequent appeal to the High Court of Australia on issues relating to damages and remedies, at [1991] HCA 54, 174 C.L.R. 64). Davies and Sheppard JJ., having found that an ETC did provide a comprehensive procedure for terminating the contract in the circumstances specified in the relevant clause (2.24) (see at [11]–[15] and [2]–[15] respectively), both pointed out that the same conclusion would not have applied to an anticipatory breach (*aliter* "a repudiation … in its strict sense") by the contractor (at [16] and [15] respectively).

[50] [1999] All E.R. (D.) 1487 (C.A.).

[51] Per Mance L.J. (as he then was) at [21].

[52] Per Langley J. in *Amoco (UK) Exploration Co. v British American Offshore Ltd.* [2001] All E.R. (D.) 244 (Nov).

[53] Per Ramsey J. in *BSkyB* (note 47 above) at [1366].

[54] *Dalkia Utilities* at [21] per Christopher Clarke J.; *South Oxfordshire District Council v SITA UK Ltd.* [2006] EWHC 2459 (Comm), [2007] Env. L.R. 13 at [174]–[178] per David Steel J. (insufficient indication that the ETCs in that case contained a complete code for termination in the relevant circumstances).

C. Clear and Unambiguous Communication

For a termination at common law, although the requirement for sufficient communication was expressed in *Vitol S.A. v Norelf Ltd.* (*The Santa Clara*) as being something which "clearly and unequivocally conveys to the repudiating party that [the other] is treating the contract as at an end",[55] in practice the law has adopted a generous approach towards the terminating party when determining whether it has been satisfied. "An acceptance of a repudiation requires no particular form: a communication does not have to be couched in the language of acceptance … It is sufficient that the fact of the election comes to the repudiating party's attention."[56] This generous approach is well illustrated by the facts of *The Santa Clara* itself (which are often overstated as affording an example of acceptance by silence), and of the further examples postulated by Lord Steyn in his speech.[57]

In the recent case of *Geys*, the Supreme Court had to consider whether the employer bank had done enough to terminate an employment contract pursuant to an ETC by a particular date. Lady Hale S.C.J., giving the leading judgment on this issue, stressed the importance of the other party being "notified in clear and unambiguous terms that the right to bring the contract to an end is being exercised, and how and when it is intended to operate."[58] This observation was not limited to employment contracts, for she added "These are general requirements applicable to notices of all kinds …"[59] The communication particularly relied on by the bank, which had previously told Mr. Geys that it had "decided to terminate [his] employment with immediate effect",[60] was its conduct in making a payment into Mr. Geys' bank account amounting to his full entitlement to salary and other allowances under the ETC relied on. This was rejected as insufficient, Lady Hale stating that:

> It is necessary … that the employee not only receive his pay in lieu of notice, but that he receive notification … in clear and unambiguous terms, that such a payment has been made and … in the exercise of the contractual right to terminate … with immediate effect.[61]

Lord Carnwath S.C.J., agreeing "after some hesitation", acknowledged that this "may seem somewhat formalistic" and that Mr. Geys "could no doubt readily infer the purpose of the payment once he

[55] [1996] A.C. 800, 811A per Lord Steyn.
[56] Ibid. at 810H-811B.
[57] Ibid. at 811F-H.
[58] [2012] UKSC 63, [2013] 1 A.C. 523 at [57].
[59] Ibid., *loc. cit*.
[60] See ibid. at [9] per Lord Hope D.P.S.C.
[61] Ibid. at [58].

became aware of it" (which the trial judge found was probably before the crucial date[62]), but then concurred that it was "not unreasonable to expect an employer relying on [such a] clause to make the position clear."[63]

This reflects a more stringent approach to the operation of ETCs than has conventionally been applied to common law terminations, involving as it did the implication of an additional term requiring service of a clear explanation of the fact and purpose of the payment to the more limited express requirement of the ETC, which was simply "making a payment to [the employee] in lieu of notice …" The decision may be contrasted with the view expressed by Kirby J. in the High Court of Australia in *Pan Foods Company Importers & Distributors Pty. Ltd. v Australia and New Zealand Banking Group Ltd.* (a case concerning the contractual efficacy of a notice pursuant to an ETC immediately to terminate a commercial lending facility) that commercial documents

> should be construed practically, so as to give effect to their presumed commercial purposes and so as not to defeat the achievement of such purposes by an excessively narrow and artificially restricted construction.[64]

IV. Issues of Continuing Difficulty

This Part seeks to explore and clarify four of the remaining difficulties and uncertainties surrounding ETCs which are of real practical importance.

A. Judicial "Reading Down" of ETCs

At common law, provided "very clear words" are used, under "general contractual principles … it is possible by express provision in the contract to make a term a condition, even if it would not be so in the absence of such a provision – not only in order to support a power to terminate the contract … but also to support a power to recover loss of bargain damages".[65] Similarly, contracting parties can in theory agree by means of a clearly worded ETC that one of them shall be entitled to

[62] Ibid. at [10] per Lord Hope.

[63] Ibid. at [103]. It may be noted that being "not unreasonable" does not satisfy any recognised test for the implication of terms, even after *Attorney General of Belize v Belize Telecom Ltd.* [2009] UKPC 10, [2009] 1 W.L.R. 1988.

[64] [2000] HCA 20, (2000) 170 A.L.R. 579 at [24].

[65] *Gumland Property Holdings Pty. Ltd. v Duffy Brothers Fruit Market (Campbelltown) Pty. Ltd.* [2008] HCA 10 at [58], 234 C.L.R. 237, 259 (see also [53], 257–258) in the joint judgment of the High Court of Australia, citing inter alia *Bettini v Gye* (1876) 1 Q.B.D. 183 at 187 per Blackburn J. See also *Bunge Corporation, New York v Tradax Export S.A., Panama* [1981] 1 W.L.R. 711 (H.L.), 715G-H per Lord Wilberforce.

terminate in circumstances amounting to only a minor breach, or even no breach at all.

In practice, there is a well recognised judicial reluctance to construe contractual provisions as elevating otherwise inessential terms to strict conditions at common law, even where the word "condition" itself is expressly, and apparently selectively, used.[66] A similar approach has been applied in a number of cases involving the construction of seemingly unambiguous ETCs. In *Antaios Cia Naviera S.A. v Salen Rederierna A.B.* (*The Antaios*), where the ETC included the phrase "failing punctual and regular payment of the hire … or on any breach …," the words "or on any breach" were construed by the House of Lords as meaning "or on any repudiatory breach".[67]

A controversial example is afforded by the decision of the Court of Appeal in *Rice v Great Yarmouth Borough Council*, where the contractually conferred right to terminate was expressed to arise if the contractor "commits a breach of any of its obligations under the Contract", and yet those words were construed (applying *The Antaios*) as meaning "commits a repudiatory breach of" the same.[68]

This decision has been powerfully criticised by, amongst others, Simon Whittaker,[69] who points out that the contract in question was made on a standard form (of the Association of Metropolitan Authorities) which had formed part of the Council's proposal in a public tendering process; thus, one can note, *Rice* was far removed from the sort of consumer protection decision where the clause in question was tucked away in some small print, with no realistic expectation of it being read, let alone considered. Further, the effect of construing the express words of the ETC in this way was to render it entirely redundant, since a right to terminate in the event of a repudiatory breach adds nothing to the common law position.[70]

As Whittaker points out, this willingness to "read down" plain words, in order to avoid what the judge considers would be a harsh termination, is in stark contrast to the courts' unwillingness to "read down" an express provision that time is "of the essence" of a particular

[66] Of which *L. Schuler A.G. v Wickman Machine Tool Sales Ltd.* [1974] A.C. 235 (Lord Wilberforce dissenting) affords the leading example.

[67] [1985] A.C. 191 (see at 200F-G and 205C-D per Lord Diplock and 209D-E per Lord Roskill). As to the contractual significance of a requirement in a charterparty that the payment of hire be "punctual and regular", at least when combined with an anti-technicality clause, see now *Kuwait Rocks Co. v AMN Bulkcarriers Inc.* (*The Astra*) [2013] EWHC 865 (Comm), [2013] 2 Lloyd's Rep. 69 at [109]–[118] per Flaux J.

[68] (2001) 3 L.G.L.R. 4 (p. 41) (C.A.) – see at [18] and [28] per Hale L.J. (as she then was). For a further example see *Dominion Corporate Trustees Ltd. v Debenhams Properties Ltd.* [2010] EWHC 1193 (Ch).

[69] "Termination Clauses" in A. Burrows & E. Peel (eds.), *Contract Terms* (Oxford 2007), 277–283. See also M. Chen-Wishart, *Contract Law*, 4th ed. (Oxford 2012), 472–473, and E. McKendrick, *Contract Law – Text, Cases and Materials*, 5th ed. (Oxford 2012), 792–793.

[70] Op. cit. at 279, citing Colman J. in *National Power plc v United Gas Co. Ltd.* [1998] All E.R. (D.) 321. Chen-Wishart makes the same point, loc. cit.

obligation, despite this having a similar practical consequence where the obligation is broken, as is illustrated by the well-known case of *Lombard North Central plc v Butterworth*.[71]

Notwithstanding the theoretical position being as stated at the outset of this section, it seems that in practice appellate courts[72] are inclined to construe ETCs so as only to be operable upon a serious, if not indeed a repudiatory, breach of contract. Such judicial "reading down" of clearly expressed provisions in ETCs brings back into the determination of the parties' rights the uncertainty which ETCs are intended to remove. Whilst the familiar tension between legal certainty and what is perceived to be a just outcome to the particular case is apparent, it is suggested that, absent circumstances rendering the ETC unenforceable by virtue of the Unfair Contract Terms Act 1977,[73] greater judicial restraint ought to be exercised before "reading down" the clear words of an ETC, given the importance of certainty in the field of commercial contracts.

B. Need Termination Be Immediate?

Hitherto, the conventional view of the position at common law has been that termination by acceptance of a repudiation has to take effect immediately upon communication of that acceptance, even though this may seriously detract from the commercial value of the right to the innocent party. In some contracts, such as for the long-term provision of a service or supply, it is not practicable to give notice of acceptance of a repudiatory breach effective immediately. Entering into contractual arrangements for the service to be provided by another in advance of an acceptance of the repudiatory breach would involve the innocent party running the risk of itself being accused of repudiating the contract, and losing its potentially important right to loss of bargain (including expectation) damages. In contrast, an ETC may well provide for the right to terminate being exercisable or taking effect upon the expiration of a specified period of notice or at a specified future date.[74]

Unlike an anticipatory breach, an actual breach has immediate legal effects, if only to give rise to a cause of action for damages. If the breach is serious enough, or of a strict condition, it may also give rise to a right to terminate at common law. In this situation, although it has

[71] [1987] Q.B. 527 (C.A.).

[72] For an exception at first instance, see *BNP Paribas v Wockhardt EU Operations (Swiss) A.G.* [2009] EWHC 3116 (Comm), 132 Con. L.R. 177, Christopher Clarke J.

[73] See section 3(2)(b)(i), held to be of "at least arguable" application by Lord Bingham M.R. in *Timeload Ltd. v British Telecommunications plc* [1995] E.M.L.R. 459 (C.A.) at 468.

[74] Anson op.cit. at 471–472, and compare, for an example, the ETC in *Walkinshaw v Diniz* [2001] 1 Lloyd's Rep. 635, which Mr Diniz sought to exercise (see headnote at 632 for clauses 7.1, 9.2(b) and 9.4, and the judgment of Tomlinson J. at [46] for the exercise of the ETC, and at [106] for his conclusion). This decision was upheld on appeal without these points being challenged ([2002] EWCA Civ 180, [2002] 2 Lloyd's Rep. 165), and is discussed below (text to note 80 ff.).

been said that there is no *via media* for the innocent party, who must elect between affirmation and termination, the law does give the innocent party a reasonable time before s/he has to make up his/her mind between these inconsistent courses.[75] Here again, however, the common law's flexibility comes at the price of uncertainty in the resolution of any given case.[76] As the Law Commission has put it in the context of the sale of goods:

> The flexibility of the factual approach to a "reasonable period" allows a great number of factors to influence the court, helping it to achieve a fair result in the individual case. However, this flexibility means that it is often not possible to predict whether the reasonable period has expired in a given case.[77]

In *Norwest Holst Group Administration Ltd. v Harrison*[78] an employee complained of unfair dismissal, based upon a demotion which was to take effect from a specified future date. The Court of Appeal decided that although the employer had thereby committed an anticipatory breach, the employee had not unequivocally accepted such repudiation before the breach had been remedied by the employer withdrawing the demotion (which it did before the specified date had arrived). All three members of the Court of Appeal regarded the employee's letter alleged to have constituted an acceptance as being merely a step in the negotiations between them, and were heavily influenced by the fact that it had been headed "without prejudice". However Sir Denys Buckley added, obiter:

> The effect of an acceptance of an anticipatory repudiation must, in my view, be the immediate termination of the contract. By accepting a repudiation, the innocent party elects to treat the contract as abrogated at the moment when he exercises his election. He cannot, in my judgment, affirm the contract for a limited time down to some future date and treat it as abrogated only from that future date.[79]

This *dictum* was applied by Tomlinson J. in *Walkinshaw v Diniz*.[80] This was another case concerning an employment contract, this time

[75] *Stocznia Gdanska S.A. v Latvian Shipping Co*. (*No. 2*) [2002] EWCA Civ 889, [2002] 2 Lloyd's Rep. 436 at [87] per Rix L.J. The legal position of the innocent party who has not (yet) accepted a repudiation has recently been discussed by M. Chetwin in "The Unaccepted Repudiation and Legal Rights", (2012) 29 Journal of Contract Law 231.

[76] See the passage from Treitel op.cit. at para. 18-026 cited early in this article.

[77] Consultation Paper No. 188 (October 2008), Consumer Remedies for Faulty Goods, Part 3, "The Right to 'Reject' in UK Law", at para. 3.2.

[78] [1985] I.C.R. 668 (C.A.).

[79] Ibid., at 683E-F. To similar effect, in one of the leading Australian judgments on the termination of contracts at common law, Jordan C.J. (N.S.W.) said that such a termination when communicated "is at once operative": *Tramways Advertising Pty. Ltd. v Luna Park (NSW) Ltd.* (1938) 38 S.R. (N.S.W.) 632, 643.

[80] [2001] 1 Lloyd's Rep. 635 (as to which see also note 74 above) at [51].

between a Formula 1 racing driver, Mr. Diniz, and (in effect) the Arrows team. The employer unsuccessfully argued that the driver's (allegedly ineffective) notice to terminate under an ETC at the end of the calendar year was itself a repudiatory breach, which the employer had accepted as terminating the contract, not immediately but after the last race of the F1 season. One of the grounds on which this argument was rejected was that, in accordance with the above dictum of Sir Denys Buckley, an acceptance postponed so as to take effect on a future date was not possible at common law.

An argument that the law's requirement that an acceptance must be with immediate effect is limited to cases of anticipatory breach was rejected in *South Oxfordshire District Council v SITA UK Ltd.*, David Steel J. holding that there was no relevant distinction in this regard between actual and anticipatory breaches.[81]

In such cases, therefore, ETCs have a distinct advantage over the common law right for the injured party. There are, however, early signs that there may be a judicial willingness to develop the common law in this regard. In *Shell Egypt* Tomlinson J., having acknowledged that he himself had in *Walkinshaw v Diniz* applied the principle formulated by Sir Deny Buckley in *Norwest Holst v Harrison*, intriguingly continued:

> There must I think be limits to that principle … It would perhaps be surprising if there were an inflexible rule that an acceptance of a repudiation can only be effective if it purports to bring about immediate termination in circumstances where the contract calls for no performance from either party in the interval before termination is expressed to take effect. In such circumstances there would surely be no affirmation.[82]

This may be no more than a hitherto closed door opening just slightly ajar, but such small beginnings can presage a significant incremental development of the common law over time. The limited change which Tomlinson J. tentatively envisages would be welcome in itself, but the development needed to reinforce the practical value of the common law right to terminate in the modern commercial world would be one enabling the aggrieved party to exercise that right on (say) reasonable notice in circumstances where immediate termination is not commercially realistic.

For example, suppose that the Arrows team had repudiated a continuing contract with a driver in late October, shortly after the end of the F1 season and at a time when neither party owed any duty of performance to the other until the start of pre-season testing on (say) 1 February the next year. Tomlinson J.'s dictum suggests that the

[81] [2006] EWHC 2459 (Comm), [2007] Env. L.R. 13 at [168].
[82] *Shell Egypt* at [27].

driver would have been free to respond by accepting Arrows' repudiation as terminating their contract with effect from (say) 31 December, rather than only (as has hitherto been understood to be the law) with immediate effect. Whilst intellectually interesting, this change would appear to have limited commercial advantage to the driver, particularly when one bears in mind (a) that ex hypothesi he could not be receiving any salary during the period up to 31 December (because the payment of salary would be a type of performance due from Arrows, taking the example outside Tomlinson J.'s dictum, at least read literally), and (b) the already established principle, which would be applicable on such facts, that the innocent party is allowed a reasonable time in which to decide whether or not to accept a repudiation as terminating the contract.[83]

The change which, it is suggested, would be desirable and of real practical value may be illustrated by another example. Suppose eighteen months into a five year contract for the maintenance of Great Yarmouth Borough Council's extensive parks and recreation grounds, the performance of the contractor over many months had been so poor, with no prospect of improvement, that it was in repudiatory breach. However the scale of the work required by the contract was outside the capacity of any locally available jobbing gardeners to undertake on a short-term basis, and the value of any equivalent replacement contract, whether for three or five years, was such as to bring it within public procurement rules, meaning that it would take four to five months for the Council lawfully to place one. In such circumstances, it is suggested, the common law ought to allow the Council to accept the contractor's repudiation as terminating the contract with effect from (say) six months' time, and to recover expectation damages if the retendering process results in it having to pay more than the original contract price for the final three years of the original contract term. At present, the Council's only means of lawfully terminating after a period of notice would be if the contract contains an ETC providing for this.[84] Furthermore, such a clause might or might not be accompanied by an express provision entitling the Council to recover the equivalent of expectation damages in such circumstances. The potential significance of that point will appear from the discussion under the next heading.

C. The Recoverability Of Expectation Damages

This is the knottiest of the four problem areas to be discussed. The underlying difficulty can be traced back to (at least) the decision

[83] See text to note 75 above.

[84] Another example can be derived from the facts of *South Oxon. v SITA* (note 81 above) if one postulates (contrary to the Judge's findings of fact in that case) that the waste disposal contractor's breaches were sufficiently serious to amount to a repudiation.

of the Court of Appeal in *Financings Ltd. v Baldock*[85] in the early 1960s, and one reflection of it may be found in the expressions of discomfort by Mustill and Nicholls L.JJ. as to the decision to which they felt driven in *Lombard North Central plc v Butterworth*.[86] To some extent, this is well-trodden ground,[87] particularly since the highest appellate courts of two other Commonwealth jurisdictions have subsequently taken up the problem, albeit coming to diametrically opposed conclusions. The approach of this article, however, will be to develop this by identifying the nub of the problem, contrasting the Canadian and Anglo-Australian solutions, considering in turn three arguments which have been put forward in support of the latter, and then offering a reasoned conclusion which both favours the Canadian solution, and ties in with an important recent decision in the Commercial Court.

1. The Nub of the Problem

Where a contract is terminated by acceptance of a repudiation (in this context taken as comprehending renunciation, breach of a strict condition, and a sufficiently serious breach of an intermediate term),[88] the injured, terminating party can ordinarily recover loss of bargain damages, comprising compensation both for accrued actual losses and for loss of the expected performance over the remainder of the contractual term.[89] That may well apply even where other remedies are also available to, and claimed by, that innocent party—for example, an express right to recover an instalment already paid, as in *Gearbulk*—provided its recovery is not inherently inconsistent with a claim for loss of bargain damages.[90]

As to the position where the termination takes place pursuant to an ETC on grounds which do not also amount to a common law repudiation, Chitty expresses a cautious view:

> where a contracting party terminates further performance of the contract pursuant to a term of the contract, and the breach which it has caused it to exercise that power is not a repudiatory breach, the party exercising the right to terminate *may* only be entitled to

[85] [1963] 2 Q.B. 104 (C.A.).
[86] [1987] Q.B. 527 (C.A.).
[87] See e.g. G. Treitel, "Damages on rescission for breach of contract" [1987] L.M.C.L.Q. 143; B. Opeskin, "Damages for breach of contract terminated under express terms" (1990) 106 L.Q.R. 293.
[88] The conferral of the right so to terminate on the innocent party is well-established as one of the common law's responses to such a breach of contract. There is, it is suggested, neither need nor justification for the radical re-theorisation of this as a response to unjust enrichment of the contract breaker, as proposed by Langley and Loveridge op.cit. (note 30 above).
[89] For criticism of the availability of loss of bargain damages upon any termination for breach of a strict condition, see J. Stannard, "Delay, Damages and the Doctrine of Constructive Repudiation" (2013) 30 Journal of Contract Law 178, esp. at 194–198.
[90] Such as, for example, a claim for the recovery of wasted expenditure.

> recover damages in respect of the loss which it has suffered at the date of termination and not for loss of bargain damages.[91]

The difficulty arises where the terminating party has, by reason of the other's breach of contract,[92] become entitled to terminate under an ETC and duly done so, but had no sufficient grounds for terminating at common law,[93] there having been no repudiation by the other party. The contract may, of course, include an express provision accompanying the ETC which entitles the terminating party also to recover damages for loss of the other party's future performance, and in principle such a clause is effective, unless invalidated by the common law rule against penalties.[94]

The argument against the recovery of expectation damages in this situation, absent a (valid) express provision for the same, has frequently been linked to the often troublesome concept of causation: the effective cause of the terminating party's loss of his/her contractual expectation, it asserts, was not the other party's breach, but his/her own decision to exercise the right to terminate under the ETC.[95]

2. Contrasting Solutions

The highest appellate courts in two Commonwealth jurisdictions have taken different views on the point. In giving the judgment of the Supreme Court of Canada in *Keneric Tractor Sales Ltd. v Langille*, Wilson J. opined that

> damages should be assessed in the same way in both cases. Repudiation may be triggered by either the inability or the unwillingness of a party to perform his contractual obligations. The same is true of a breach of contract that gives rise to a right to terminate; it may be the result of inability or unwillingness to perform. The breach and the repudiation are merely subdivisions within a general category of conduct, i.e., conduct which gives the innocent party the right to treat the contract as terminated. Thus, there is no conceptual difference between a breach of contract that

[91] Op.cit. at para. 22-049 (emphasis added).

[92] In theory, an ETC may be triggered by an event which does not constitute, and has not been brought about by, a breach of contract at all. However in practice such cases seem to be quite rare, and in any event there cannot be any principled basis on which damages of any sort should be recoverable at common law in circumstances where there has been no relevant breach.

[93] Regardless of whether or not the latter was asserted at any stage: see "The 'Second Thoughts' Principle" (above). Contrast the position where a carefully drawn clause in the contract has elevated the broken obligation, which would not otherwise have been a strict condition, to that status, as to which see *Lombard North Central plc v Butterworth* [1987] Q.B. 527 (C.A.).

[94] See, for examples from cases cited elsewhere in this article, *Esanda Finance Corp. v Plessnig* [1989] HCA 7, 166 C.L.R. 131, *Dalkia Utilities* at [122] and *The Astra* [2013] EWHC 865 (Comm), [2013] 2 Lloyd's Rep. 69 at [31] & [120] (clauses not penal); contrast *Financings Ltd. v Baldock* [1963] 2 Q.B. 104 (C.A.), *Lombard v Butterworth* (note 86 above), *AMEV-UDC Finance Ltd. v. Austin* [1986] HCA 63, 162 C.L.R. 170, and *Dalkia Utilities* at [123] (clauses penal).

[95] For an earlier discussion of some of the issues this raises see Opeskin op.cit. (note 87 above) at 315–320.

> gives the innocent party the right to terminate and the repudiation of a contract so as to justify a different assessment of damages when termination flows from the former rather than the latter. General contract principles should be applied in both instances.[96]

By contrast, a line of authority to contrary effect developed first in England and then in Australia. In *Cooden Engineering Co. Ltd. v Stanford*,[97] Jenkins L.J. (dissenting) cited with apparent approval an obiter dictum from the unreported decision of Salter J. in *Elsey & Co. Ltd v Hyde* to the effect that where a hire-purchase contract has been terminated by the owner pursuant to an ETC triggered by the hirer's payments falling into arrears, damage suffered by the owners beyond interest for late payment is irrecoverable, because it "is not the result of the hirer's breach of contract … it is the result of their own election to determine the hiring."[98] In the leading English case of *Financings Ltd. v Baldock*, this obiter dictum was adopted and approved by Lord Denning M.R. as part of the ratio decidendi in his (the first) judgment.[99] In that case there had been no repudiation but a termination pursuant to an ETC, the accompanying express provision for the payment of damages was void as a penalty,[100] and the Court of Appeal held that expectation damages were not recoverable. The judges' reasoning is considered further below.

Then in *Shevill v Builders Licensing Board* the High Court of Australia held that where a contract is terminated pursuant to an ETC on grounds which do not also amount to a common law repudiation, loss of bargain damages are not recoverable. Gibbs C.J. reasoned that

> it does not follow from the fact that the contract gave the [innocent party] the right to terminate the contract that it conferred on it the further right to recover damages as compensation for the loss it will sustain as a result of the failure of the [other party's performance] for the rest of the [contractual] term.[101]

The Chief Justice and all three other judges determined the case simply by reference to whether the breach was sufficiently serious to amount to a repudiation, and whether the ETC should be construed as elevating any obligation whose breach triggers the right to terminate to the status of a strict condition. No further reasoning as to why

[96] [1987] 2 S.C.R. 440, (1987) 43 D.L.R. (4th) 171, at [25]. This approach was discussed by Opeskin op.cit. at 298–300. For a recent English decision taking a strikingly similar line, see *The Astra* (note 67 above) at [109] & [118], considered in the text to notes 128–130 below.

[97] [1953] 1 Q.B. 86 (a case which itself turned on a penalties point), at 102.

[98] (1926) K.B.D.C., C.G. Jones & R. Proudfoot, *Notes on Hire-Purchase Law*, 2nd ed. (London 1937), Appendix A, 107, 112.

[99] [1963] 2 Q.B. 104 (C.A.), 111–112 (see also per Upjohn L.J. at 115).

[100] Which the owners accepted (at 106) as being the consequence of the then recent decision of the House of Lords in *Bridge v Campbell Discount Co. Ltd.* [1962] A.C. 600.

[101] [1982] HCA 47 at [8], 149 C.L.R. 620, 627.

expectation damages are not recoverable upon termination under an ETC was offered, although subsequently Mason J. offered the short explanation (in terms reminiscent of the causation argument) that

> in the case of termination for non-essential breach, as *Shevill* demonstrates, … by terminating pursuant to the contract at that stage, the innocent party puts it beyond his power to insist on performance, thereby bringing to an end any possibility of repudiation or fundamental breach with consequential damages for loss of bargain.[102]

3. The Causation Argument

In the further High Court of Australia case of *AMEV-UDC Finance Ltd. v Austin*,[103] where again there had been no repudiation, although the immediate issue for decision was whether the measure of damages following termination under an ETC provided for by an accompanying express provision was void as a penalty, the judges considered as part of their reasoning what measure of damages would have been payable at common law, absent the express provision under consideration. Four of the five judges considered that expectation damages would not have been recoverable, approving the causation argument and several of them citing with approval passages from *Financings Ltd. v Baldock*.[104] Mason and Wilson JJ. stated that

> when the lessor terminates pursuant to the contractual right given to him for breach by the lessee, the loss which he can recover for non-fundamental breach is limited to the loss which flows from the lessee's breach. The lessor cannot recover the loss which he sustains as a result of his termination because that loss is attributable to his act, not to the conduct of the lessee.[105]

The causation argument was rejected in the joint judgment of the High Court of Australia in *Gumland Property Holdings Pty. Ltd. v Duffy Brothers Fruit Market (Campbelltown) Pty. Ltd.*[106] There, however, the ETC which had been operated sat alongside an express term

[102] *Progressive Mailing House Pty. Ltd. v Tabali Pty. Ltd.* [1985] HCA 14 at [33], 157 C.L.R. 17, 31. In *AMEV-UDC* (note 103 below) at [4], 175 Gibbs C.J. himself described the reasoning of the High Court in *Shevill* (in which he had presided) as "very similar" to that in *Financings Ltd. v Baldock* (note 99 above).

[103] [1986] HCA 63, 162 C.L.R. 170 (a chattel lease case).

[104] See per Gibbs C.J. at [3]–[5], 175–176; Mason and Wilson JJ. at [26], 185–186; Dawson J. (dissenting as to the result) at [15], 212–213; (and contrast Deane J., also dissenting as to the result, at [10]–[12], 204–207 *dubitante*).

[105] At [26], 186. This passage was cited with approval by Brennan J. in *Esanda Finance Corporation Ltd. v Plessnig* [1989] HCA 7 at [4], 166 C.L.R. 131, 145.

[106] [2008] HCA 10, 234 C.L.R. 237 (a case concerning the provisions of a lease of real property, to which the ordinary principles of contract law, including that of termination for repudiation or fundamental breach, were applicable – *Progressive Mailing House v Tabali* (note 102 above) per Mason J. at [24]–[28], 27–30).

providing for the payment of such damages.[107] Nothing was said to cast doubt on the statement of Mason and Wilson JJ. in the *AMEV-UDC* case quoted above.

The causation argument was also raised in *Gearbulk* on behalf of the seller, Stocznia. It was rejected by the Court of Appeal, but in carefully limited terms:

> In the present case … the exercise by Gearbulk of the right to treat the contract as terminated under article 10.1(b) and 10.1(c) was intended to and did operate to discharge the contract with the same consequences as if it had been discharged by repudiation in accordance with the general law … Whatever may have been said in other cases about other contracts, I think it is clear that in this case the contract proceeds on the footing that if Gearbulk chose to exercise its right, the yard's breach was to be viewed as the effective cause of the contract's termination.[108]

One obvious difficulty of principle with the current Anglo-Australian position is that the causation argument does not always work, because it is equally applicable to at least some terminations at common law as to terminations pursuant to an ETC. It may be argued that in some cases of renunciation, or a sufficiently serious breach of an intermediate term, the breach has ex hypothesi already deprived the innocent party of "in effect the benefit",[109] or "substantially the whole benefit",[110] of the contract before it is available for acceptance at common law (although even there, only its acceptance brings about the termination of the contract[111]). However, in cases of breaches of clauses which the parties have agreed shall be strict conditions[112] that may well not be the case – for example, cases where one instalment payment is tendered shortly after a time essential date.[113] Further, more modern formulations of what suffices to constitute a renunciation, or a sufficiently serious breach of an intermediate term – notably, depriving the innocent party of "a substantial part of the benefit to which he is entitled under the contract"[114] – appear to be less stringent than older

[107] As their Honours pointed out at [52]. For the relevant clauses, see earlier in the same joint judgment at [3].

[108] *Gearbulk*, at [36] per Moore-Bick L.J.

[109] *Universal Cargo Carriers Corporation v Citati* (*The Catherine D. Goulandris*) [1957] 2 Q.B. 401, 431 per Devlin J.

[110] *Hongkong Fir Shipping Co. Ltd. v Kawasaki Kisen Kaisha Ltd.* (*The Hongkong Fir*) [1962] 2 Q.B. 26 (C.A.), 70–73 per Diplock L.J.; *The Afovos* [1983] 1 W.L.R. 195 (H.L.), 202H-203G per Lord Diplock.

[111] See text to notes 118–119 below; hence a repudiation pending such acceptance has famously been said to be a "thing writ in water" – *Howard v Pickford Tool Co. Ltd.* [1951] 1 K.B. 417 (C.A.), 421 per Asquith L.J.

[112] As they are entitled to do: see note 125 below.

[113] See *Lombard North Central plc v Butterworth* [1987] Q.B. 527 (C.A.).

[114] *Decro-Wall International S.A. v Practitioners in Marketing Ltd.* [1971] 1 W.L.R. 361 (C.A.), 380A-B per Buckley L.J.; *Rice v Great Yarmouth Borough Council* (2000) 3 L.G.L.R. 4 (p. 41) (C.A.) at [38] per Hale L.J.

formulations.[115] As Lewison L.J. recently observed of the classic formulation "going to the root of the contract", "[t]he trouble with expressing important propositions of English law in metaphorical terms is that it is difficult to be sure what they mean".[116]

So it is not only where grounds for operating an ETC to terminate a contract have arisen that the party so entitled has an unfettered[117] right to choose whether or not to do so; it is well established, and has very recently been reaffirmed by the Supreme Court in *Geys*,[118] that an innocent party with a right to terminate at common law has freedom of choice whether or not to "accept" the other's breach as terminating the contract at common law.[119] Thus, at least in cases other than those where the breach has already (i.e. prior to any acceptance) deprived the innocent party of (substantially) the whole benefit of the contract, insofar as it is true to say that the terminating party's loss of future contractual performance is attributable not to the other's breach, but to his/her own election to terminate, that is equally true of a termination pursuant to an ETC and one made at common law.[120]

4. The No Post-Termination Breach Argument

Another ground for the Anglo-Australian position was put forward by Lord Denning M.R. in *Financings Ltd. v Baldock*:

> It seems to me that when an agreement of hiring is terminated by virtue of a power contained in it … [the terminating party] can recover damages for any breach up to the date of termination but not for any breach thereafter, for the simple reason that there are no breaches thereafter … [A] repudiation being itself a breach which took place before the termination, it is within the class of breaches for which the owners can recover damages according to the principle I have already stated. But if there is no repudiation, and simply, as here, a failure to pay one or two instalments (the failure not going to the root of the contract and only giving a right

[115] Such as depriving the innocent party of substantially the whole benefit of the contract (see per Diplock L.J. in *The Hongkong Fir* (note 110 above) at 72). Notwithstanding the opinion expressed by Lord Wilberforce in *Federal Commerce and Navigation Co. Ltd. v Molena Alpha Inc.* (*The Nanfri*) [1979] AC 757 at 779C-D that there is no "divergence of principle" between this formulation and that of Buckley L.J. in *Decro-Wall International* (text to note 114 above), it is suggested that the older formulation clearly presented a higher threshold for the innocent party to overcome, a view apparently supported by Lewison L.J. in *Ampurius Nu Homes Holdings Ltd. v Telford Homes (Creekside) Ltd.* [2013] EWCA Civ 577, [2013] 4 All E.R. 377 at [48].

[116] Ibid., at [50].

[117] See note 21 above.

[118] In perhaps the most challenging factual circumstances for this principle, namely where a contract of employment has been repudiated by an employer who wishes to have nothing further to do with the employee.

[119] A point emphasised in a variety of well-known cases including *Hochster v De la Tour* (1852) 2 E. & B. 678, 691 per Lord Campbell C.J.; *White and Carter (Councils) Ltd. v McGregor* [1962] A.C. 413, 427 per Lord Reid and 444 per Lord Hodson; *Clea Shipping Corp. v Bulk Oil International Ltd.* (*The Alaskan Trader*) *(No. 2)* [1984] 1 All E.R. 129, 137d-e per Lloyd J. (as he then was).

[120] As Peel acknowledges op.cit. (note 30 above) at 523.

> to terminate by virtue of an express stipulation in the contract), the owners can only recover the instalments in arrear, with interest, and nothing else: for there was no other breach in existence at the termination of the hiring.[121]

With respect, this reasoning is similarly unconvincing. Whilst some might argue that it is theoretically supportable where the repudiation has taken the form of a renunciation or a sufficiently serious breach of an intermediate term,[122] it offers no justification for a distinction being drawn between termination under an ETC and termination in reliance on a breach of a strict condition.

5. The Election Between Remedies Argument

There are echoes of Lord Denning's above reasoning in Upjohn and Diplock L.JJ.'s explanation of the same result, not in terms of causation but in terms of remedy:

> this is not a case of repudiation: this is a case where the owner elected to terminate the contract, and … he can only sue for any breaches which can be proved before he terminated the contract [that seems to me prima facie the extent of the remedy of the owners in this action];[123]
>
> if [one] party has not done something which the law regards as a wrongful repudiation of the contract, the other party, although he may be entitled under an express power to determine the contract, is not entitled to damages for non-performance of the contract during the period for which it would have continued to run but for such determination. [The owners' remedy is accordingly limited to recovery of the two instalments, together with interest thereon at the agreed rate …].[124]

The difficulty with this approach is that termination as such is not, in the conventional sense, a remedy at all: termination is something which a party does for itself, not something which it seeks to obtain from the court. And simply to assert what the remedy is in a particular situation fails to address the question of why that, rather than anything more or different, is the available remedy in law.

6. Discussion and Conclusion

As a matter of principle, the Canadian position appears to have greater merit than the Anglo-Australian. It is undesirable and unattractive that important commercial rights be made to depend on artificial and

[121] [1963] 2 Q.B. 104, 110 and 113. Compare per Lord Sumption S.C.J. in *ENE Kos I Ltd. v Petroleo Brasileiro S.A. (No. 2)* [2012] UKSC 17, [2012] 2 A.C. 164 at [7].
[122] See text to notes 109–110 above.
[123] Per Upjohn L.J. at 117 and 115.
[124] Per Diplock L.J. at 123 and 121.

lawyerly distinctions between the event giving rise to the right to terminate and the consequent termination itself, which will generally follow quite quickly. The Canadian rejection of this approach has the great merits of realism and clarity.

Furthermore, parties are entitled to agree that a clause, which would otherwise not be a strict condition, shall be treated as such, provided that they do so in sufficiently clear terms.[125] It should not, therefore, be regarded as surprising or improbable that where parties have expressly agreed that a particular breach by one shall entitle the other to terminate, they should be taken thereby also to have agreed that the other shall be entitled to recover the same measure of damages as upon a termination at common law.[126] The difference between these two agreements, it is suggested, is one of drafting form, and without substance.[127]

In the recent case of *Kuwait Rocks Co. v AMN Bulkcarriers Inc.* (*The Astra*) Flaux J. adopted an approach very similar to this, holding (in the context of a time charterparty) that the presence of an ETC operable upon a breach irrespective of whether it was otherwise repudiatory is "a strong indication" that the parties intended that the underlying obligation "would go to the root of the contract and thus that the provision was a condition".[128] He described the suggestion in Wilford on Time Charters[129] that judicial *dicta* there cited could be understood as indicating that an ETC attached to the obligation to pay hire can give that obligation one characteristic of a condition (the right of termination) without another (recoverability of expectation damages) as "somewhat heretical", adding that the obligation "either is a condition or it is not".[130] This reasoning represents a striking departure from that in *Financings Ltd. v Baldock*, and in the subsequent decisions of the High Court of Australia, discussed above, and is much closer to that of the Supreme Court of Canada.

It may well be that the underlying reason for the decision in *Financings Ltd. v Baldock* was an unspoken concern to protect ordinary consumers who had entered into hire-purchase agreements as a means of acquiring a motor car in an age when ideas of consumer protection and consumer rights were in their infancy, and against the background

[125] See e.g. *Bettini v Gye* (1876) 1 Q.B.D. 183, 187 per Blackburn J.; *Financings Ltd. v Baldock* [1963] 2 Q.B. 104, 120 per Diplock L.J.; *Lombard North Central plc v Butterworth* [1987] Q.B. 527 (C.A.), 535F per Mustill L.J. and 546C-D per Nicholls L.J. (as they then were); *Gumland v Duffy Brothers* [2008] HCA 10, 234 C.L.R. 237 at [58], 259 (cited in the text to note 65 above).

[126] For an argument that the common law measure of damages upon termination for breach of a strict condition should be modified, see Stannard op.cit. (note 89 above).

[127] Compare the observations of Nicholls L.J. in *Lombard v Butterworth* (note 125 above) at 546E-F.

[128] [2013] EWHC 865 (Comm), [2013] 2 Lloyd's Rep. 69 at [109].

[129] 6th ed. (T. Coghlin, A. Baker, J. Kenny & J. Kimball eds.) (Informa, London, 2008) at para. 16.132.

[130] Ibid. at [118] (see also [34] & [91]).

of a readily inferred gross inequality of bargaining power in favour of the finance companies. If such factors are thought, fifty years on, still to require some policy-based restriction on the recovery of expectation damages following termination pursuant to an ETC, a still justifiable approach – albeit one providing less certainty than the Canadian approach – would be for the question to depend on whether the terms of the particular contract as a whole sufficiently support an implication that the parties must be taken to have agreed that the terminating party should be entitled (as between them) to regard any breach triggering the ETC as depriving it of the substantial benefit of the contract as a whole. It is suggested that, generally, the answer to that question should be in the affirmative, but that there would be room for a negative answer in some cases, in particular where the triggering event was simply a minor default in the payment of instalments due to continue over a substantial period of time.

In any event, it is suggested that the Canadian approach, with or without such a refinement, would provide litigants with a commercially realistic outcome, and the Anglo-Australian common law with a neat resolution to its current continuing difficulty. In England, with *Financings Ltd. v Baldock* standing in the way of such a solution, this would seemingly require a decision of the Supreme Court.

D. Avoiding An Unintended Repudiation

A further consequence of Treitel's question of "very great difficulty" is that an innocent party, faced with a breach of contract by the other, may genuinely conclude that the breach was sufficiently substantial to entitle him to terminate at common law,[131] and accordingly serve a notice "accepting" the breach as terminating the contract, only to find out some time later that a judge (or even an appellate court) takes a different view.[132] In the meantime, an astutely advised contract breaker may have leapt at the opportunity itself to terminate the contract, by treating the innocent party's termination notice as constituting a repudiation of the contract, and accepting that repudiation, if only thereby to avoid its potential liability for loss of bargain damages. Is it possible for a party who was, when the initial breach occurred,

[131] Or that the term breached constituted a strict condition of the contract.

[132] A difficulty which court proceedings, even if they can be brought on quickly enough, cannot be used to resolve in advance, because the courts will regard a declaration of entitlement to terminate a contract which is still on foot as a hypothetical matter and refuse to make one: *Galaxy Communications Pty. Ltd. v Paramount Films of Australia Inc.* [1998] NSWCA 48, citing inter alia *Howard v Pickford Tool Co. Ltd.* [1951] 1 K.B. 417, 420–412 per Lord Evershed M.R. and *Dormer v Solo Investments Pty. Ltd.* (1974) 1 N.S.W.L.R. 428, 434–435 per Holland J. ("… it is one thing to declare present contractual rights of the parties, another to declare them contingently on the plaintiff electing to take some course that he has not yet taken, is not bound to take and may not take").

the innocent one, to protect itself against its properly motivated actions back-firing in this way?

In *Shell Egypt*, Tomlinson J. indicated that he could see no reason why an innocent party should not serve a notice which accepts the (putative) repudiatory breach as terminating the contract, but in the alternative, in case the assertion of repudiatory breach were to prove wrong, exercising a right to terminate under an ETC.[133] What, however, where the applicability of an ETC is open to doubt?

A party may assert a genuinely held view of the effect of, or position under, a contract—for example, that it has been validly terminated under an ETC—because s/he is mistaken as to the true contractual position. In such circumstances s/he will not, without more, be taken to have repudiated the contract, at least where s/he makes clear by his/her words and actions that s/he is ready, willing and able to abide by his/her true contractual obligations as determined by the court, *and* his/her actions do not have the immediate effect of depriving the other party of a substantial part of that to which s/he is entitled under the contract: see *Woodar Investment Development Ltd. v Wimpey Construction UK Ltd.*,[134] as reconciled with *Federal Commerce & Navigation Co. Ltd. v Molena Alpha Inc.* (*The Nanfri*)[135] by first Christopher Clarke J. in *Dalkia Utilities*,[136] and more recently Etherton L.J. (as he then was) in *Eminence Property Developments Ltd. v Heaney*:

> So far as concerns repudiatory conduct, the legal test is simply stated, or, as Lord Wilberforce put it, "perspicuous". It is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contact … The innocent and obvious mistake of Mr. Jones in the present case has no comparison whatever with, for example, the cynical and manipulative conduct of the ship owners in *The Nanfri* … all the circumstances must be taken into account insofar as they bear on an objective assessment of the intention of the contract breaker. This means that motive, while irrelevant if relied upon solely to show the subjective intention of the contract breaker, may be relevant if it is something or it reflects something of which the innocent party was, or a reasonable person in his or her position would have been, aware and throws light on the way the alleged repudiatory act would be viewed by such a reasonable person. So, Lord Wilberforce in *Woodar* (at p. 281D) expressed himself in qualified

[133] At [34]. For a short discussion of the issues raised see Peel, op.cit. (note 30 above) at 542–543.
[134] [1980] 1 W.L.R. 277 (H.L.), in particular at 283A-B per Lord Wilberforce (citing *James Shaffer Ltd. v Findley Durham & Brodie* [1953] 1 W.L.R. 106 (C.A.) and *Sweet & Maxwell Ltd. v Universal News Services Ltd.* [1964] 2 Q.B. 699 (C.A.)) and 295A-H per Lord Keith of Kinkel (also citing *Ross T. Smyth and Co. Ltd. v T. D. Bailey and Son & Co.* (1940) 164 L.T. 102, 107 per Lord Wright).
[135] [1979] A.C. 757.
[136] At [148].

> terms on motive, not by saying it will always be irrelevant, but that it is not, of itself, decisive.[137]

In practice, it is a good deal easier to deploy a "genuinely mistaken but not repudiation" argument where the basis for termination relied on, albeit ultimately unsuccessfully, was an ETC present in the contract, because the very attempt to operate a specified clause of the contract tends to evince an intention to honour its terms, rather than to repudiate them. Lord Wilberforce drew attention to that aspect of the facts in *Woodar v Wimpey*:

> … it would be a regrettable development of the law of contract to hold that a party who bona fide relies upon *an express stipulation in a contract* in order to rescind or terminate a contract should, by that fact alone, be treated as having repudiated his contractual obligations if he turns out to be mistaken as to his rights.[138]

As John Carter has pointed out, it was the presence of an ETC in the underlying contract "which saved Wimpey".[139] This reasoning is strikingly close to that propounded by Peel in support of his postulated paradox considered above.[140]

It should be emphasised, however, that as the law stands a genuinely attempted but ineffective termination in reliance on an ETC will by no means always escape being held itself to have constituted a repudiation. In *Dalkia Utilities*, the time for Dalkia's performance of its primary obligations (which it refused, in the genuine belief that its termination had been effective) had arrived, and there had been no discussions between the parties about leaving the true position to be resolved by the court, with Dalkia then to perform if it turned out to be wrong. Had Dalkia's termination been held ineffective, Christopher Clarke J. made clear that he would have held the same to have amounted to a repudiation by Dalkia, and Celtech's acceptance thereof to have been a valid termination of the contract.[141]

The valuable principle in *Woodar v Wimpey* merits further development. For courts to adopt the hands-off approach reflected by the laconic observation that an innocent party's concern that "they may elect to give a notice of termination which is later found to be invalid and amount to a repudiation of the agreements … is a risk which [they]

[137] [2010] EWCA Civ 1168, [2011] 2 All E.R. (Comm.) 223 at [61]–[63]. See also *DTR Nominees Pty. Ltd. v Mona Homes Pty. Ltd.* [1978] HCA 12, 138 C.L.R. 423; and *Vaswani v Italian Motors (Sales and Services) Ltd.* [1996] 1 W.L.R. 270 (P.C.). The Court of Appeal approved the application of this principle in the context of denial of title in *Eastaugh v Crisp* [2007] EWCA Civ 638, at [32]–[39] per Arden L.J.

[138] Note 134 above at 283D-E (emphasis added).

[139] "Termination Clauses" (1990) 3 Journal of Contract Law 90, 93–94.

[140] Under "Only One Type of Termination" (text to note 38 above).

[141] *Dalkia Utilities* at [149]–[151].

have to weigh in electing to give a notice of termination"[142] is to abrogate their responsibility to avoid, so far as principle permits, unjust outcomes. A great merit of the common law is supposed to be that it has sufficient flexibility generally to produce just outcomes in particular cases, whilst maintaining an acceptable degree of certainty and legal principle. If the termination of contracts is not to resemble a game of chess, generally won by those with the smartest lawyers rather than the preponderance of merits, cases where a well-intentioned, innocent party is tripped up by being held inadvertently to have committed a technical repudiation need to be minimised if not entirely eliminated.

V. Conclusions

The greater clarity as to the common law's approach to ETCs which has been achieved over the past 6 or so years is welcome, but the appellate courts' continuing appetite for "reading down" the plain words of ETCs is not. The rule that any termination at common law has to take effect immediately ought to be reconsidered, and Tomlinson L.J. (as he now is) has given the first hint that there may be judicial sympathy for this. The Anglo-Australian position as to the non-recoverability of expectation damages following termination pursuant to an ETC is inherently unsatisfactory, and the reasons given for it unconvincing. The Canadian position, or perhaps a modified version of it, would be clearer, more commercial, and relegate to history the importance of artificial, lawyerly distinctions. The principle in *Woodar v Wimpey* should be developed, so as to minimise the number of cases in which a well-intentioned, innocent party is tripped up by being held inadvertently to have committed a technical repudiation. These are all matters which can and should be resolved by the law of contract itself, without the need to cede ground to the burgeoning empire of the law of unjust enrichment.[143]

[142] *Galaxy Communications v Paramount Films* [1998] NSWCA 48 per Stein J.A. at [36].
[143] Cf. Langley and Loveridge op.cit. (note 30 above).