Although the meaning of authorisation has never been properly worked out, *Jogee*, which clearly favours an intention-based approach to assessing the culpability of secondary parties for incidental crimes, fleetingly associated the intent to assist or encourage with authorisation (in [66]). Maybe the latter can come to the rescue and help us devise a compromise definition of intention that is acceptable to jurisdictions which, like the HCA, reject *Jogee* as setting the bar for liability for murder intolerably high. Much will depend on how post-*Jogee* cases will flesh out the as yet undefined requirement of (conditional) intent to assist or encourage incidental crimes.

Beatrice Krebs

Address for Correspondence: School of Law, University of Reading, RG6 7BA, UK. Email: b.krebs@reading.ac.uk

REPUDIATORY BREACH: INABILITY, ELECTION AND DISCHARGE

STUDENTS – and indeed judges – of the law of contract have been sorely tried by *White & Carter (Councils) Ltd. v McGregor* [1962] A.C. 413. Mercifully, other propositions about the breach and discharge of contracts seem elementary.

Where circumstances change so radically that the contract can no longer be performed, it may be frustrated. Frustration discharges the contract "forthwith, without more and automatically" (*Hirji Mulji v Cheong Yue SS Co. Ltd.* [1926] A.C. 497, 505, per Lord Sumner). But frustration must be the product of external forces; it cannot stem from the actions of either party. A party that renders the contract incapable of performance will rather be held in repudiatory breach. Repudiation encompasses the promisor's *inability* to perform, in addition to "renunciation", namely a refusal or unwillingness to perform. But it is trite law that repudiation does not automatically bring the contract to an end (cf. frustration). The innocent party is given the option either to accept the repudiation (bringing the contract to an end) or to reject it (thereby affirming the contract). In the latter case (affirmation), the original repudiation has no effect. In the *White & Carter* case, the House of Lords confirmed the right of affirmation. The precise degree of any limits on that right have subsequently proved controversial (to say the least).

This question was again aired in *MSC Mediterranean Shipping Co. SA v Cottonex Anstalt* [2016] EWCA Civ 789; [2016] 2 Lloyd's Rep. 494. Ultimately, the court did not rule on the *White & Carter* point. Their reasons for holding that it did not arise create doubts about the supposedly trite propositions rehearsed in the previous paragraph.

MSC carried 35 containers of cotton by sea to Bangladesh under contract with the shipper, Cottonex. On arrival, Cottonex was permitted a certain "free" period of time to unload, after which time it was obliged to return the containers to MSC (which owned them). After the free period, Cottonex had to pay a daily hire charge in respect of each container not redelivered, at rates laid down in the contract ("container demurrage"). On the facts, after the containers of cotton had been unloaded, the consignee (purchaser of the cotton) failed to collect the goods; the customs authorities in Chittagong seized the containers and refused to permit the carrier, shipper or anyone else to unpack them. Thus, Cottonex was unable to return the containers to MSC. MSC alleged that the hire (demurrage) continued to accrue unless and until the containers were returned, and eventually issued proceedings against Cottonex for the sum of $577,184 and counting. (Notably, 35 replacement containers could readily have been purchased for $3,262 each, i.e. $114,170 in total.)

At first instance, Leggatt J. held that Cottonex had repudiated the contract by its long delay in returning the containers: [2015] EWHC 283 (Comm). But applying Lord Reid's proviso in *White & Carter*, he held MSC obliged to accept that repudiation. There was no "legitimate interest" for them in continuing to claim demurrage, "in effect, to seek to generate an unending stream of free income". On the contrary, this would be "wholly unreasonable" when replacement containers were available (at [121]).

The Court of Appeal agreed that Cottonex's delay in returning the containers had amounted to repudiation (although at a later date than the learned judge had held). But it held that this was not a case in which MSC's right to affirm arose. Why not?

According to Moore-Bick L.J. at [43], "the option of affirming the contracts [did not remain] open to the carrier once the adventure had become frustrated, because at that point further performance became impossible, just as it would if the shipper or those for whom it was responsible had caused the containers to be destroyed". At [63], Tomlinson L.J. reasoned similarly: the shipper's delay in redelivery had been so prolonged that the original contract had become incapable of performance. And so "the innocent party simply cannot treat the contract as subsisting because it is no longer capable of performance as agreed".

Some comments occur. First, "frustrated" does not of course mean here that the shipper was absolved from liability. Cottonex remained liable in damages. It was in breach by not redelivering the containers. However, secondly, it appears that the contract was discharged by the repudiatory breach (Cottonex's inability to perform) – and discharged *automatically* rather than at the election of the innocent party. (Had MSC had the right of election, it would of course have been necessary to consider the limits on its purported affirmation of the contract.)

This sits uneasily with our elementary propositions. For repudiation to discharge a contract, it must be accepted by the innocent party (but that had not happened here). Frustration *does* automatically discharge a contract; but not where it is self-induced (and nobody suggested that Cottonex's failure to redeliver was not breach). There have been suggestions that the *innocent party* (here the carrier) might be able to rely on frustration resulting from the acts of the other party; but the party who self-induces frustration of course cannot: see *FC Shepherd & Co. v Jerrom* [1987] Q.B. 301. Yet, in *MSC v Cottonex*, was the shipper not permitted to rely on its own default to discharge its obligation to pay demurrage?

Contrast also the Supreme Court's decision that summary dismissal does not automatically discharge a contract of employment: *Geys v Société Générale* [2012] UKSC 63; [2013] 1 A.C. 523. The majority held it would be wrong to permit the party in breach (the employer) to rely on its own wrong; the need for acceptance by the innocent party (employee) was thus reaffirmed. This came in the face of a strong dissent by Lord Sumption. His Lordship reasoned at [116] that the right to affirm was "to enable [the contract] to be performed at the option of the innocent party", and it was therefore wrong to maintain that right when the contract could not be performed because necessary co-operation (from the employer) was neither forthcoming nor legally compellable (quoted by Tomlinson L.J. at [60]). There is much to be said for Lord Sumption's reluctance to recognise that the contract of employment "limped on as a formal 'shell' or 'husk'": *Geys* (at [139](3)). But he was in dissent. Tomlinson L.J. nevertheless relied on Lord Sumption's reasoning, holding at [62] that *MSC* was "an a fortiori case" (the contract was incapable of performance through (commercial) *impossibility* and not merely non-co-operation). *Geys* was distinguished at [61] on the ground that the Supreme Court (majority) had not contemplated "a case where a contract has become repudiated because it is no longer capable of performance, as in the classic case of frustrating delay".

Despite the difficult fit with supposedly basic propositions and with *Geys*, the Court of Appeal's decision was perhaps inevitable. What if (as Moore-Bick L.J. suggested) the containers had been completely destroyed through the shipper's default? Because self-induced, the shipper could not plead frustration. But surely its liability to pay demurrage would not last literally until the end of time. That (absurd) conclusion could be avoided by several routes: first by holding the carriers obliged to accept the repudiatory breach (as Leggatt J. did, invoking the "no legitimate interest" exception to *White & Carter*); secondly, by the Court of Appeal's novel path; and, thirdly, by interpreting the "container demurrage" obligation not to extend to such a situation (cf. *Staffordshire Area Health Authority v South Staffordshire Waterworks Co.* [1978] 1 W.L.R. 1387). It might appear "officious bystander obvious" that demurrage could not have been intended to accrue in perpetuity following such an event. Janet O'Sullivan has recently drawn attention to the law's distaste for perpetual obligations, when considering possible exceptions to the *White & Carter* principle: see S. Worthington and G. Virgo (eds), *Commercial Remedies* (Cambridge, 2017, forthcoming).

It is a shame that the Court of Appeal did not consider in detail Leggatt J.'s interesting approach to the "legitimate interest" exception (for the role of mitigation, see J. Morgan [2015] L.M.C.L.Q. 575). Moore-Bick L.J. did briefly discuss the cases on Lord Reid's proviso, observing at [35] merely that "the debate has been, perhaps inevitably, inconclusive". Very reassuring for parties caught in a *White & Carter* deadlock. Leggatt J. had also held that, were MSC not prevented from claiming demurrage by Lord Reid's proviso, it would anyway have been an unenforceable penalty. Although the point did not arise on appeal, Moore-Bick L.J. very sensibly (with respect) deplored this as having never previously been suggested: [46] (see [2015] L.M.C.L.Q. 575, 590). Finally, as Leggatt J. had gone out of his way to suggest that "good faith" might lie at the core of the *White & Carter* proviso, so Moore-Bick L.J. at [45] pointedly thought this rationalisation neither necessary nor desirable. In the end, courts are the prisoners of counsel's argument and no "root and branch" challenge was mounted here to the foundations of the *White & Carter* "legitimate interest" doctrine (see [31]). So the debate continues – perhaps perpetually – with another marginal gloss.

Jonathan Morgan

Address for Correspondence: Corpus Christi College, Cambridge, CB2 1RH, UK. Email: jem44@cam.ac.uk

FROM OPPORTUNITY TO OCCASION: VICARIOUS LIABILITY IN THE HIGH COURT OF AUSTRALIA

IN *Prince Alfred College Incorporated v ADC* [2016] HCA 37, the High Court of Australia (HCA) has once again considered the appropriate test for establishing vicarious liability of employers for the wrongful acts of their employees. The decision will be of interest to tort lawyers in the common-law world for at least four reasons. First, the Court looked afresh at the test for vicarious liability in the context of intentional wrongdoing and has accordingly clarified the confusion arising from its earlier decision in *New South Wales v Lepore* [2003] HCA 4; (2003) 212 C.L.R. 511. Secondly, the Court expressed very strong disagreement with the decision of the UK Supreme Court handed down just months earlier in *Mohamud v WM Morrison Supermarkets plc* [2016] UKSC 11; [2016] A.C. 677. The