RATIONALISING ANTICIPATORY BREACH IN EXECUTED CONTRACTS

RATIONALISING the doctrine of anticipatory breach is notoriously difficult. This may explain the complete lack of attempt by the UK Supreme Court to address its conceptual difficulties in its recent judgment in *Bunge SA v Nidera BV* [2015] UKSC 43; [2015] 3 All E.R. 1082. It is therefore of interest that the Singapore Court of Appeal in *The "STX Mumbai"* [2015] SGCA 35; [2015] 5 S.L.R. 1 explained why the doctrine of anticipatory breach can be applied to executed contracts (in the sense of being fully executed by the innocent party). Whilst anticipatory breach applies similarly under English law, the English courts have never considered the underlying justification, save to say in a case with a partially executed contract that "it would be very strange and hardly unworkable" if the innocent party had to wait until the time for performance (*Moschi v Lep Air Services Ltd.* [1973] A.C. 331, 356, per Lord Simon).

In *The "STX Mumbai"*, the appellant supplied bunkers to the respondent's vessel. Two days before payment was due, the appellant arrested the vessel pursuant to an *in rem* writ based on the respondent's alleged anticipatory breach of the payment obligation. The appellant justified this action by contending that the respondent's failure to respond to a letter of demand sent the day before evinced a clear intention not to be bound by the contract. The demand for accelerated payment was in turn justified by the insolvency of a company known as STX Pan Ocean Pte Ltd., which was named as the "group owner" of the vessel, and which supposedly affected the respondent's ability to make payment. The respondent succeeded in striking out the appellant's *in rem* action before the Assistant Registrar, which was upheld by the Singapore High Court. The Court of Appeal, however, reversed the decisions below. It identified as a preliminary issue whether the appellant should even be able to invoke the doctrine of anticipatory breach since all the appellant's other obligations under the contract had been executed: the only obligation that remained was for the respondent to make payment within 30 days. The Court of Appeal ruled that not only was the appellant able to invoke anticipatory breach to an executed contract, but that it was arguable that STX Pan Ocean's insolvency could render the respondent unable to pay for the bunkers. In particular, although STX Pan Ocean was a third party, the Court of Appeal considered that the precise facts of its financial relationship to the respondent should be canvassed at a full trial. As such, the appellant's *in rem* action was not so plainly and obviously unsustainable as to be struck out.

The traditional analysis of anticipatory breach is premised on the defendant's actual breach of an implied promise that the defendant would not prevent the plaintiff from performing its contractual obligations. On this understanding, the doctrine would not apply to executed contracts where the plaintiff's obligations have been fully performed, so that there is

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therefore nothing prevented by the defendant's repudiation of its contractual obligations. This is the justification used by the American and Canadian courts to deny the application of anticipatory breach to executed contracts.

In *The "STX Mumbai"*, the Court of Appeal offered two justificatory accounts for applying the doctrine of anticipatory breach to executed contracts. The first redefines the implied promise: the defendant impliedly promised that it would not act in such a manner so as to render the plaintiff's performance of its obligation towards completion of the contract "an exercise in futility" (at [45]). Thus, if the defendant announced that it would not be performing its obligations before the time for performance, it would have rendered the plaintiff's performance, whether already or still to be performed, an exercise in futility, since the plaintiff would not be receiving its part of the contractual bargain. There is no reason why a plaintiff who has performed its obligations should find itself in a worse position than a plaintiff who has not. As Carter forcefully argues, a "[plaintiff's] concern about any conduct which materially increases the risk of non-receipt of the agreed return for its performance is, if anything, more acute where the [plaintiff] has already provided that performance" (see Carter, *Carter's Breach of Contract*, 3rd ed. (Chatswood 2011), para. 7–80).

However, the Court of Appeal acknowledged that an implied promise explanation may appear artificial. In Lord Atkin's words, implied contracts are "fantastic resemblances of contracts invented to meet the requirements of the law" (*United Australia Ltd. v Barclays Bank Ltd.* [1941] A.C. 1, 29). More relevantly, it would be a misnomer to call the doctrine "anticipatory" breach when the implied promise explanation is premised on an actual breach having taken place (see Tabachnik, [1972] C.L.P. 149, 151).

The Court of Appeal thus advanced an alternative account founded on the defendant's indication of a clear intention that it would not perform its obligation under the contract. Where this has occurred, the Court of Appeal held that this fact would support the finding that an actual breach had in substance occurred although the time for performance had not arrived. However, this analysis effectively transforms an event that is not a breach into a breach based on practical convenience and justice, with the potential for disrupting the conceptual underpinnings of discharge by breach itself. This may explain why Liu has argued against the use of the expression "actual breach" under this analysis, preferring instead the expressions "present breach" and "inferential breach" (see Liu, *Anticipatory Breach* (Oxford 2011), 35–37).

The Court of Appeal's alternative account could be extrapolated to acquire greater doctrinal justification. The defendant's unequivocal indication that it would not perform its obligations could be construed as a waiver of its right to be held strictly to the bargain; that is to say, it was only liable to perform its obligation at a later date and not earlier. Alternatively, it is a

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waiver of its right not to be called upon by the plaintiff to perform earlier than the stipulated date of performance. The waiver account is less strained and artificial than the "implied promise" analysis and does not involve transforming an event of no breach into one of breach. By this account, owing to the defendant's waiver, the plaintiff can demand early performance, which is then breached when the defendant does not perform. The shortcoming of the waiver account, however, is that it does not readily apply to anticipatory breach by disablement and omission. Nor could it be extended to cover anticipatory breach by impossibility of performance caused by third-party acts, which was accepted as a type of anticipatory breach in *The "STX Mumbai"*.

Returning to the court's central ruling, there are strong policy reasons justifying the application of the doctrine to executed contracts. First, it is incorrect to think that the plaintiff in an executed contract has suffered no hardship if required to wait for actual breach to occur before suing. If the defendant's refusal to perform the contract is known to third parties, the plaintiff could suffer present losses, including incurring costs to obtain alternative cash inflow and loss of public confidence in its financial health. To a certain extent, the concept of anticipatory breach is informed by economic efficiency. Thus, the doctrine operates in executory contracts to prevent future waste, and in executed contracts to reduce losses. Allowing the parties to settle their dispute early enables them to move on and plan their future economic activities – a course of action which might minimise related losses. Finally, making the plaintiff of an executed contract wait could in some cases render any eventual victory in litigation nugatory. This was probably the appellant's concern in *The "STX Mumbai"*. The respondent was a one-ship company with no other substantial assets. Arresting the ship before it departed from port would be the best way of obtaining substantial relief. If the doctrine of anticipatory breach could not be invoked in respect of an executed contract, the appellant would have no basis to arrest the vessel while it was docked, and there was a real risk that the respondent could evade full liability while having gained the full advantage of the contract.

Significantly, as has been pointed out, *The "STX Mumbai"* highlights an important implication of anticipatory breach: it has the effect of accelerating payment through a claim for damages as opposed to debt (which claim has not matured). This may be illustrated by the following facts: the paying party is contractually obliged to pay on Day 10 but indicates irrevocably his inability to do so on Day 3. Upon acceptance of his repudiation on Day 3, the other contracting party, through the doctrine of anticipatory breach, becomes entitled to call upon him to make full payment immediately. There is a certain irony that one's honest communication of an inability to pay triggers the maturing of that very obligation. Furthermore, unlike an acceleration clause in loan contracts which may have debtor disciplining

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functions (e.g. ensuring the debtor's proper accounting practices), the doctrine of anticipatory breach has the sole effect of protecting that one creditor who is entitled to invoke the claim from the point of "breach". The doctrine thus enables that creditor to "leap over" other creditors to enforce his "debt" in the event of the debtor's financial distress. Contracting parties, especially the debtor, should consider their options seriously before embarking on a course of conduct that will trigger the doctrine of anticipatory breach in this situation.

YIHAN GOH AND MAN YIP

School of Law, Singapore Management University, Singapore 178899. Email: yihangoh@smu.edu.sg; manyip@smu.edu.sg

ESTOPPEL AND THE LAND REGISTRATION ACT 2002

WISHART v Credit and Mercantile Plc [2015] EWCA Civ 655 is an unusual priorities case. At its heart is an informal business partnership between two close friends: S and W. Together, the pair undertook a series of property developments. In all their ventures, S took the lead on financial matters. With the approaching sale of a particularly lucrative development, S and W considered how to spend their gains. W indicated that he would like to purchase a residential property for himself and his family, and entrusted the arrangements for the acquisition to S. W removed himself entirely from the process, failing even to look at the contract of sale. As such, he did not realise that S had inserted himself as the purchaser of the property. Upon sale, W and his family moved into the property, oblivious to the subterfuge. S then secured a loan of £500,000 on the property by way of a legal mortgage in favour of C&M. The sum was promptly gambled away, and S, now declared bankrupt, disappeared. C&M obtained possession of the property and sold it for £1.1 million, using just under £700,000 of the proceeds to recoup their loan and expenses. It was at this point that W re-entered the narrative, appearing before the court to argue that, by virtue of an overriding interest, he was entitled to the proceeds of the sale over C&M.

W's bid for priority failed due the court's adherence to a little-used nineteenth-century principle laid down in *Brocklesby v Temperance Permanent Building Society* [1895] A.C. 173. Although this is not an authority that has featured prominently in recent years, it was explicitly relied upon in *Thompson v Foy* [2009] EWHC 1076 (Ch), at [142], and rests behind the Court of Appeal's decision in *Abbey National Building Society v Cann* [1989] 2 F.L.R. 265, though the point was left untouched by the House of Lords. The effect of this principle is a simple estoppel: when

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