Cambridge Law Journal, **76(1)**, March 2017, pp. 63–86
doi:10.1017/S0008197316000830

AN ASSIMILATED APPROACH TO DISCHARGE FOR BREACH OF CONTRACT BY DELAY

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I. INTRODUCTION

The conflict between common law and equity on the question of when time should be regarded as being "of the essence" for the performance of a contract has often been debated, as has the impact of its resolution by the Judicature reforms in favour of equity's more relaxed approach. Even so, it is tolerably clear that the two approaches have been substantially assimilated within general principles of discharge for breach. If, as a matter of construction, a time stipulation is a condition, then time is of the essence. Alternatively, time may have become of the essence by an effective notice to perform served by a promisee. If the contract has been validly discharged on either basis, specific performance will not be ordered in favour of the promisor.[1]

The conflict between law and equity was not the product of divergent views about contract construction or discharge for breach. Assimilation is therefore a very significant development. It involved considerable give and take. "Equity" acquiesced in the view that whether time is of the essence is a question of construction. For its part, the "common law" abandoned its view that delay in the performance of a sale of land contract is presumed to be a breach of condition, and accepted as material factors in construction the considerations that formerly led the Court of Chancery to decline specific performance. Also adopted was equity's facility to make time of the essence by reasonable notice following breach by delay. Noncompliance disentitles the promisor to specific performance (if relevant) and is a repudiation for the purposes of the discharge regime.

Against the weight of considerable authority and, in our view, contrary to all principle, the Court of Appeal has convinced itself that, even for sale of land contracts, the notice to perform facility has not been assimilated within

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[1] See e.g. *Union Eagle Ltd. v Golden Achievement Ltd.* [1997] A.C. 514 (sale of land – time expressly of the essence).

the discharge regime. Summarising the court's current thinking on discharge for delay, in *Urban 1 (Blonk Street) Ltd. v Ayres*,[2] Sir Terence Etherton C. (with whom Underhill L.J. agreed) devoted two of eight numbered paragraphs to completion notices:

> (6) Service of a valid written notice to complete after the contractual completion date has passed has the effect of bringing to an end the possibility of equity's intervention by the grant of specific performance to the contract-breaker. A valid notice is one which calls on the contract-breaker to perform within a reasonable period, specifying exactly what it is that party must do and what consequences will follow (that is to say, exercise of the right to terminate if he or she fails to do so): *In re Olympia & York Canary Wharf Ltd. (No. 2)* [1993] B.C.C. 159, 169C–F citing *Behzadi v Shaftesbury Hotels Ltd.* [1992] Ch. 1, 12B–E. Statements in many of the cases and some textbooks that the service of a notice to complete makes time of the essence in equity are incorrect. Absent any relevant express provisions in the contract (as are to be found in the [*Law Society's Standard Conditions of Sale*, 4th ed., 2003], for example), it is contrary to all principle for one party to be able unilaterally to transform one type of contractual provision (namely, an innominate term or a warranty in the strict sense) into something different (a condition in the strict sense). Equity's role, in this context, always has been to relieve a contract-breaker against the strict legal rights of the other party, not to enhance them: *Parkin v Thorold* [(1852)] 16 Beav. 59, 71, *Behzadi's* case, at pp. 12 and 24.
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> (7) Accordingly, absent any relevant express terms in the contract, where a completion notice has been served and expired following breach of a time provision which is an innominate term the question whether the other party can terminate the contract depends on that party's ordinary legal rights.[3]

"Ordinary legal rights" were explained[4] in terms of alternative bases for concluding that the promisor "repudiated the contract": delay depriving the promisee of "substantially the whole benefit" of the contract, or that the promisor "renounced the contract". Sir Terence Etherton C. said[5] that, "in principle", these criteria also determine when delay disentitles a promisor to specific performance. He also thought noncompliance with a notice to complete "some evidence" of deprivation of benefit.

Assume that a purchaser fails to comply with a notice to complete that was effective to make time of the essence under the general law. If *Urban* is correct, the contract is now an albatross. The purchaser cannot call for completion, is disentitled to specific performance and can no longer

[2] *Urban 1 (Blonk Street) Ltd. v Ayres* [2013] EWCA Civ 816; [2014] 1 W.L.R. 756 ("*Urban*"). See also Sir Terence Etherton, "Time Provisions at Common Law and Equity" [2013] Conv. 355. cf spar shipping A.S. v Grand China Logistics Holding (Group) Co. Ltd. (The Spar Capella) [2016] EWCA Civ 982; [2016] 2 Lloyd's Rep. 447 at [104] per Sir Terence Etherton M.R.

[3] *Urban* [2013] EWCA Civ 816; [2014] 1 W.L.R. 756, at [44].

[4] Ibid. See further text at note 138 below.

[5] Ibid.

assert an equitable interest in the land. Although entitled to specific performance, the vendor does not desire it. But the fact that the purchaser not only breached its principal contractual obligation, but also failed to remedy the breach after being allowed a reasonable time to do so does not justify termination by the vendor. Presumably, should the purchaser happen to obtain finance before delay deprives the vendor of "substantially the whole benefit" of the contract, a notice to complete may be served on the vendor. Under *Urban*, noncompliance disentitles the *vendor* to specific performance, but no right to terminate accrues to the purchaser. Is the law of contract so impotent to deal with delay in the performance of an executory contract?

For a sale of land contract (or agreement for lease), the practical impact of the summary in *Urban* is mitigated by the common inclusion of an express notice to complete facility, usually cl. 6.8 of the *Law Society's Standard Conditions of Sale*.[6] Sir Terence Etherton C.'s denial that notices to perform have been assimilated within general principles of discharge is nevertheless significant. Since noncompliance with a notice given in respect of a pre-completion obligation – to which cl. 6.8 does not apply – merely disentitles the promisor to specific performance, the notice seems pointless. More generally, a notice to perform has no utility at all for any contract to which specific performance is not relevant.

There are therefore good reasons to query the accuracy of Sir Terence Etherton C.'s summary.[7] Relevantly, it embodies three propositions about notices to perform (including notices to complete) served under the general law:

(1) the notice does not make time of the essence "in equity";
(2) noncompliance disentitles the promisor to specific performance but, since the promisee did not act under an express provision, there is no immediate right to terminate; and
(3) an express provision is necessary because the common law does not entitle one party unilaterally to "transform" a non-essential time stipulation into a condition.

The principal purpose of this paper is to show that the above propositions are erroneous. The two approaches to breach by delay have been substantially assimilated within general principles of discharge. Our analysis has four components. In the first, we trace the assimilation process through several phases. The second component discusses notices to perform sale of land contracts from the same perspective. In the third, the relevance of

[6] 5th ed., 2011 ("*Standard Conditions of Sale*"). See text at note 102 below. Relevantly, the clause is to the same effect as in the 4th ed. referred to in *Urban*.
[7] The purchasers in *Urban* were not legally represented.

notices to perform for contracts in general is considered. Finally, we suggest that the views in *Urban* are impractical.

II. Time of the Essence: Three Phases in Development

A. Beginnings and Overview

Every textbook discussion of breach of contract by delay begins with a generalisation contrasting common law and equity. Timely performance was formerly "of the essence" at law, but not in equity. The contrast is derived from analysis of the order of performance. It took some time to emerge.

The intended order of contract performance has always been worked out on a presumptive basis by contrasting dependent and independent promises.[8] In the early days of the law of contract, promises were presumed to be independent. Once the time for payment passed, a vendor could recover the contract price, even if title had not been conveyed.[9] The parties having exchanged independent promises, each had a remedy and neither could plead delay as a defence.[10] The position was different if the defendant's obligation was *expressly* dependent on prior performance by the plaintiff.[11] Timely performance was then a condition precedent to the defendant's liability on the contract.[12]

Towards the end of the eighteenth century, the above approach was abandoned in favour of the presumption of dependency of obligation[13] which still characterises the law.[14] What we describe below as the first phase in development began. At law, performance on time was a condition precedent to the defendant's obligation to perform. Since delay was not per se a defence to a claim for specific performance, textbook discussions contrasting law and equity hark back to this phase.[15]

A second phase commenced when s. 25(7) of the Judicature Act 1873 resolved the conflict in favour of equity. The more integrated approach to breach by delay encouraged by that provision led, ultimately, to the current position, which we term the "third phase". Although the conflict resulted from different views about a promisor's entitlement to *enforce* the contract, "assimilation" means that the perspective today is to consider a promisee's

[8] See S.J. Stoljar, "Dependent and Independent Promises" (1957) 2 Syd.L.R. 217.
[9] See *Pordage v Cole* (1669) 1 Wms. Saund. 319; 85 E.R. 449 (promise to pay for land "before Midsummer"). See also *Nichols v Raynbred* (1615) Hob. 88; 80 E.R. 238 (sale of goods).
[10] See e.g. *Pordage* (1669) 1 Wms. Saund. 319, 320; 85 E.R. 449, 450 per the court ("mutual remedy").
[11] The usual example was a contract stating that payment would be made "for" the other party's performance, as in *Peeters v Opie* (1671) 2 Wms. Saund. 350; 85 E.R. 1144. *Pordage* was therefore a strong case: the presumption was not rebutted by the purchaser's covenant to pay the vendor "for all his lands".
[12] At least while the contract remained executory. See *Thorp v Thorp* (1701) 12 Mod. 455, 460–61; 88 E.R. 1448, 1451, per Holt C.J. (for the King's Bench).
[13] Key cases include *Kingston v Preston* (1773) 2 Doug. 689; 99 E.R. 437; and *Jones v Barkley* (1781) 2 Doug. 684; 99 E.R. 434.
[14] See e.g. Sale of Goods Act 1979, s. 28.
[15] But see S.J. Stoljar, "Untimely Performance in the Law of Contract" (1955) 71 L.Q.R. 527 ("somewhat misleading generalization").

entitlement to *terminate* a contract on the basis that time is, or has become, of the essence.

B. First Phase: Enforcement of Dependent Promises

As noted above, the first phase of development began with adoption of the presumption of dependency of obligation. For sale of land contracts, it was presumed that a vendor did not intend to give credit to the purchaser (and risk the latter's insolvency) by making conveyance without payment; and also that the purchaser did not intend to pay in advance (and risk the vendor's title). Unless the presumption was rebutted, a vendor could recover the price only if title had been conveyed.[16] If a contract nominated the same date for payment and conveyance, an intention for performance to be concurrent was presumed. A purchaser (or vendor) could recover damages only if ready and willing to perform on the nominated day.[17] Accordingly, if a purchaser was ready and willing to complete, but the vendor was not, the purchaser had a good defence at law to any claim for damages.[18] Because the matter turned on pleadings, most common law claims were disposed of in demurrer proceedings.[19]

None of the cases that established the approach summarised above spoke in terms of time being "of the essence". However, that was the issue in equity. It was therefore commonplace in that jurisdiction so to describe the common law position.[20] Even so, the description merely signified that readiness and willingness to perform on time was a condition precedent to a plaintiff's right to enforce the contract. Equity saw things differently. Specific performance would be ordered (and an injunction granted to restrain any action at law) unless it was "inequitable" to do so. That would be the case if, in the circumstances, time was of the essence. The issue was approached on a principled basis. In *Parkin v Thorold*,[21] Lord Romilly M.R. summarised the law by saying that "time is held to be of the essence of the contract … only in cases of direct stipulation, or of necessary implication". He said[22] the former required an express statement that "time is … of the essence of the contract"; and explained that the

[16] See e.g. *Glazebrook v Woodrow* (1799) 8 T.R. 366; 101 E.R. 1436. Contrast *Campbell v Jones* (1796) 6 T.R. 570; 101 E.R. 708.

[17] See e.g. *Goodisson v Nunn* (1792) 4 T.R. 761; 100 E.R. 1288 (claim for penalty). Contrast *Jones* (1781) 2 Doug. 684; 99 E.R. 434. Readiness and willingness included ability to perform: *Duke of St. Albans v Shore* (1789) 1 H. Bl. 270; 126 E.R. 158.

[18] See e.g. *Morton v Lamb* (1797) 7 T.R. 125; 101 E.R. 890 (sale of goods).

[19] Section 57 of the Common Law Procedure Act 1852 permitted a general averment of fulfilment of conditions precedent, but it remained a good defence for the defendant to identify delay as non-fulfilment of a condition precedent. See e.g. *Graves v Legg* (1854) 9 Exch. 709; 156 E.R. 304. Cf. *Raineri v Miles* [1981] A.C. 1050, 1082, per Lord Edmund-Davies (impact of Common Law Procedure Act 1854 on relationship between law and equity).

[20] Cf. *United Scientific Holdings Ltd. v Burnley Borough Council* [1978] A.C. 904, 940 per Lord Simon.

[21] *Parkin v Thorold* (1852) 16 Beav. 59, 65; 51 E.R. 698, 701.

[22] Ibid. See also *Roberts v Berry* (1853) 3 De G.M. & G. 284, 291; 43 E.R. 112, 114–15, per Turner L.J.

"necessary implication" must be "derived from the circumstances of the case", including the nature of the contract's subject matter.[23]

Divergence was therefore expressed in terms of contrasting views about the *effect* of delay on a promisor's ability to enforce a contract: delay could be a disentitling circumstance in either court. The perspective was remedial and procedural, but the contrasting views were not the product of different constructions of the contract. Thus, Lord Romilly M.R. said[24] in *Parkin v Thorold* that a "contract is undoubtedly construed alike both in equity and at law". Accordingly, while an express agreement for time to be of the essence added nothing at law, time was of the essence in equity because the agreement made an order of specific performance inequitable. Nor can the contrast be explained in terms of a promisee's entitlement to terminate the contract. No theory of discharge for breach existed.[25] At common law, failure of a condition precedent simply meant that the plaintiff could never enforce the contract.[26] Therefore, when Lord Romilly M.R. said[27] that "at law the contract is at an end", he was describing the promisor's practical position.

The focus on specific performance made equity's approach irrelevant to most mercantile contracts. Equally, timely performance was not always essential. Thus, by the middle of the nineteenth century, time of payment was not usually of the essence in a sale of chattels.[28] Nor had independent promises become obsolete.[29] Delay by a plaintiff was no defence if the defendant's promise was independent of performance as a matter of construction.[30]

C. Second Phase: The Judicature Act

In resolving the conflict between law and equity in favour of equity, s. 25(7) of the Judicature Act 1873 provided: "Stipulations in contracts, as to time or otherwise, which would not before the passing of this Act have been deemed to be or to have become of the essence of such contracts in a

[23] See e.g. *Macbryde v Weekes* (1856) 22 Beav. 533, 539–40; 52 E.R. 1214, 1216, per Sir John Romilly M.R. (contract to lease working mine).

[24] *Parkin* (1852) 16 Beav. 59, 66–67; 51 E.R. 698, 701. See also *Tilley v Thomas* (1867) L.R. 3 Ch. App. 61, 67, per Lord Cairns L.J. See J.W. Carter, *The Construction of Commercial Contracts* (Oxford, 2013), §4–26.

[25] A theory emerged in the middle of the nineteenth century, in cases such as *Hochster v De la Tour* (1853) 2 E.&B. 678; 118 E.R. 922 (anticipatory breach), and *Behn v Burness* (1863) 3 B.&S. 751; 122 E.R. 281 (conditions and warranties). See also *Hurst v Bryk* [2002] 1 A.C. 185, 193, per Lord Millett, with whom the other members of the House of Lords agreed (before middle of the nineteenth century, the basis for discharge was failure of condition precedent, not breach of contract).

[26] See J.W. Carter, "Discharge as the Basis for Termination for Breach of Contract" (2012) 128 L.Q.R. 283, at 285.

[27] *Parkin* (1852) 16 Beav. 59, 67; 51 E.R. 698, 701. See also e.g. *Tilley* (1867) L.R. 3 Ch. App. 61, 69, per Sir John Rolt L.J.

[28] See *Martindale v Smith* (1841) 1 Q.B. 389, 395; 113 E.R. 1181, 1184, per Lord Denman C.J.

[29] See e.g. *Ellen v Topp* (1851) 6 Exch. 424; 155 E.R. 609.

[30] See e.g. *Davidson v Gwynne* (1810) 12 East. 381; 104 E.R. 149.

Court of Equity, shall receive in all Courts the same construction and effect as they would have heretofore received in equity."

This marks the commencement of the second phase in development. Given that it resolved a conflict in relation to contract enforcement, the reference in s. 25(7) to "the same construction" was strictly unnecessary. However, "and effect" captured the equitable perspective that specific relief could be granted if time was "not … deemed to be" of the essence "in a Court of Equity". That wording also ensured continued application of the principles established during the first phase.[31] A conclusion that time was of the essence "in equity" therefore continued to signify that specific performance would be refused. However, principles of discharge had by this time emerged. It was therefore also true to say that a promisee enjoyed a positive right to "rescind" the contract.[32] The availability of the right could be rationalised on the basis that the defendant had no equity to restrain exercise of a common law right (to rescind), or because a single court was now charged with the task of resolving all matters in controversy between the parties.

Section 25(7) was also relevant to "common law relief". The classic statement of the impact of s. 25(7) on such claims is found in Lord Parker's judgment in *Stickney v Keeble*:

> It means, in my opinion, that where equity would prior to the Act have, for the purposes of decreeing its own remedies, disregarded a stipulation as to time and restrained an action at law based on the breach thereof, the Courts constituted by the Act are for the purpose of giving common law relief to disregard it in like manner. … If since the Judicature Acts the court is asked to disregard a stipulation as to time in an action for common law relief, and it be established that equity would not under the then existing circumstances have prior to the Act granted specific performance or restrained the action, the section can, in my opinion, have no application, otherwise the stipulation in question would not, as provided in the section, receive the same effect as it would prior to the Act have received in equity.[33]

Accordingly, notwithstanding that delay by a plaintiff would otherwise (time being of the essence at law) be a good defence, s. 25(7) enabled a plaintiff to recover damages if specific relief could have been obtained, that is, if time was not of the essence in equity.[34] To that extent, a vendor

[31] See e.g. *Re Sandwell Park Colliery Co.* [1929] 1 Ch. 277, 285, per Maugham J. (whether before Judicature Act court would have restrained a common law action).

[32] See e.g. *Howe v Smith* (1884) 27 Ch. D. 89, 103, per Fry L.J.; *Cornwall v Henson* [1900] 2 Ch. 298, 304, per Collins L.J.; *Stickney v Keeble* [1915] A.C. 386, 403, per Lord Atkinson; *Re Sandwell Park Colliery Co.* [1929] 1 Ch. 277, 284, per Maugham J.; *Wendt v Bruce* (1931) 45 C.L.R. 245, 257, per Dixon J. Cf. *Maynard v Goode* (1926) 37 C.L.R. 529, 537, per Isaacs J. ("dissolution by acts of the parties is the same both in law and equity"). That "rescission" meant "discharge" was not clarified until *Johnson v Agnew* [1980] A.C. 367 (see text at note 46 below).

[33] *Stickney* [1915] A.C. 386, 417.

[34] See *Holland v Wiltshire* (1954) 90 C.L.R. 409, 418–19, per Kitto J.

(or purchaser) of land seeking damages was not required to establish readiness and willingness to complete on the nominated date.[35] But if specific relief was not relevant, the "deeming" effect of s. 25(7) was immaterial. For example, stipulations relating to matters such as the time of shipment or delivery of goods continued to operate as conditions.[36]

Subsequently, s. 25(7) was replaced by s. 41 of the Law of Property Act 1925: "Stipulations in a contract, as to time or otherwise, which according to rules of equity are not deemed to be or to have become of the essence of the contract, are also construed and have effect at law in accordance with the same rules."

Notwithstanding slightly different wording, it has never been suggested that s. 41 changed the law.[37]

D. Third Phase: Assimilation within Discharge for Breach

United Scientific Holdings Ltd. v Burnley Borough Council[38] recognised (and to an extent brought about) a third phase in development, namely, substantial assimilation of the two approaches to breach by delay within the discharge regime. The question was whether timely compliance with rent-review timetables in certain commercial leases was of the essence. No equitable relief was sought, and relief of that nature would not have been available.[39] The House of Lords nevertheless considered it appropriate to emphasise the assimilated approach to delay. From that perspective, *United Scientific* is authoritative on three points.

First, in situations to which s. 41 of the Law of Property Act 1925 is relevant, Lord Parker's judgment in *Stickney v Keeble* does not dictate a purely historical approach – that is, analysis by reference to whether timely performance of the obligation in question would have been of the essence prior to 1873.[40] Subsequent developments must be brought into account. For example, it is quite impossible today to start with a presumption that "at law" time is of the essence for a sale of land contract.

Second, the question raised by breach of a time stipulation is whether the promisee is entitled to terminate the contract, not whether the promisor is disentitled to enforce it. Time is of the essence if the parties intend a time stipulation to be a condition. Even if s. 41 applies, the question is

[35] See *Howe* (1884) 27 Ch. D. 89, 103, per Fry L.J.

[36] See e.g. *Bowes v Shand* (1877) 2 App. Cas. 455; *Reuter Hufeland & Co. v Sala & Co.* (1879) 4 C.P.D. 239. Contrast *Bettini v Gye* (1876) 1 Q.B.D. 183, 187, per Blackburn J., for the court (delay in performance of independent promise).

[37] See e.g. *Harold Wood Brick Co. Ltd. v Ferris* [1935] 2 K.B. 198, 206–07, per Slesser L.J. In *Lock v Bell* [1931] 1 Ch. 35, 43, per Maugham J., noted the inappropriate reference to "construction" in s. 41.

[38] *United Scientific Holdings Ltd.* [1978] A.C. 904.

[39] General analysis of the interaction between law and equity under the Judicature Act therefore excited considerable controversy. See e.g. P.V. Baker, "The Future of Equity" (1977) 93 L.Q.R. 529; F. Dawson (1979) 8 N.Z.U.L.R. 281.

[40] See *United Scientific Holdings Ltd.* [1978] A.C. 904, 926 per Lord Diplock, 937 per Viscount Dilhorne, 944 per Lord Simon, 957 per Lord Fraser.

one of construction. For example, although the original rationale for expressly stating that time is of the essence was to make it inequitable to order specific performance, today the statement is an agreement that failure to perform on time is a breach of condition.[41]

Third, *United Scientific* approved[42] as a framework for analysis a statement of principle in *Halsbury's Laws of England*:

> The modern law, in the case of contracts of all types, may be summarised as follows. Time will not be considered to be of the essence unless: (1) the parties expressly stipulate that conditions as to time must be strictly complied with; or (2) the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence; or (3) a party who has been subject to unreasonable delay gives notice to the party in default making time of the essence.[43]

The reference to "contracts of all types" in the opening sentence is important, as is the absence of any reference to equitable relief. Also significant is the formulation of category (2), which treats as material factors in construction the considerations that formerly influenced equity to refuse specific performance. Construing the leases in *United Scientific* with reference to the statement, it was held that the time stipulations were not conditions.

Lord Diplock may have gone further. He said[44] that, by 1873, a time stipulation was not regarded as a "condition precedent" at common law if a "failure to perform that promise punctually did not deprive the other party of substantially the whole benefit which it was intended that he should obtain from the contract". Therefore, although s. 41 of the Law of Property Act 1925 was inapplicable to the facts in *United Scientific*, Lord Diplock appeared to regard s. 41 as illustrating, or perhaps stating, a presumption capable of being applied in the construction of any contract.[45]

Three further House of Lords decisions confirmed – and also refined – the assimilation recognised by *United Scientific*. First, *Johnson v Agnew*[46] decided that general principles governing the consequences of discharge apply to discharge for breach by delay, even when termed "rescission".

The second case is *Raineri v Miles*.[47] At issue was whether failure to complete a sale of land on time is a breach of contract for which damages may be awarded if time is not of the essence. That the question remained unsettled is somewhat remarkable; but the affirmative answer was not. Breach by failure to perform on time is therefore no different from any

[41] See e.g. *Lombard North Central plc v Butterworth* [1987] Q.B. 527.
[42] See *United Scientific Holdings Ltd.* [1978] A.C. 904, 937, per Viscount Dilhorne, 941 and 944 per Lord Simon, 958 per Lord Fraser.
[43] 4th ed. (London 1974), vol. 9, para. 481 ("*Halsbury*").
[44] *United Scientific Holdings Ltd.* [1978] A.C. 904, 928. Subject to certain exceptions: see p. 924.
[45] Cf. ibid., at p. 962, per Lord Fraser.
[46] *Johnson* [1980] A.C. 367.
[47] *Raineri* [1981] A.C. 1050.

other breach of contract. Additionally, as in *United Scientific*, the statement in *Halsbury* was approved, and the importance of legal developments since 1873 again emphasised.[48]

Bunge Corp New York v Tradax Export S.A. Panama[49] is the third decision. It arose in a very different context, namely, delay by buyers in giving notice of the probable readiness of the vessel under an F.O.B. contract for the sale of goods. In his general discussion of when a time stipulation is a condition, Lord Roskill (with whom the other members of the House of Lords agreed) drew attention[50] to the approval in *United Scientific* of the statement in *Halsbury*. He also adopted[51] another statement:

> Apart from express agreement or notice making time of the essence, the court will require precise compliance with stipulations as to time wherever the circumstances of the case indicate that this would fulfil the intention of the parties. Broadly speaking, time will be considered of the essence in "mercantile" contracts and in other cases where the nature of the contract or of the subject matter or the circumstances of the case require precise compliance.[52]

On this approach, *United Scientific* did not dictate the application in construction of a universal presumption that time is not of the essence. Similarly, the court rejected an argument, based on Lord Diplock's judgment,[53] that an intention for a time stipulation to be a condition can be inferred only if delay will always deprive the promisee of substantially the whole benefit of the contract.[54] Time may therefore be of the essence even if delay is unlikely to cause substantial loss. Construing the contract in *Bunge* in light of the statement, the relationship between the buyers' obligation and the seller's ability to nominate the loading port,[55] as well as the need for certainty in the commercial context, the buyers were held to have breached a condition.

III. Notices to Perform: Sale of Land Contracts

A. Position Prior to Assimilation

In *United Scientific*, Lord Diplock noted[56] that, prior to 1873, a notice to perform "had the effect of making it of the essence of the contract that

[48] See ibid., at pp. 1089, 1092, per Lord Fraser (with whom Lords Russell and Keith agreed).
[49] *Bunge Corp New York v Tradax Export S.A. Panama* [1981] 1 W.L.R. 711 ("*Bunge*").
[50] Ibid., at pp. 728–29. See also p. 716, per Lord Wilberforce (with whom Lords Fraser, Scarman and Lowry agreed).
[51] Ibid., at p. 729. See also p. 716, per Lord Wilberforce (with whom Lords Fraser, Scarman and Lowry agreed).
[52] *Halsbury*, vol. 9, para. 482.
[53] And also in *Hongkong Fir Shipping Co. Ltd. v Kawasaki Kisen Kaisha Ltd.* [1962] 2 Q.B. 26, 69.
[54] Lord Wilberforce gave the answer that time stipulations admit of "only one kind breach . . ., namely, to be late": *Bunge* [1981] 1 W.L.R. 711, 715.
[55] Nomination by the buyers was a condition precedent to the sellers' ability to nominate the loading port. See ibid., at p. 729, per Lord Roskill.
[56] *United Scientific Holdings Ltd.* [1978] A.C. 904, 928.

performance should take place within" the period specified. Therefore, during the first phase, Turner L.J. said in *Roberts v Berry*[57] that, following sufficient delay, the time for completion "may be made essential … by notice". Similarly Lord Romilly M.R. said[58] in *Parkin v Thorold* that, even though time was "not originally an essential part of the contract", a promisee could by "proper notice, bind the other to complete, within a reasonable time, to be specified in such notice". Time was then regarded as having "become of the essence".[59] Since noncompliance with the notice made it inequitable to order for specific performance, he explained[60] that the parties were left to their "remedies and their liabilities at law".

Taking the case of breach by a vendor, since at law time was of the essence, noncompliance with an effective notice to complete shut the vendor out in both jurisdictions.[61] It was in fact standard practice for the notice to include a warning that the contract would be treated as "at an end" for noncompliance.[62] A notice was ineffective in equity without a clear warning to that effect.[63]

During the second phase, service of an effective notice to perform was one situation in which s. 25(7) of the Judicature Act 1873 (and later s. 41 of the Law of Property Act 1925) required a court to treat time as having "become of the essence" in "all courts".[64] For contracts requiring completion within a reasonable time, Fry J. referred in *Green v Sevin*[65] to "improper conduct" sufficient to justify "rescission of the contract *sub modo*, that is, if a reasonable notice be not complied with". The position was the same for pre-completion obligations, as in *Compton v Bagley*,[66] where the vendor failed to comply with a notice allowing a reasonable time for delivery of the abstract of title. The purchaser's "rescission" being effective, Romer J. ordered the vendor to return the deposit and pay damages. But for the rule in *Bain v Fothergill*,[67] damages would have been assessed on a loss of bargain basis.

Lord Parker dealt in *Stickney v Keeble* with notice following breach of an express time stipulation. He said:

[57] *Roberts* (1853) 3 De G.M. & G. 284, 291; 43 E.R. 112, 114–15.
[58] *Parkin* (1852) 16 Beav. 59, 71; 51 E.R. 698, 703. If time was of the essence, but waived, a notice to perform had to be given. See *Webb v Hughes* (1870) L.R. 10 Eq. 281, 286, per Sir Richard Malins V.-C.
[59] *King v Wilson* (1843) 6 Beav. 124, 126; 49 E.R. 772, 773, per Lord Langdale M.R.
[60] *Parkin* (1852) 16 Beav. 59, 71; 51 E.R. 698, 703.
[61] See *Neeta (Epping) Pty Ltd. v Phillips* (1974) 131 C.L.R. 286, 298, per Barwick C.J. and Jacobs J. ("same effect in equity as it had at law").
[62] See e.g. *Taylor v Brown* (1839) 2 Beav. 180, 183; 48 E.R. 1149, 1150, per Lord Langdale M.R.
[63] See *Reynolds v Nelson* (1821) 6 Madd. 18, 26; 56 E.R. 995, 999, per Sir John Leach V.-C.
[64] See e.g. *United Scientific Holdings Ltd.* [1978] A.C. 904, 946, per Lord Simon. See also K.E. Lindgren, *Time in the Performance of Contracts*, 2nd ed. (Sydney 1982), §227.
[65] *Green v Sevin* (1879) 13 Ch. D. 589, 599.
[66] *Compton v Bagley* [1892] 1 Ch. 313.
[67] *Bain v Fothergill* (1874) L.R. 7 H.L. 158.

> [If a vendor] has been guilty of unnecessary delay, and the purchaser has served him with a notice limiting a time at the expiration of which he will treat the contract at an end, equity will not, after the expiration of such time, provided it is a reasonable time, enforce specific performance or restrain an action at law. The time limited by such a notice is sometimes referred to as having become, by virtue of the notice, of the essence of the contract.[68]

If the benefit of an effective notice was waived, a further notice was necessary. Assuming it allowed a reasonable time, Lord Parker said that the notice was effective to make time of the essence again.[69]

The notice to perform facility was not a licence to vary the contract[70]: it simply enabled a promisee to establish "unreasonable" delay following breach by the promisor. Noncompliance justified refusal of specific performance because (in Lord Parker's words) the "time limited by such a notice" became of the essence. Since, prior to 1873, time was of the essence at law,[71] it might, of course, be said that discharge could be based on the promisor's failure to complete within the time limited by *the contract*. However, modern authorities[72] looking back at this phase have invariably accorded two consequences to *noncompliance*: from the promisor's perspective: disentitlement to specific performance; and, from the promisee's perspective, a right to treat the contract as repudiated. Each is based on the view that noncompliance with the notice evidences unreasonable delay.

B. Urban *and the Impact of Assimilation*

The first of the three propositions we have derived from *Urban* is that a notice to complete served under the general law does not make "time of the essence in equity". As the discussion above shows, that proposition is incorrect. It is also incompatible with Sir Terence Etherton C.'s view that noncompliance with a notice brings "to an end the possibility of equity's intervention". A statement in those terms has always been regarded as describing accurately the effect of time being "of the essence in equity", if not the very *meaning* of that expression.[73] Prior to *Urban*, the Court of Appeal proceeded on that basis.[74] So also have courts in other

[68] *Stickney* [1915] A.C. 386, 418–19. See also p. 401, per Lord Atkinson.
[69] Ibid., at p. 419. See also *O'Brien v Dawson* (1941) 41 S.R. (N.S.W.) 295, 304, per Jordan C.J., with whom Halse Rogers and Roper JJ. concurred (affirmed on other grounds (1942) 66 C.L.R. 18).
[70] See *Green* (1879) 13 Ch. D. 589, 599, per Fry J.
[71] See *Wendt* (1931) 45 C.L.R. 245, 253, per Gavan Duffy and Starke JJ. (time of essence "both at law and in equity").
[72] See e.g. *Laurinda Pty. Ltd. v Capalaba Park Shopping Centre Pty. Ltd.* (1989) 166 C.L.R. 623, 644–45, per Brennan J.; *British and Commonwealth Holdings plc v Quadrex Holdings Inc.* [1989] Q.B. 842, 858, per Sir Nicolas Browne-Wilkinson V.-C. (with whom Woolf and Staughton L.JJ. agreed).
[73] See *Laurinda Pty. Ltd.* (1989) 166 C.L.R. 623, 652, per Deane and Dawson JJ. ("real sense" and "traditionally … so described").
[74] See e.g. *British and Commonwealth Holdings plc* [1989] Q.B. 842, 857, per Sir Nicolas Browne-Wilkinson V.-C. (with whom Woolf and Staughton L.JJ. agreed).

jurisdictions.[75] Indeed, since it originally served no function other than to prevent specific performance, Sir Terence Etherton C. might equally have made the same observation in relation to an express agreement for time to be of the essence.

We therefore turn to the second proposition in *Urban*: if the promisee did not act under an express provision, there is no immediate right to terminate for noncompliance with the notice. The parties are therefore thrown back on their common law rights, analysed on the basis that time has *not* become of the essence.[76] Somehow, even though the promisee cannot be compelled to perform, it must remain ready and willing to do so.[77] If that were correct, it would, as Brennan J. said in *Laurinda Pty. Ltd. v Capalaba Park Shopping Centre Pty. Ltd.*,[78] make service of the notice a "futile" exercise.

There is abundant authority for the view that noncompliance entitles the promisee to terminate the contract. On three occasions, the House of Lords[79] approved the statement of principle in *Halsbury*, that time becomes of the essence if "a party who has been subject to unreasonable delay gives notice to the party in default". *Johnson v Agnew* is a fourth House of Lords authority. Lord Wilberforce included[80] in certain "uncontroversial propositions of law" that "in a contract for the sale of land, after time has been made, or has become, of the essence of the contract", failure to complete entitles the vendor to "treat the purchaser as having repudiated the contract". The purchaser may therefore terminate the contract or seek specific performance. Consistently with assimilation, Lord Wilberforce described[81] this proposition as "simply the ordinary law of contract". Similarly, in *Graham v Pitkin*,[82] the Privy Council cited[83] Lord Simon's speech in *United Scientific* to justify the statement that failure to complete in accordance with an effective notice "can be treated as a repudiatory breach" which

[75] See e.g. *Laurinda Pty. Ltd.* (1989) 166 C.L.R. 623, 652, per Deane and Dawson JJ.; *Morris v Robert Jones Investments Ltd.* [1993] 2 N.Z.L.R. 275, 280, per Hardie Boys J.; *Lau Suk Ching Peggy v Ma Hing Lam* (2010) 13 H.K.C.F.A.R. 226, 240–41, per Lord Millett (for the court).

[76] The logic of Sir Terence Etherton C.'s suggestion that the notice should warn the recipient that the contract may be terminated if the notice is not complied with is challenging. Since, in his view, noncompliance does not entitle the promisee to terminate the contract, the warning is incorrect as a matter of law. By asserting a right that does not exist, the notice may be a repudiation by the *promisee*. See e.g. *Total Oil Great Britain Ltd. v Thompson Garages (Biggin Hill) Ltd.* [1972] 1 Q.B. 318, 322, per Lord Denning M.R. (with whom Edmund-Davies and Stephenson L.JJ. agreed); *Metro Meat Ltd. v Fares Rural Co. Pty. Ltd.* [1985] 2 Lloyd's Rep. 13, 17 per the Privy Council.

[77] Sir Terence Etherton C.'s treatment of failure to comply with a general law notice to complete is also difficult to reconcile with his "in principle" view (text at note 5 above) that a promisor's entitlement to specific performance depends on the criteria applied to determine whether delay is a repudiation.

[78] *Laurinda Pty. Ltd.* (1989) 166 C.L.R. 623, 645.

[79] In *Bunge*, the further statement which Lord Roskill adopted was introduced with "[a]part from . . . notice making time of the essence".

[80] *Johnson* [1980] A.C. 367, 392. The other members of the House of Lords agreed. See also J. McGhee (ed.), *Snell's Equity*, 33rd ed. (London 2015), §17–042.

[81] *Johnson* [1980] A.C. 367, 392.

[82] *Graham v Pitkin* [1992] 1 W.L.R. 403.

[83] Ibid., at p. 406. See also *Bechal v Kitsford Holdings Ltd.* [1989] 1 W.L.R. 105, 107, per Sir Nicolas Browne-Wilkinson V.-C.

the promisee "is entitled to accept by rescission". The Supreme Court of New Zealand has expressed the same view.[84] As explained below, so also has the High Court of Australia.

The principal authority in the Court of Appeal is *Behzadi v Shaftesbury Hotels Ltd*.[85] A purchaser served a notice to perform when the vendor did not deliver the abstract of title within the time specified. The purchaser purported to terminate for noncompliance. Relying on *Smith v Hamilton*,[86] the vendor contended that the notice was premature. In that case, Harman J. had said[87] that, if time is not of the essence, "one party cannot, of his own motion, make it so"; there must be "unreasonable delay". The notice was premature because it was given the day following the completion date. As is well known, Harman J.'s view was rejected in *Behzadi*.

In overruling *Smith v Hamilton*, the court adopted *Louinder v Leis*,[88] the leading Australian authority. Passages in the judgments of Gibbs C.J. and Mason J. were expressly approved.[89] Gibbs C.J. said: "[A] party who fails to complete on the specified day is guilty of delay …. In principle, … such delay entitles the innocent party to treat the contract as at an end provided that, if time is not of the essence of the contract, he first gives a reasonable notice which is not complied with."[90]

The passages quoted from Mason J.'s judgment included the statement:

> Unreasonable delay in complying with the stipulation in substance amounting to a repudiation is essential to justify rescission. It is to this end that, following breach, the innocent party gives notice fixing a reasonable time for performance of the relevant contractual obligation. The result of non-compliance with the notice is that the party in default is guilty of unreasonable delay in complying with a non-essential time stipulation. The unreasonable delay amounts to a repudiation and this justifies rescission.[91]

Both statements treat notices to complete as one manifestation of a common law facility permitting service of a notice to perform a sale of land contract

[84] *Mana Property Trustee Ltd. v James Developments Ltd.* [2010] NZSC 90; [2010] 3 N.Z.L.R. 805, at [37], per Blanchard J. (for the court).

[85] *Behzadi v Shaftesbury Hotels Ltd*. [1992] Ch. 1. See C. Harpum, "Conveyancing: Notices to Fulfil a Contractual Obligation" [1991] C.L.J. 40.

[86] *Smith v Hamilton* [1951] 1 Ch. 174.

[87] Ibid., at p. 181.

[88] *Louinder v Leis* (1982) 149 C.L.R. 509. See also J.D. Heydon, M.J. Leeming and P.G. Turner, *Meagher, Gummow and Lehane's Equity, Doctrines and Remedies*, 5th ed. (Sydney 2015), §3–150.

[89] See *Behzadi* [1992] Ch 1, 15, per Nourse L.J. (with whom Purchas and Glidewell L.JJ. agreed), 29–31 per Purchas L.J. (with whom Glidewell L.J. agreed).

[90] *Louinder* (1982) 149 C.L.R. 509, 514. See also *Laurinda Pty. Ltd.* (1989) 166 C.L.R. 623, 664, per Gaudron J.

[91] *Louinder* (1982) 149 C.L.R. 509, 526. Gibbs C.J., Stephen and Wilson JJ. agreed. See also *Ciavarella v Balmer* (1983) 153 C.L.R. 438, 446, per the court ("non-compliance … evidences a fundamental breach or renunciation"); *Braidotti v Queensland City Properties Ltd.* (1991) 172 C.L.R. 293, 316, per Gaudron J. ("repudiation of the entire contract").

following breach of a non-essential time stipulation.[92] Since, in *Behzadi*, they were used to justify overruling *Smith v Hamilton*, their adoption was part of the ratio of the decision.

None of the above decisions requires the promisee to be acting under an express provision. A key feature of *Behzadi* is that the case did not concern a notice to complete. Nourse L.J. (with whom Purchas and Glidewell L.JJ. agreed) said[93] it was "accepted, as [Hoffmann J.] thought and as I think correctly, that time can be made of the essence of the vendor's obligation to deliver an abstract of title by complying with the requirements of the general law in that respect". *Compton v Bagley* was regarded as good law, and Nourse L.J. concluded[94] that a promisee is entitled to "*treat the contract as repudiated*" if the "party in default has been given an opportunity to mend his ways . . . by giving him notice to comply within a reasonable time". On the facts, the vendor succeeded on an alternative argument, namely, that the purchaser's notice did not allow a reasonable time.

The third proposition in *Urban*, that the common law does not entitle one party unilaterally to "transform" a non-essential time stipulation into a "condition", is of course correct. But it is also beside the point. A notice to perform does not transform any term. The authorities referred to above do not treat breach of condition as the basis for discharge.[95] In *United Scientific*, Lord Simon said[96]: "The promisee is really saying, 'Unless you perform by such-and-such a date, I shall treat your failure as a repudiation of the contract'." The High Court of Australia made the point expressly in *Ciavarella v Balmer*[97]: the "effect of the notice is not to convert a non-essential term into an essential term". Failure to comply with a notice evidences repudiation, not the breach of a term of the contract.

Sir Terence Etherton C. found support[98] for his analysis in ambivalent dicta of Lewison L.J. (with which Etherton L.J. agreed) in *Samarenko v Dawn Hill House Ltd*.[99] They cannot justify departure from *Behzadi*, which is limited in *Urban* to the elementary point that failure to comply with a general law notice to complete disentitles the promisor to specific

[92] See also J.E. Stannard, "In the Contractual Last Chance Saloon: Notices Making Time of the Essence" (2004) 120 L.Q.R. 137, at 154.

[93] *Behzadi* [1992] Ch. 1, 11. *Louinder* (1982) 149 C.L.R. 509 was also such a case.

[94] *Behzadi* [1992] Ch. 1, 12, emphasis in original.

[95] See also *MacIndoe v Mainzeal Group Ltd.* [1991] 3 N.Z.L.R. 273, 280–81, per Cooke P., with whom Hardie Boys J. agreed (basis for "cancellation" under Contractual Remedies Act 1979 (N.Z.) is repudiation (or substantial breach), rather than breach of an essential term).

[96] *United Scientific Holdings Ltd.* [1978] A.C. 904, 946. See also p. 947, per Lord Simon (no entitlement "unilaterally by notice to introduce a new term into" the contract); *Behzadi* [1992] Ch. 1, 12, per Nourse L.J.

[97] *Ciavarella* (1983) 153 C.L.R. 438, 446. See also *Braidotti* (1991) 172 C.L.R. 293, 307, per Deane J. ("not based upon default in the performance of a particular term of the contract"); *Morris* [1993] 2 N.Z.L.R. 275, 280, per Hardie Boys J. (notice "does not turn" non-essential term into essential term).

[98] *Urban* [2013] EWCA Civ 816; [2014] 1 W.L.R. 756, at [44].

[99] *Samarenko v Dawn Hill House Ltd*. [2011] EWCA Civ 1445; [2013] 1 Ch. 36, at [42]. Surprisingly, there is no reference to this aspect of Rix L.J.'s judgment in that case.

performance. As the Privy Council acknowledged in *Sentinel International Ltd. v Cordes*,[100] *Behzadi* is authority for significantly more than that. Specific performance was not in issue, and would in any event have been an inappropriate response to the notice. It would be bizarre for a purchaser to be entitled to terminate a contract for failure to comply with a notice to deliver the abstract of title but not when the notice is to complete. Under the propositions stated in *Urban*, noncompliance with the notice in *Behzadi* would not have entitled the purchaser to terminate even if he had allowed a reasonable time. *Urban* therefore stamps the analysis in *Behzadi* as totally misconceived. It also resurrects *Smith v Hamilton*. Superficially, the only difference is that, whereas Harman J. required further ("unreasonable") delay *preceding* the notice, *Urban* requires further ("unreasonable") delay *following* noncompliance. Actually, it is considerably more restrictive. Under *Urban*, further delay is unreasonable only if (when combined with the initial delay) it is sufficient to deprive the promisee of "substantially the whole benefit" of the contract.

C. Notices Under Express Provisions

If time is expressly of the essence, failure to perform on time is a breach of condition.[101] Any agreed procedure for termination therefore regulates exercise of a common law right.[102] In the same way, unless the contract provides to the contrary, any express notice procedure regulates the common law facility to make time of the essence. Since the basis for discharge under that facility is repudiation of obligation, the presumption is that an express provision regulates proof of repudiation. But, according to *Urban*, cl. 6.8 of the *Standard Conditions of Sale* operates differently: it permits a vendor (or purchaser) to transform a non-essential term into a condition. While it is conceivable that a contract might confer such a right, cl. 6.8 does not.

If the contract is not completed, cl. 6.8.1 entitles a party who is ready and willing to perform to serve a completion notice. The effect is stated in cl. 6.8.2: "The parties are to complete the contract within ten working days of giving a notice to complete, excluding the day on which the notice is given. For this purpose, time is of the essence of the contract."[103]

It is not an obvious construction to conclude that the effect of a notice under cl. 6.8.2 is to "transform" the promise to complete. By definition, the time for completion has passed. Further delay is the failure to remedy a past breach. Consistently with the general law, a notice served under

[100] *Sentinel International Ltd. v Cordes* [2008] UKPC 59, at [41].
[101] Contrast the text at note 120 below (conferral of express right to terminate).
[102] *Legione v Hateley* (1983) 152 C.L.R. 406, 445, per Mason and Deane JJ.; *Lombard North Central plc* [1987] Q.B. 527.
[103] The right to terminate is stated in cll. 7.4 and 7.5.

cl. 6.8 limits the time for the promisee to do so.[104] Accordingly, cl. 6.8.2 describes completion "within ten working days" – that is, compliance with the notice, as the "purpose" for which time is of the essence. No transformation occurs.

The question debated in cases on standard provisions has always been the extent to which the common law facility is modified, not whether a term of the contract is transformed. As readiness and willingness to complete is required by the general law unless expressly dispensed with, cl. 6.8.1 states what would otherwise be inferred.[105] If a provision specifies a *minimum* period, the requirement to allow a reasonable period remains.[106] By contrast, cl. 6.8 includes an agreement on the sufficiency of 10 working days. In that respect, the clause can be regarded as "tidying up of the common law position".[107] And, since cl. 6.8 does not provide to the contrary, any notice binds both parties.[108]

Two further points may be noted. One is illustrated by *Behzadi*: an express provision does not displace the common law facility for breaches outside its scope. The other is a debate[109] as to whether a notice that is ineffective under an express provision may be upheld as a general law notice. Whatever the resolution, that debate is incompatible with the analysis in *Urban*.

IV. Notices to Perform: Contracts in General

Sir Terence Etherton C.'s summary in *Urban* restricts the notice to perform facility to contracts to which specific relief is relevant. That is inconsistent with the assimilated approach to delay. Although the facility is an incident of general principles of discharge borrowed from equity,[110] its scope of application is not determined by the scope of the remedy of specific performance. Noncompliance with the notice is a repudiation.

In fact, even in the commercial context, the common law and notices to perform have never been complete strangers.[111] Section 48(3) of the Sale of Goods Act 1979 states (as did the 1893 Act) that, if an unpaid seller gives

[104] See P. Butt, "Notices to Perform Obligations in Conveyancing Transactions: A View From Down Under" [1991] Conv. 94, 105ff.

[105] See e.g. *McNally v Waitzer* [1981] 1 N.S.W.L.R. 294; *British and Commonwealth Holdings plc* [1989] Q.B. 842, 857, per Sir Nicolas Browne-Wilkinson V.-C. (with whom Woolf and Staughton L.JJ. agreed); *Chaitlal v Ramial* [2003] UKPC 12, at [28].

[106] See *Re Barr's Contract* [1956] Ch. 551, 558–59, per Danckwerts J.

[107] *Quadrangle Development and Construction Co. Ltd. v Jenner* [1974] 1 W.L.R. 68, 72, per Russell L.J. (with whom Lawton L.J. agreed).

[108] See e.g. *Finkielkraut v Monohan* [1949] 2 All E.R. 234; ibid.; *Balog v Crestani* (1975) 132 C.L.R. 289, 298, per Gibbs J.

[109] See e.g. *Dimsdale Developments (South East) Ltd. v De Haan* (1983) 47 P. & C.R. 1, 9–10, per Gerald Godfrey Q.C. (sitting as a deputy High Court judge); *Country and Metropolitan Homes Surrey Ltd. v Topclaim Ltd.* [1996] Ch. 307, 314, per Timothy Lloyd Q.C. (sitting as a deputy High Court judge).

[110] See *United Scientific Holdings Ltd.* [1978] A.C. 904, 928, per Lord Diplock ("no close counterpart").

[111] See e.g. *Page v Cowasjee Eduljee* (1866) L.R. 1 P.C. 127, 145, per the court.

notice of an intention to re-sell, the seller may re-sell and recover damages if the buyer does not within a reasonable time pay (or tender) the price. In *R.V. Ward Ltd. v Bignall*,[112] Diplock L.J. explained the purpose of the notice as being "to make payment within a reasonable time after notice of the essence of the contract".

To justify treatment of the notice to perform facility as an element of the assimilated approach to delay, it is unnecessary to look further than approval by the House of Lords in *United Scientific, Raineri v Miles* and *Bunge* of statements in *Halsbury* that the facility applies to "contracts of all types". Clearly, that approval was intended to be acted on.[113] In *United Scientific* – where specific performance was neither sought nor available – both Lord Diplock and Lord Fraser said[114] that notice to perform the rent review might have been given. Noncompliance would have terminated the review. Cases confirming that noncompliance is a repudiation include *Carr v J. A. Berriman Pty. Ltd.*[115] and *North Eastern Properties Ltd. v Coleman*,[116] in the building contract context, and *British and Commonwealth Holdings plc v Quadrex Holdings Inc*.[117] and *Sentinel*, which concerned share-sale contracts. Since the assimilated approach to delay is the basis for these decisions,[118] no express term is required.

That is not to say that notices to perform play a major role for contracts in general. One justification for the preference applied in *Bunge* – to construe time stipulations in executory commercial contracts as conditions – is that performance timeframes are frequently too short to make service of a notice viable.[119] More generally, express termination rights are common for breach by failure to pay money on time, where it is well understood that delay is not a breach of condition.[120]

A common context for use of the notice facility is following "waiver" of a right to terminate for breach of an essential time stipulation. *Charles*

[112] *R.V. Ward Ltd. v Bignall* [1967] 1 Q.B. 534, 550. Russell L.J. agreed. See also H. Beale, *Remedies for Breach of Contract* (London 1980), 90.

[113] In *Bunge* [1981] 1 W.L.R. 711, 728–29, Lord Roskill stressed that the approval in *United Scientific* related to the *entire* statement.

[114] *United Scientific Holdings Ltd.* [1978] A.C. 904, 934 and 962, respectively.

[115] *Carr v J. A. Berriman Pty. Ltd.* (1953) 89 C.L.R. 327, 348–49, per Fullagar J. (with whom the other members of the court agreed).

[116] *North Eastern Properties Ltd. v Coleman* [2010] EWCA Civ 277; [2010] 1 W.L.R. 2715, at [71], per Briggs J. (with whom Longmore and Smith L.JJ. agreed). See also *Charles Rickards Ltd. v Oppenhaim* [1950] 1 K.B. 616, 628, per Singleton L.J.

[117] See *British and Commonwealth Holdings plc* [1989] Q.B. 842, 856, per Sir Nicolas Browne-Wilkinson V.-C. (with whom Woolf and Staughton L.JJ. agreed).

[118] See also *Balog* (1975) 132 C.L.R. 289, 296, per Gibbs J.; *Morris* [1993] 2 N.Z.L.R. 275, 280, per Hardie Boys J.; *Shawton Engineering Ltd. v D.G.P. International Ltd.* [2005] EWCA Civ 1359; [2006] B.L.R. 1, at [32], per May L.J.; *Dalkia Utilities Services plc v Celtech International Ltd.* [2006] EWHC 63 (Comm); [2006] 1 Lloyd's Rep. 599, at [131], per Christopher Clarke J.

[119] See *Bunge* [1981] 1 W.L.R. 711, 720, per Lord Lowry. See also J.W. Carter, *Carter's Breach of Contract* (Oxford 2012), §§5–59, 5–64.

[120] See e.g. *Financings Ltd. v Baldock* [1963] 2 Q.B. 104 (hire purchase contract).

Rickards Ltd. v Oppenhaim[121] is the leading authority. Denning L.J. (with whom Singleton and Bucknill L.JJ. agreed) said[122] that an effective notice makes "time of the essence of the contract". He drew[123] an analogy with Lord Parker's treatment[124] in *Stickney v Keeble* of noncompliance with notice following waiver of the benefit of an earlier notice. Since, in this context, "waiver" refers to an election to affirm the contract, the analogy is apt.

The promise in question in *Oppenhaim* was to deliver goods (or complete work) by a certain date. It therefore concerned a "once and for all" breach.[125] In such cases, failure to comply with a notice to perform does not revive the promisee's original right to terminate by removing a temporary bar arising from estoppel.[126] The basis for discharge is a "fresh" right, namely, repudiation of obligation established by noncompliance with the notice. This illustrates that the general facility to make time of the essence operates.[127] Accordingly, breach of condition is not the rationale.[128] The fact that most of the cases have concerned sale of goods contracts[129] shows that it is immaterial whether specific performance could have been obtained.

V. Practicality

A. Introduction

It goes without saying that certainty and practicality are important considerations in evaluating solutions provided by the law of contract. Time and time again, in relation to both express provisions for termination and the common law discharge regime, the point has been made in leading decisions dealing with breach by delay that certainty is of paramount importance.[130]

In this section, we explain that, although the solutions in *Urban* achieve a kind of certainty, it is not appropriate to the typical situations in which the

[121] *Charles Rickards Ltd.* [1950] 1 K.B. 616.
[122] Ibid., at p. 625.
[123] Ibid., at pp. 624–25.
[124] *Stickney* [1915] A.C. 386, 419. See text at note 69 above.
[125] For the concept, see e.g. *Thomas v Ken Thomas Ltd.* [2006] EWCA Civ 1504; [2007] Bus. L.R. 429, at [15], per Neuberger L.J., with whom Mummery and Jacob L.JJ. agreed (failure to pay rent under lease).
[126] Cf. *Panoutsos v Raymond Hadley Corp. of New York* [1917] 2 K.B. 473, 478, per Viscount Reading C.J. (with whom Lord Cozens-Hardy M.R. and Scrutton L.J. agreed). Contrast the position under the principle of *Barclay v Messenger* (1874) 30 L.T. 351; 43 L.J. Ch. 449. See e.g. *Tropical Traders Ltd. v Goonan* (1964) 111 C.L.R. 41.
[127] See *Concordia Trading B.V. v Richco International Ltd.* [1991] 1 Lloyd's Rep. 475, 480–81, per Evans J.
[128] See *Ogle v Comboyuro Investments Pty. Ltd.* (1976) 136 C.L.R. 444, 458, per Gibbs, Mason and Jacobs JJ.
[129] See e.g. *Hartley v Hymans* [1920] 3 K.B. 475, 495–96, per McCardie J.; *Aryeh v Lawrence Kostoris & Son Ltd.* [1967] 1 Lloyd's Rep. 63, 73, per Diplock L.J.
[130] See e.g. *A/S Awilco of Oslo v Fulvia SpA di Navigazione of Cagliari (The Chikuma)* [1981] 1 W.L.R. 314, 322, per Lord Bridge (with whom the other members of the House of Lords agreed); *Bunge* [1981] 1 W.L.R. 711, 725, per Lord Roskill.

analysis would be applied. That is because the solutions lack practicality, especially in the sale of land context.

B. Certainty and Waiting upon Events

For executory commercial contracts, the *Bunge* line of authority promotes certainty at the moment of breach. But the preference for conditions is by no means universal. Timely payment is presumed not to be of the essence for a sale of goods contract[131] and, following *United Scientific*, the same presumption applies to compliance with rent-review timetables in commercial leases. For sale of land contracts, the presumption is more general.[132] Of course, in these (and other) situations, it is open to the parties to make time of the essence expressly; and we have already noted that express rights to terminate may be conferred. In the absence of such provisions, the promisee must "wait upon events".[133] Unless the parties have addressed the matter expressly,[134] the relevant event is "unreasonable delay". The question of principle is how that is established.

The *Bunge* line of authority means that, for commercial contracts, the usual situation in which the promisee must wait upon events is a partially executed contract. *Hongkong Fir Shipping Co. Ltd. v Kawasaki Kisen Kaisha Ltd*.[135] is the leading decision. It concerned a partially performed two-year time charter party. Although delay was a consequence of the shipowners' breach of their seaworthiness "warranty", rather than late performance, frustration of commercial purpose was adopted as the criterion for "unreasonable" delay.[136] It was famously formulated[137] by Diplock L.J. in terms of deprivation of "substantially the whole benefit which it was intended that [the promisee] should obtain from the contract". Except in that extreme situation, the parties must "soldier on", as the charterers found to their cost in *Hongkong Fir*. Substantial certainty of result is achieved: the promisee's remedy is *compensation*, not discharge.

C. The Solutions *in* Urban

According to *Urban*,[138] noncompliance with a general law notice to perform relegates the promisee to "ordinary legal rights", determined on the

[131] See Sale of Goods Act 1979, s. 10(1).
[132] The one general exception is failure to pay a deposit on time. See e.g. *Samarenko* [2011] EWCA Civ 1445; [2013] 1 Ch. 36.
[133] *Bunge* [1981] 1 W.L.R. 711, 725, per Lord Roskill.
[134] See e.g. *Stocznia Gdanska S.A. v Latvian Shipping Co. (No. 3)* [2002] EWCA Civ 889; [2002] 2 Lloyd's Rep. 436 (right to terminate if payment outstanding for 21 days).
[135] *Hongkong Fir Shipping Co. Ltd.* [1962] 2 Q.B. 26.
[136] Although rarely satisfied, the same criterion applies where the promisee invokes anticipatory breach by inability to perform. See *Universal Cargo Carriers Corp. v Citati* [1957] 2 Q.B. 401.
[137] *Hongkong Fir Shipping Co. Ltd.* [1962] 2 Q.B. 26, 69.
[138] *Urban* [2013] EWCA Civ 816, [2014] 1 W.L.R. 756, at [44]. See also at para. [48], suggesting that the promisee's position is "probably" the same if a notice to perform is served.

basis that time is not of the essence. Sir Terence Etherton C. conceptualised these rights in terms of "repudiation". Expressed schematically, the promisee must show:

(1) actual delay sufficient to deprive the promisee of "substantially the whole benefit" of the contract; or
(2) that the promisor "renounced the contract", by a "demonstrated intention":
    (a) "never to carry out the contract"; or
    (b) to perform in a way that will deprive the promisee of "substantially the whole benefit" of the contract.

The influence of Diplock L.J.'s formulation of commercial frustration is apparent. It is unsurprising that illustrations of (1) are few and far between,[139] including in the sale of land context. In *Behzadi*, Nourse L.J. described[140] situation (2)(a) as "rare". And the conventional approach to notices to perform means that resort to situation (2)(b) has hardly ever been necessary for sale of land contracts. Sir Terence Etherton C.'s solutions for the problem of delay therefore achieve substantial certainty that the promisee's remedy is compensation. But, for executory contracts to sell or lease land, they lack practicality.

Even putting to one side that frustration of commercial purpose and repudiation are different concepts, and also that Diplock L.J. did not put forward his formulation of the former as a test for "repudiation", frustration of commercial purpose is an inappropriate criterion. First, sale of land contracts are not characteristically commercial adventures: typically, one party (if not both) has a purely domestic purpose. And the parties do not exchange performance over time.

Second, an executory contract to sell or lease land is an entirely different kettle of fish from a partly-performed contract. An executed lease is rarely frustrated,[141] and the doctrine of repudiation does not apply.[142] But at no point in the past 200 years has substantial deprivation of benefit been applied as the principal criterion for unreasonable delay while a contract remains executory.

Third, substantial certainty that the promisee's remedy is compensation is misconceived in the sale of land context. If the purchaser breached the contract, the vendor cannot deal with the land safe from allegations of its own default. The stultifying effect is not in the interests of the parties or the community. If the vendor is in breach, the purchaser must maintain

[139] See *Phibro Energy A.G. v Nissho Iwai Corp. (The Honam Jade)* [1991] 1 Lloyd's Rep. 38 (actual delay had fundamental effect on the contract).
[140] *Behzadi* [1992] Ch. 1, 12. Cf. *Laurinda Pty. Ltd.* (1989) 166 C.L.R. 623 (delay in execution of lease a repudiation).
[141] See *National Carriers Ltd. v Panalpina (Northern) Ltd.* [1981] A.C. 675.
[142] See *Total Oil Great Britain Ltd.* [1972] 1 Q.B. 318.

ready access to the requisite finance for an indeterminate period – a difficult task at any time, but quite impossible in a fluctuating market.[143] And why would anyone finance a purchase from a vendor presently unwilling or unable to make title? Since the relevant event (frustrating delay) is a matter of pure conjecture, the promisee is also exposed to the significant risk of repudiation by wrongful termination.

Fourth, by asserting that failure to comply with a general law notice to perform merely disentitles the promisor to specific performance, the parties are denied an effective means to "move on". Consistently with *Urban*, a declaration may be obtained that the promisor is disentitled to specific performance. But, even for land transactions, that does not assist the promisee. After a potentially long and expensive trial, the parties remain shackled to each other.

D. Notices to Perform: A Practical Solution

Inherent in the 200 years of development that we have traced is the view that the notice to perform facility provides a practical solution to the uncertainty created by indeterminate delay. Since the notice in *Behzadi* related to a pre-completion obligation, the court's analysis is a graphic illustration that substantial deprivation of benefit need not be proved to justify termination. For completion notices, *Urban* loses sight of the fact that the notice relates to the parties' principal obligation.[144]

Although a promisee must "wait upon events", the notice to perform facility enables the promisee to identify an event – non compliance with the notice – the occurrence of which establishes unreasonable delay. This achieves a more appropriate form of certainty than the solutions advocated by *Urban*. The prior cases illustrate that there are two permutations if a notice to perform is not complied with. Assuming the promisee elected to terminate, the election is valid if the notice was effective to make time of the essence. Otherwise, the election is a repudiation.[145] The *promisor* may terminate the contract, or seek specific performance (if available).

Outside the sale of land context, the notice to perform facility is appropriate, even for partially executed contracts. Once the perception (in *Urban*) that the promisee must be entitled to "transform" a contractual term is put to one side as erroneous, it is also difficult to see what objection could be made as a matter of principle. Since the notice must allow the promisor a reasonable time to remedy its breach, insistence on substantial deprivation of benefit is irrational.

[143] That was one problem under the agreement for lease in *Urban*.
[144] Cf. Stannard, "In the Contractual Last Chance Saloon", p. 161.
[145] But see *Eminence Property Developments Ltd. v Heaney* [2011] EWCA Civ 1168; [2011] 2 All E.R. (Comm) 223, at [61]–[64], per Etherton L.J. (with whom the other members of the court agreed).

VI. Conclusions

In this paper, we have traced the evolution of the treatment of breach by delay to show how the approaches of the common law and equity have been substantially assimilated within general principles of discharge. The key point is a change in perspective. Whereas the original concern was whether delay prevented enforcement of the contract by a promisor, the modern perspective is whether the promisee has validly terminated the contract under general principles of discharge for breach.

The presumption of dependency of obligation established in the first phase of development remains applicable to an executory sale of land contract. However, assimilation has had a twofold impact. First, whether time is of the essence is a question of contract construction. Since there is usually no immediate right to terminate the contract for delay unless time is expressly of the essence, either party may seek specific performance, and the promisee may serve a notice to perform. Second, if an effective notice to perform is not complied with, the promisee may terminate the contract.

Our principal purpose has been to expose the impossibility of reconciling Sir Terence Etherton C.'s summary of the law in *Urban* with the prior cases. The first proposition identified in the summary, that a notice to perform does not make time of the essence in equity, is inaccurate. It can be conceded that the idea of time "becoming" of the essence is somewhat Delphic. Prior to the Judicature reforms, because the notice facility operated defensively, the expression stated a conclusion that it would be inequitable to order specific performance. However, even before assimilation, noncompliance was established as a basis for discharge ("rescission"). Following assimilation, there can be no doubt that the function of a notice to perform is to provide evidence of unreasonable delay sufficient both to disentitle the promisor to specific performance and to entitle the promisee to terminate the contract.

Accordingly, the second proposition in *Urban*, namely, that noncompliance with a notice to perform given under the general law merely disentitles the promisor to specific performance, is also historically inaccurate. The defensive function necessarily survived the Judicature reforms; but there is authority throughout the Commonwealth that noncompliance with a notice to perform is unreasonable delay amounting to a repudiation. Authorities binding on the Court of Appeal have consistently proceeded on the basis that the notice to perform facility is an element of the discharge regime. Its adoption was, effectively, the quid pro quo for application of equity's more relaxed approach to delay. But assimilation also means that whether the specific performance would have been available to the promisor is irrelevant. On that basis, the notice to perform facility is in principle applicable to any contract. The end result is a balanced approach to discharge for delay.

The third proposition in Sir Terence Etherton C.'s summary is that the legal basis for denying a promisee an immediate right to terminate is the inability of a promisee to "transform" a non-essential time stipulation into a "condition". As we have shown, notices served under the general law do not operate in that way. Nor does cl. 6.8 of the *Standard Conditions of Sale*. All the leading cases support the view that the purpose of a notice is to establish repudiation by unreasonable delay, not a breach of condition.

There are also significant practical objections to the summary in *Urban*. How can it be in anyone's interest for the parties to be tied to each other until delay renders their contract substantially worthless? It is no answer to say that most sale of land contracts deal with the matter expressly. If the common law did not recognise a notice to perform facility, it would need to be invented!