SHORTER ARTICLES, COMMENTS AND NOTES

HOW DOES FRENCH LAW DEAL WITH ANTICIPATORY BREACHES OF CONTRACT?

IT is clear that there is no doctrine of anticipatory breach as such in French contract law.[1] How then does it deal with the facts which in English law give rise to the application of this doctrine? In answering this question, it is helpful to bear in mind that the two situations which English law treats as anticipatory breach are where a party declares in words or demonstrates by conduct his unwillingness to perform and where a party has "disabled" himself from performance owing to his own "act or default".[2]

A. No Room in French Contract Law for "Anticipatory Breaches"

French contract law distinguishes sharply between the existence of a contractual obligation and its actionability, a distinction which is discussed under the heading of the nature and effect of *termes suspensifs*.[3] In principle, where a party agrees to undertake an obligation, performance of that obligation is due immediately on contract, although this strict approach is tempered in the case of obligations to perform services, where a reasonable period is allowed for performance.[4] Where, however, the parties have fixed a time for performance of a party's obligation, this time creates a *terme suspensif*, which may be defined as that part of an agreement which merely delays performance of an engagement rather than suspending it.[5] Article 1186 of the Civil Code itself expressly provides that where an obligation is due only on a certain event (typically a date), its performance cannot be claimed before the occurrence of that event.[6] French law does admit three exceptions to this rule, where as a result a party may be sued for non-performance of an obligation before the date on which it is due according to the *terme*,[7] but these do not

1. See the assertion by a French jurist to this effect in R. Houin, "Some Comparative Aspects of the Law Relating to Sale of Goods", in I.C.L.Q. Suppl. Publ. No.9 (1964), pp.27–28.

2. G. H. Treitel, *The Law of Contract* (9th edn, 1995), pp.769 *et seq*.

3. B. Nicholas, *The French Law of Contract* (2nd edn, 1992), pp.158–159.

4. A. Bénabent, *Droit civil, Les obligations* (4th edn, 1994), p.154. The length of this period is within the *appréciation souveraine des juges du fond*. Cf. J. Ghestin and B. Desché, *Traité des contrats, La Vente* (1990), pp.719–720, who note that the courts allow a reasonable time for performance of a seller's obligation to deliver property under a contract of sale.

5. Art.1185, Civil Code. It is therefore, to be contrasted with *condition* in that the latter may suspend the party's obligation itself, this suspension being dependent on the occurrence of a future but *uncertain* event: Art.1168.

6. On the other hand, the fact that the obligation already exists is reflected in the fact that if e.g. money is paid under an obligation whose performance is not yet due it cannot be recovered as money undue: *idem*, Art.1186.

7. The time at which performance is due is referred to as the *échéance de la créance à terme* and where this non-performance is actionable before this time, its *déchéance* is said to have occurred: see the elaborate discussion in J. Ghestin, *Traité de droit civil, Les effects du contrat* (2nd edn, 1994 with C. Jamin and M. Billiau), Nos.161 *et seq*.

include the case of the party being unable or declaring himself unwilling to perform the obligation before the due date. Thus, these two situations which English law would see as possibly attracting the doctrine of anticipatory breach would be covered by the rule found in Article 1186, with the result that no actions for *enforcement* can be brought before the due date. Nor can the "injured party" bring an action for judicial termination of the contract (*résolution*) on the ground of its serious non-performance as, *ex hypothesi*, before the *terme* falls due no non-performance has occurred. These two propositions explain why neither of the circumstances which in English law give rise to the special rights associated with "anticipatory breach" give rise to any immediate right of action in French law, whether that action is for enforcement, damages or for termination of the contract.

This French position may be explained, therefore, as the result of three factors. First, historically, the central distinction between obligation and performance (which gave rise to Article 1186) is ultimately a Roman one.[8] Secondly, logically, if there is no non-performance there can be no actions based on non-performance (notably, damages or *résolution*). Thirdly, as a matter of legal policy, French lawyers have a constant preference for encouraging performance of a contract's obligations. This may be seen in their approach to enforcement but even more in the treatment of a party's ability to terminate a contract on non-performance.[9] Given this, it should not be surprising that French lawyers do not accept that a party to a contract should be able to terminate it *before* its performance is due.

B. French Treatment of Facts which in English Law Attract "Anticipatory Breach"

On the other hand, the circumstances which in English law attract the doctrine of anticipatory breach do affect the remedies which are available in French law *after* the due date arrives. The first situation (of denunciation of the contract) necessarily requires that the non-performance be deliberate, given that it applies only where a party to a contract can perform but chooses not to. By contrast, the second situation includes some cases in which the disablement is due to a deliberate act of the party, but may include circumstances not amounting to such an act.[10] This is important for French law since in this context it characterises deliberate non-performance as *dol*, or bad faith in the performance of the contract.[11] As will be seen, one party's bad faith may affect the other's remedies on non-performance. Let us take these in turn.

1. Enforcement in kind (exécution en nature)

As is explained by Nicholas,[12] French law takes as its starting point that contractual obligations should be performed, and this is reflected by a more generous approach to the availability of actions for their specific enforcement. This is not the place to describe the nuances of the French position here, but it may be observed

8. J. A. C. Thomas, *Textbook of Roman Law* (1976), pp.233–234; Gaius 3.124.
9. See *infra*.
10. Treitel, *op. cit. supra* n.2, at p.770.
11. F. Terré, P. Simler and Y. Lequette, *Droit civil, Les obligations* (5th edn, 1993), No.549, pp.413–414. This is often referred to in terms of *inéxecution dolosive*.
12. *Op. cit. supra* n.3, at pp.216 *et seq*.

that in general obligations to do or not to do may be subject to an order for performance unless they are impossible. Do the circumstances giving rise in English law to anticipatory breach affect the availability of such an order? It would seem that the basic answer is in the negative, as the deliberate nature of a party's non-performance is not an express factor in the judges' decision whether or not to make such an order. However, even in cases where performance is possible, the judges have a discretion (*une simple faculté*) whether or not to order it[13] and the bad faith of the party could influence the exercise of this discretion. Moreover, in "disablement cases" it is clear that a party would not be ordered to perform as his obligation's performance would be impossible even if this impossibility arose through his own fault.

2. *The "defence based on non-performance"* (exception d'inexécution)

French law has recognised that in some circumstances the non-performance of his obligation or obligations by one party to a bilateral contract may give a defence to the other if sued by the party in breach for performance, a defence known as the *exception d'inexécution*.[14] However, the fact that the first party's non-performance was deliberate does not have any formal impact on the availability of the defence, though it could go to the issue of the seriousness of the non-performance necessary to attract its application. So, for example, if a party to a contract informed the other party that he would not perform his obligations at all, this would after the date when performance was due clearly constitute a sufficiently serious non-performance to attract the defence.

3. *Judicial termination of the contract for non-performance* (résolution judiciaire)

Strikingly for a common lawyer, in the absence of express stipulation,[15] in principle an injured party cannot terminate the contract by his own act or by notice however serious the other party's non-performance and must instead apply to the court for judicial termination under Article 1184 of the Civil Code. Once seised of such a claim, and if satisfied of the seriousness of the non-performance, the court *may* terminate the contract,[16] but it may declare it subsisting and award damages instead or allow the debtor further time for performance.[17] There is here much room for what a common lawyer would see as judicial discretion and it would seem that a French court would take into account whether or not the non-performance was deliberate (and therefore whether or not it was in bad faith) in coming to its decision,[18] it being particularly unlikely that any further time for performance

13. Bénabent, *op. cit. supra* n.4, at No.864, p.427.
14. Nicholas, *op. cit. supra* n.3, at pp.213 *et seq*.
15. These are known as *clauses résolutoires* and are very common in practice.
16. The effect of this termination is retroactive.
17. Art.1184.3, Civil Code. French courts have on occasion come to intermediate results, declaring the contract subsisting but reducing the price.
18. Cf. H., L. and J. Mazeaud, *Leçons de droit civil*, T.II, Vol.1: *Obligations, théorie générale* (8th edn, 1991, by F. Chabas), No.1099, p.1160; Terré *et al.*, *op. cit. supra* n.11, at No.630, p.479.

would be given where the party had previously declared himself unwilling to perform even though he was able to do so.[19]

As Treitel has noted,[20] however, the case where a party to a contract has declared that he will not perform his obligations forms an exception to the general requirement of going to court for *résolution* and, while the point is not specifically adverted to by *la doctrine*, there would seem to be no reason why this exception should not hold good in the case of a declaration made *before* the date for performance. Here, then, a creditor may, *after the date for performance arrives*, treat the contract as though it is at an end there and then, though he does so at the risk of a court subsequently holding that he was not entitled to do so on grounds other than the mere failure to go to court.[21]

4. Damages

There are two ways in which the facts which give rise to the doctrine of anticipatory breach may affect the damages awardable in French law for non-performance.

First, while the availability of damages for delay in performance is in principle subject to a requirement of formal "notice to perform" (*mise en demeure*) being given by the injured party, it is clear that no notice is required where the other party has indicated that he will not perform.[22] In the result, where a party has declared that he will not perform, after the date for performance has arrived damages for delay in performance will accrue without more.

Secondly, the deliberate nature of a party's non-performance affects what a common lawyer would term the test of remoteness of damage applicable. In principle, damages for non-performance of a contractual obligation are limited to those which were or could have been foreseen at the time of making the contract,[23] but this rule finds an exception where the non-performance constitutes *dol*. In that

19. There is no formal restriction in Art.1184.3, Civil Code to cases of non-performance in good faith. However, this provision is to be compared to Art.1244–1, which gives the court a discretion to give debtors of money obligations time to pay where their financial circumstances are difficult, a possibility which one leading text declared applied at least before its last re-amendment only to debtors in good faith: P. Malaurie and L. Aynès, *Droit civil, Les obligations* (6th edn, 1995), No.1012, p.587.

20. *Remedies for Breach of Contract, A Comparative Account* (1988), p.380, citing J. Carbonnier, *Droit civil*, T.4: *Les obligations* (updated to 18th edn, 1994), No.187, p.303.

21. This position is confirmed by the way in which some jurists describe what some of them consider to be another exception to the rule requiring judicial intervention, viz. the *faculté de remplacement*. Under this doctrine, a buyer of fungible goods in a commercial sale may, without the need to go to court, buy equivalent goods in the market and then claim their cost from the seller, but this possibility is restricted by the jurists to the case where the seller has failed to deliver at the stipulated time: Ghestin and Desché, *op. cit. supra* n.4, at No.700, p.742; F. Collart Dutilleul and P. Delebecque, *Contrats civils et commerciaux* (2nd edn, 1993), No.242, p.196. Other jurists treat this possibility as reflecting a general rule according to which an injured party may "repair his own damage" at the cost of the person responsible for it: H., L. and J. Mazeaud and F. Chabas, *Leçons de droit civil*, T.III, Vol.2: *Principaux contrats: vente et échange* (7th edn, 1987, by M. de Juglart), No.946, p.261.

22. B. Starck, H. Roland and L. Boyer, *Obligations*, Vol.2: *Contrat* (4th edn, 1993), No.1402, p.586; Mazeaud *et al.*, *idem*, No.944, p.260, and see Req. 4.1.1927, D.H. 1927.65.

23. Art.1150, Civil Code.

case, a non-performing party is liable for damages which are the "immediate and direct consequence of the agreement's non-performance".[24]

C. *Conclusion*

In conclusion, therefore, it can be seen that in French law the fact that a breach of a contract has occurred before the time for performance does not in general affect *when* any remedy based on breach becomes available, but its deliberate nature may have considerable effects on any subsequent remedy. By contrast, in English law, while in principle the deliberate nature of a breach of contract is irrelevant to the remedies which it attracts, when combined with the element of "anticipation" it may attract the accelerated remedies associated with the doctrine of anticipatory breach, even though these are not restricted only to this situation.

What significance does this discussion have at a more general level? Comparative lawyers have often looked for either the conceptual or the functional equivalent of a particular legal doctrine or set of rules which exists in their own legal system. It is widely recognised that the first of these (if not actually misconceived) is tricky and potentially misleading, an apparent harmony often disguising a discordant or somewhat discordant reality: perhaps the comparison between *cause* in French contract law and consideration in English is a prime example. A search for the functional equivalent of a legal doctrine avoids many of the problems which a conceptual comparison entails, as it focuses on the purpose or purposes which a particular doctrine performs in one legal system and looks to see how this is or these are achieved in another. However, this approach also has its drawback, as it presupposes that a rule or technique *does* exist in the second system (somewhere and somehow) which performs the same or a similar function. While this is often the case (particularly as regards two legal systems with similar political traditions and values and similar economies), it is not always so. Sometimes there is a "gap" in the other system, with no functional equivalent for a doctrine simply because that system has not (for whatever reason) considered it a function to be fulfilled or its purposes to be worthy of pursuit.

The present article illustrates how the study of a doctrine in one legal system which draws such a blank in another may also be of use in comparative law. First, the explanation of a gap may be revealing (or at least of illustrative use) in itself, here underlining the importance of French contract law's "preference for performance". Secondly, though, analysis of the fact-situations which give rise to the doctrine in one system according to the rules of the other may show more clearly what are the concerns of that other system. The absence of a conceptual *or* functional equivalent of the English doctrine of anticipatory breach in French contract law does not make the latter any "less developed" and is not the result of accident, but reflects its historical foundations, legal authorities and preoccupations of principle and of policy: differences in these formative influences on the law do sometimes lead to differences of result and not merely ones of conceptual arrangement or technique. On the other hand, sweeping statements to the effect that English law takes no notice of the deliberate nature of a breach of contract must be read subject to the importance which deliberate breach *is* given "within" the doctrine of

24. *Idem*, Art.1151.

anticipatory breach. Here, then, if but to this limited extent, the two systems are not as starkly different as they at first appear.

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ADVERSE POSSESSION OF LAND IN SCOTS AND ENGLISH LAW

IN Scotland, like England, possession plays a part in landownership. In Scotland a non-owner may acquire a title to land by the operation of prescription;[1] in England the title of an owner may be lost by limitation[2] but an easement can be acquired by prescription,[3] as can a servitude in Scotland.[4] Because the acquisition of ownership in Scots law is by the operation of prescription, both a title and possession are necessary,[5] whereas in England only possession is required. Although the theory behind and the purpose of adverse possession are different in each jurisdiction, as are the periods of possession, the result in many cases will be similar. The purpose of this article is to look at the similarities and the differences, and to consider recent cases on possession in each jurisdiction to show to what extent, if at all, one jurisdiction may learn from the other. The Prescription & Limitation (Scotland) Act 1973 codified the law and, although it shortened the period of prescription, cases decided under the previous law, notably those on the requisites of possession, are still relevant.

A. Title

As has been said, because Scotland adopts the notion of prescription rather than limitation there is the dual requirement of a title and possession. The description in the title deeds which is relied upon must be sufficient to include the subjects claimed, or alternatively must not be clearly exclusive of them. Patently, therefore, a title that contains a description of land which clearly excludes the land claimed cannot be a basis for prescriptive acquisition. The 1973 Act provides for two types of situation. One is where the title to an "interest in land" is recorded in the Register of Sasines (a register of deeds) or the Land Register, which for this purpose is not dissimilar to the English model, and the other is where the deed is not so recorded or registered. The only difference between the two is that, in the first case, the period of possession is ten years,[6] whereas in the second it is 20 years.[7] Most cases would be in the first category, but non-feudal subjects, e.g. those in Orkney and Shetland still covered by udal law where there would be a written deed (but not one appearing in either the Register of Sasines or the Land Register)

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1. Prescription & Limitation (Scotland) Act 1973 ("1973 Act"), ss.1–2.
2. Limitation Act 1980 ("1980 Act"), s.15(1).
3. Prescription Act 1832, s.2; *Gale on Easements* (13th edn), pp.162–163.
4. 1973 Act, s.3.
5. The problems created in English law by the differences between adverse possession and prescription do not exist in Scots law. See Michael J. Goodman, "Adverse Possession or Prescription? Problems of Conflict" (1968) 32 Conv. & Property Lawyer 270.
6. 1973 Act, s.1.
7. *Idem*, s.2.