"REMEDY-STIPULATION" IN THE ENGLISH LAW OF CONTRACT— FREEDOM OR PATERNALISM?

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I. INTRODUCTION

The early volumes of this journal contain two important articles on the English law of contract, Fridman's "Freedom of Contract" [1] and Atiyah's "Judicial Techniques and the English Law of Contract". [2] At the end of his conspectus of the operation in English law of the time-honoured principle of freedom of contract, Fridman concludes: "The tendency of modern law, therefore, is away from the principle of freedom of contract. It may be that there is a long way to go before utter regulation of contractual relationships is the rule, rather than the exception. But the signs to be found in the cases, it is suggested, point to a movement towards such a situation." [3] Atiyah examines the role of the so-called "construction technique" [4] in judicial decision-making, and, in light of its ubiquity, suggests that more attention should be paid to the consequences of its use. The exploratory nature of the article is acknowledged by Atiyah himself when he says that if the article stimulates "further thought and writing about this technique, its purpose will have been achieved". [5]

The present article can be regarded as a sequel to the two earlier articles, for it investigates both freedom of contract and judicial techniques in the law of contract. The relationship, however, is no more direct than this. No attempt is made to verify Fridman's prognostication about the general trend away from freedom of contract, and no evaluation of the "construction technique" is offered. In contrast with the two earlier papers, this paper deals with just one type of contractual situation, that in which the parties expressly stipulate the remedies available to the innocent party on a breach of contract. This may be termed a "remedy-stipulation" situation, and within its context the present article attempts to describe judicial techniques and judicial policy.

It will be appreciated that under the head of remedy-stipulation situations we are able to see as cognate phenomena such devices as penalty clauses, liquidated damages clauses, limitation clauses and exclusion clauses.

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[1] 2 OTTAWA L. REV. 1 (1967).

[2] 2 OTTAWA L. REV. 337 (1968).

[3] *Supra* note 1, at 22.

[4] *Supra* note 2, at 339.

[5] *Id.* at 362.

Section II of this article focusses on stipulations that purport to *extend* the remedies available to the innocent party on a breach of contract; section III deals with stipulations that purport to *restrict* the remedies available to the innocent party. To decide whether a particular stipulation extends or restricts the available remedies, it is necessary to determine the remedy that would be awarded by a court in the absence of such an express contractual provision.

The choice of remedy-stipulation situations as the area for enquiry is not arbitrary; nor is it camouflage for another academic excursion into the area of exemption clauses. Remedy-stipulation situations contain all the ingredients for producing not only difficult cases but also those notorious "hard" cases. The former are brought about by the problems inherent in establishing contractual intention, while the latter are generated by the tension between the principles of freedom of contract and plain justice. Thus remedy-stipulation situations provide the perfect climate for evaluating both the strength of judicial techniques and the merits of judicial policy.

A. *Freedom of Contract as the Starting Point*

The complex network of rules that comprises the law of contract is, according to the traditional theory, underpinned by a single master principle, the principle of freedom of contract. In its most extreme form this theory would assert that every rule of the law of contract finds its rationale in the principle of freedom of contract and that apparent contradictions within the law can be resolved by reference to the principle.[6] In a more moderate form the theory holds that the principle has great explanatory power, especially as regards reconciliation of the apparent contradictions in the reported cases. Thus it would assert that although judicial decisions might, in the fashion of a kaleidoscope, present an ever-shifting pattern to the observer, such variation is for the most part merely superficial and has underlying it the principle of freedom of contract.[7] The attraction of the traditional theory, in either of its forms, hardly needs to be stated; it transforms an apparently disjointed and conflicting collection of rules into a neat and symmetrical package.

The traditional theory effects this remarkable transformation from chaos to order by means of the concept of freedom of contract. The suspicion that this and kindred exercises entail more than their share of sophistry was voiced many years ago by Jerome Frank. He said: "Lawyers use what the layman describes as 'weasel words', so-called 'safety-valve concepts', such as 'prudent', 'negligence', 'freedom of contract', 'good faith', 'ought to know',

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[6] It is unlikely that anybody actually adheres to this form of the theory, for quite plainly it claims far too much. For example, how does freedom of contract explain the conflicting decisions which revolved around "mistake of identity" prior to Lewis v. Averay, [1972] 1 Q.B. 198, [1971] 3 All E.R. 906 (C.A.).

[7] The adherent of this version of the theory has less of the look of an "Aunt Sally" about him. Nevertheless, the chances of anyone espousing this version would depend on the flexibility of the reservation, "for the most part".

'due care', 'due process',—terms with the vaguest meaning—as if these vague words had a precise and clear definition; they thereby create an appearance of continuity, uniformity and definiteness which does not in fact exist." [8] This "Word-Magic", [9] as Frank would call it, creates its illusion by use of vague general concepts; the vaguer the concept, the greater the illusion produced. Freedom of contract is as vague a concept as one is likely to encounter. As Atiyah says: "Like most shibboleths, that of 'freedom of contract' rarely, if ever, received the close examination which its importance deserved, and even today it is by no means easy to say what exactly the nineteenth-century judges meant when they used this phrase." [10] Fortunately, we need not concern ourselves with nineteenth-century usage, but we can go no further until twentieth-century usage of this critical yet elusive concept has been described.

In current usage "freedom of contract" appears to mean that a person ought to be free to contract (a) with whomever he wishes; and (b) on whatever terms he wishes. But this is obscure. Consider the first limb. *A* wishes to contract with *B*; *B*, on quite arbitrary grounds, refuses to contract with *A*. Whose freedom is to prevail—*A*'s to insist on the contract, or *B*'s to refuse it? The second limb is unclear because it sounds like a plea for a minimum of legal involvement when its real thrust is just the opposite. It is true that freedom from criminal restriction is an implicit claim here, but more important is the demand for a sympathetic structure of civil regulation. The principle seeks to maximize the area of legally secured transactions.

The great advantage in starting with freedom of contract is that, despite its linguistic and conceptual difficulties, it requires anybody who proposes to encroach upon that freedom to make out a case for the encroachment. Such a case, it is suggested, can be made out on one of two bases.

(1) *Social Harm.* According to this argument, the principle of freedom leads to such socially harmful consequences that it must yield to other principles of social policy. The classic illustration of an agreement that falls foul of this objection is an illegal contract. If two men agree to commit a crime and to share the spoils, their freedom to make and enforce such an agreement must give way to other considerations, notably the prevention of harm to other persons and to society. [12]

(2) *Harm to One of the Contracting Parties.* This argument is paternalistic; the principle of freedom must give way when such freedom would be harmful to one of the contracting parties. There is, however, arrogance in the idea that a person's freedom should be limited for his own sake, the implication being that someone else knows better than he does what is good

[8] J. FRANK, LAW AND THE MODERN MIND 30 (1970).

[9] *Id.* at 65.

[10] P. ATIYAH, AN INTRODUCTION TO THE LAW OF CONTRACT 4 (2nd ed. 1971).

[11] *Cf.* Fuller, *Freedom—A Suggested Analysis*, 68 HARV. L. REV. 1305 (1955).

[12] The notions of "harm" and "society" are capable of bearing many shades of meaning. The consequences which follow from an unreflecting use of the terms are notorious, but, fortunately, that is another story.

for him. This may be perfectly justifiable where the person is an infant or suffers from some form of incapacity, but we have to recognize the insidious nature of paternalism once it extends beyond questions of capacity. We need not accept the paternalistic argument when it is applied to a contract that is merely unduly onerous for one of the parties. This article is particularly concerned with that situation.

B. *Sanctity of Contract*

Linked inextricably with the idea of freedom of contract is the idea of sanctity of contract. Atiyah says of the latter that it "is merely another facet of freedom of contract, but the two concepts cover, to some extent, different grounds. The sanctity of contractual obligations is merely an expression of the principle that once a contract is freely and voluntarily entered into, it should be held sacred and be enforced by the courts if it is broken". [13] Because of the ambiguities surrounding freedom of contract, its precise relationship with sanctity of contract is not easily defined, but the two concepts clearly carry different emphases.

When we speak of freedom of contract we are directing our minds toward the content of the rules of contract. We are arguing that the rules should be framed so as to maximize rather than minimize contractual freedom, especially as regards the range of agreements that parties are free to make. But we are concerned with the civil and not the criminal law, and so when we speak of people being "free" to do such and such a thing, we are not directly referring to the absence of criminal sanctions. We are referring to enforcement by a court of law. In other words, freedom of contract is an exhortation to enforce as wide a range of agreements as possible.

This is where sanctity of contract comes in, for that principle requires the courts to effectuate an agreement within the prescribed area of freedom given to the parties. It reminds the courts that within the limits of that freedom they should see to it that agreements are enforced. Any other approach would be quite recalcitrant. This point was captured in Sir George Jessel's famous dictum:

> [I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract. [14]

Thus freedom of contract can be seen as a plea for maximum contractual freedom within the rules, while sanctity of contract concerns the enforcement of bargains rather than formulation of the limits within which to enforce them. Although in theory the establishment of the area of freedom is logically prior to actual enforcement, in practice the courts

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[13] P. ATIYAH, *supra* note 10, at 9-10.

[14] Printing & Numerical Registering Co. v. Sampson, L.R. 19 Ex. 462, at 465, 32 L.T. 354 (1875).

telescope these two phases by deciding questions of formulation and enforcement at the same time. [15] Despite this, the principle of freedom of contract emphasizes the creation of as wide an area of enforcement as possible, whereas the principle of sanctity of contract emphasizes enforcement within that given area. With this difference of emphasis in mind, "freedom of contract" may be used in the narrow sense to refer simply to that phase where the rules are formulated, or it may be used in a wider sense encompassing both freedom of contract proper as well as sanctity of contract. Unless otherwise indicated, "freedom of contract" will here be used in the wide sense.

C. *Judicial Technique and the Enforcement of Remedy Stipulations*

The basic idea of enforcing a bargain has the appearance of simplicity, but the appearance is deceptive. Protecting the sanctity of contract assumes that there exists a bargain capable of enforcement and that justice will be served by such enforcement. But suppose the bargain is incomplete or enforcement would be unjust in the particular case. The doctrine of frustration has its origins in these difficulties; it is the classic example of the incomplete bargain which if enforced would lead to great oppression. No doubt it is arid in the extreme to enquire into the "true" or "real" basis of frustration, but the avowed bases provide a valuable insight into rudimentary judicial technique. The technique of finding an "implied term" is an attempt to implement an allegedly complete bargain and thus to satisfy the demand for freedom of contract. [16] The rationale of the "just solution" is less sophisticated; it is an openly paternalistic intervention. [17]

This article is not concerned with frustration as such, but it is concerned with judicial techniques and policy in an equally difficult situation—remedy-stipulation. It is hoped that a study of this phenomenon will illuminate the techniques employed by judges, especially in interpreting the traditional theory of freedom of contract.

Remedy stipulations fall into two groups: (i) those where the remedy stipulated is more extensive than that which a court would order; and (ii) those where the remedy stipulated is more restricted than that which a court would order. Penalty clauses are typical of stipulations that fall within the first category; exemption clauses are typical of stipulations that fall within the second category. In this framework we shall explore the operation of freedom of contract and the paternalistic response to that principle.

The paradigm of contractual freedom is bargaining about the price of goods. If a man makes a bad bargain and pays above the market price, the

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[15] The distinction would be much clearer if the formulation of the rules were handled by the legislature, leaving the courts to deal with enforcement.

[16] *See, e.g.*, the judgment of Earl Loreburn in F.A. Tamplin S.S. Co. v. Anglo-Mexican Petroleum Products Co., [1916] 2 A.C. 397, at 402, [1916-17] All E.R. Rep. 104, at 107.

[17] *See, e.g.*, the judgment of Lord Wright in Joseph Constantine S.S. Line, Ltd. v. Imperial Smelting Corp., [1942] A.C. 154, at 179, [1941] 2 All E.R. 165, at 182.

law of contract offers him no solace; equally, if a man pays less than the market price, he has nothing to fear from the law. In neither case will the court interfere with the bargain; that is the policy of freedom of contract. It allows and indeed encourages people to haggle, and having haggled, makes them stand by the result.

So much for the paradigm; what happens when we move beyond that clear case? We soon encounter restrictions imposed on the freedom of the parties either because they wish to enter into socially harmful contracts or because one of them suffers from an incapacity that impairs his freedom. Neither type of restriction is of immediate interest to us though the latter type is clearly "paternalistic". Our interest here is with the type of paternalism which occurs when the restriction is imposed, not because of incapacity, but because the agreement struck is considered to be harmful not to society at large, but to one of the contracting parties in particular.

When the parties have stipulated the remedy for a breach, freedom of contract may come into conflict with paternalism. If the contracting parties agree that the remedy for breach is to be X, prima facie there is no reason a court should not award X. But if X would be unjust as a remedy, being either too great or too small, what does a court do? Does it award X and mutter about freedom of contract, or, in the name of justice, does it refuse X? If it does the latter, it takes the paternalistic path, the path this article intends to investigate.

II. Remedy Extension

The English law of contract provides the innocent party with two principal remedies for a breach—damages and the election between repudiation and affirmation of the contract. [18] The former remedy is always available, the latter only for a serious breach of contract. A serious breach of contract is usually described as a breach of "condition"; whereas a lesser breach is usually described as a breach of "warranty". [19] Bearing in mind that damages and the election to repudiate or affirm the contract are two quite separate remedies, we can consider now the various forms of remedy-stipulation found in contracts.

A. *Damages*

The archetypal clause providing for damages beyond the amount that would otherwise be awarded is the so-called "penalty" clause. Lord Hals-

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[18] This article is limited to a discussion of these two remedies, although it is, of course, recognized that other remedies are available to the innocent party, notably the action for an agreed sum, and the equitable remedies. Since the equitable remedies lie at the courts' discretion, it is difficult to see remedy-stipulation having any impact here.

[19] This terminology has strong roots in sale of goods cases; *see, e.g.*, Wallis, Son & Wells v. Pratt & Haynes, [1911] A.C. 394, [1911-13] All E.R. Rep. 989, and the judgment of Fletcher Moulton L.J. at the Court of Appeal stage, [1910] 2 K.B. 1003, at 1011, 79 L.J.K.B. 1013, at 1020.

bury gives a good illustration of such a clause (as distinct from one providing for liquidated damages) in the *Clydebank Engineering* case: [20] "For instance, if you agreed to build a house in a year, and agreed that if you did not build the house for £50, you were to pay a million of money as a penalty, the extravagance of that would be at once apparent." [21] Penalty clauses are disregarded by the courts, and damages are assessed on the usual compensatory basis. The rule against penalty clauses is so firmly entrenched that we no longer even enquire as to its rationale. We are content to describe such clauses as "extravagant", "exorbitant", "extortionate", and "unconscionable". Notwithstanding this powerful stock of epithets, why do we actually dislike penalty clauses?

The equitable basis of the objection to penalty clauses is put most succintly by Story: "In reason, in conscience, in natural equity, there is no ground to say, because a man has stipulated for a penalty in case of his omission to do a particular act (the real object of the parties being the performance of the act), that, if he omits to do the act, he shall suffer an enormous loss, wholly disproportionate to the injury to the other party." [22] Although, Story continues, the stipulation has been agreed upon by the parties, the law "would be unworthy of the name, if it did not to some extent provide the means of preventing the mischiefs of improvidence, rashness, blind confidence, and credulity on one side; and of skill, avarice, cunning, and a gross violation of the principles of morals and conscience, on the other". [23] As for the sanctity of the bargain: "There is no more intrinsic sanctity in stipulations by contract, than in other solemn acts of parties, which are constantly interfered with by courts of equity upon the broad ground of public policy, or the pure principles of natural justice." [24]

We can see from these statements by Story that the rationale for the rule against penalty clauses rests upon one or both of two possible bases. Either penalty clauses are socially harmful in that they run counter to the compensatory spirit of the civil law, or they encourage sharp dealing and, in any particular case, work a hardship on the party in breach. Nothing is to be gained by speculating as to whether the former or the latter rationale first generated the judicial dislike of penalty clauses, but it should be noted that the latter rationale has in it the seeds of paternalism.

For our purposes the most significant feature of penalty clauses is the open way in which they have been dealt with by the courts. In the leading case of *Bridge v. Campbell Discount Co.*, [25] Lord Radcliffe says: "The refusal to sanction legal proceedings for penalties is in fact a rule of the court's

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[20] Clydebank Eng'r & Shipbldg. Co. v. Don Jose Ramos Yzguierdo y Castaneda, [1905] A.C. 6, [1904-07] All E.R. Rep. 251.

[21] *Id.* at 10.

[22] J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE para. 1316 (3d English ed. 1920).

[23] *Id.*

[24] *Id.*

[25] [1962] A.C. 600, [1962] All E.R. 385.

own, produced and maintained for purposes of public policy . . . ." [26] Such candour has obvious merit, but it carries certain dangers. Once a court is prepared to admit that it will interfere with a freely made bargain on the grounds of public policy, and in particular because the bargain is considered "unconscionable", we are bound to enquire as to the limits of this interference. Lord Radcliffe warns us that the word "unconscionable" is not to be taken as "a panacea for adjusting any contract between competent persons when it shows a rough edge to one side or the other". [27] This appears to leave penalty clauses as an isolated exception to the dominant principle of freedom of contract.

Thus, every penalty clause is *ex hypothesi* unconscionable, but not every unconscionable term of a contract is necessarily a penalty clause. If a man is to be relieved of his obligation under the bargain, thereby violating the principle of freedom of contract, he must establish (i) that the bargain is unconscionable and (ii) that it is unconscionable specifically by virtue of containing a penalty clause. It is not sufficient to establish the first point alone. However, if both points are established, the courts will refuse to enforce the penalty clause and will do so without subterfuge.

B. *The Election to Repudiate or to Affirm the Contract*

It will be remembered that the election to repudiate or to affirm the contract is a remedy enjoyed only in limited circumstances, namely where there has been a breach of "condition". Thus, the characterization of a contractual obligation as a condition is an important issue. Frequently the courts are left to classify the obligation in question, but it has never been doubted that contracting parties may themselves, if they so wish, expressly classify the various obligations of the contract. Accordingly, Diplock L.J. (as he then was) said, in a leading statement on the subject, that "where an event occurs the occurence of which neither the parties nor Parliament have expressly stated will discharge one of the parties from further performance of his undertakings, it is for the court to determine whether the event has this effect or not". [28] The point is made even more decisively in the important recent case of *Schuler v. Wickman*, [29] where Lord Kilbrandon says: "It is undoubted that parties may, if they so desire, make any term whatever, unimportant as it might seem to be to an observer relying upon *a priori* reasoning of his own, a condition giving entitlement, on its breach, to rescission at the instance of the party aggrieved." [30] Both statements are explicitly concerned with the situation where an otherwise unimportant obligation has been up-graded by the parties to the status of a condition; but the parties

[26] *Id.* at 662, [1962] 1 All E.R. at 395.

[27] *Id.* at 626, [1962] 1 All E.R. at 397.

[28] Hongkong Fir Shipping Co. v. Kawasaki Kisen Kaisha Ltd., [1962] 2 Q.B. 26, at 66, [1962] 1 All E.R. 474, at 485 (1961 C.A.).

[29] L. Schuler A.G. v. Wickman Machine Tools Sales Ltd., [1974] A.C. 235, [1973] 2 All E.R. 39.

[30] *Id.* at 271, [1973] 2 All E.R. at 62.

might also down-grade an otherwise important obligation—a condition—to the level of a warranty. The latter form of stipulation, the limitation of a remedy, will be considered in section III: here our concern is with the former type of stipulation, the clear extension of a remedy.

Such a stipulation came under scrutiny in *Schuler v. Wickman*, the facts of which were as follows. Schuler, German manufacturers of panel presses (large machine tools used by motor manufacturers), entered into a distributorship agreement with Wickman, an English company. The main purpose of the agreement was that Wickman should promote, within territory which included the United Kingdom, the sale of Schuler's products. Accordingly, clause 7(b) of the agreement required Wickman at least once a week to send representatives to six named motor manufacturers in order to solicit orders for Schuler's panel presses. Wickman broke this "visiting" obligation under clause 7(b) on a vast number of occasions, and eventually Schuler purported to repudiate the agreement. Wickman contested Schuler's right to determine the agreement, claiming that this was a wrongful repudiation.

In the ensuing litigation, Schuler defended on the basis of the express wording of clause 7(b), which, they argued, entitled them to repudiate at once should Wickman fail to fulfil the visiting obligation. [31] Clause 7(b) stated *inter alia*: "It shall be condition [sic] of this agreement that:—(1) Sales [Wickman] shall send its representatives to visit the six firms whose names are listed in the Schedule hereto at least once in every week for the purpose of soliciting orders for panel presses . . . ." [32] The crucial feature of this clause was its express description of the unfulfilled obligation as a "condition" of the agreement. Clause 7(b) was the only clause in the agreement containing such a description, and thus Schuler was prima facie entitled to repudiate in the face of Wickman's admitted breaches of the clause. Despite this, the House of Lords held by a majority of four to one that Schuler's defence failed. [33]

Why did the majority decide the case in the way they did, and how did they reach their decision? Amplifying the first question, we have to enquire whether the decision rests upon a principle of general application, or whether, as lawyers euphemistically put it, the decision rests upon the par-

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[31] In fact, this was an amended defence: see Brownsword, Note, 37 MODERN L. REV. 104 (1974).

[32] The precise terms of clause 7(b) were as follows:

> It shall be condition [*sic*] of this agreement that—(i) Sales [Wickman] shall send its representatives to visit the six firms whose names are listed in the Schedule hereto at least once in every week for the purpose of soliciting orders for panel presses; (ii) that the same representative shall visit each firm on each occasion unless there are unavoidable reasons preventing the visit being made by that representative in which case the visit shall be made by an alternative representative and sales will ensure that such a visit is always made by the same alternative representative.
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> Sales agrees to inform Schuler of the names of the representatives and alternate representatives instructed to make the visits required by this clause . . . .

[33] Lords Reid, Morris, Simon and Kilbrandon, with Lord Wilberforce dissenting.

ticular facts of the case. The decision in *Schuler v. Wickman* would seem to rest on its facts, for the majority made no attempt to set up a general principle debarring contracting parties from expressly classifying the various obligations of an agreement. Indeed, they took quite the opposite line, saying that it was perfectly proper for contracting parties to designate a particular term as a condition.[34] Moreover, they appeared to hold the view that the appropriate way of designating a term a condition was by expressly labelling it as such. Lord Morris put this most clearly when he said: "I do not take the view that before the word 'condition' can be construed in the technical sense of denoting something fundamental to the continued operation of an agreement there must in every case be found words expressly spelling out the consequences of a breach . . . ."[35] Thus it seems that there is no general policy objection against designating an otherwise unimportant obligation a condition. So we must ask: what was the peculiarity of the facts in *Schuler v. Wickman*?

The peculiar facts which swung the argument against Schuler are to be found in the consequences that would have flowed from treating clause 7(b) as a condition—namely that *any* failure by Wickman to perform the visiting obligation, though entirely blameless, would have entitled Schuler at once to determine the agreement. Since some 1400 visits were scheduled to be made under the agreement, the majority felt that such an interpretation of clause 7(b) would be "unreasonable";[36] it would lead to "absurd results"[37] and "grotesque consequences".[38] This looks very much like a paternalistic encroachment upon the freedom of the parties, and Lord Wilberforce, dissenting, did not care for the approach:

> [T]o call the clause arbitrary, capricious or fantastic, or to introduce as a test of its validity the ubiquitous reasonable man . . . is to assume, contrary to the evidence, that both parties to this contract adopted a standard of easygoing tolerance rather than one of aggressive, insistent punctuality and efficiency. This is not an assumption I am prepared to make, nor do I think myself entitled to impose the former standard upon the parties if their words indicate, as they plainly do, the latter.[39]

Thus we find the majority apparently rejecting the notion of freedom of contract in favour of the touchstone of reasonableness.

What technique, then, did the majority use to reach their decision and, apparently, to reject freedom of contract? The word "apparently" is used advisedly, for we can scarcely accuse the majority of abandoning the principle of freedom of contract when the intention of the contracting parties has yet to be established. The concept of freedom of contract, it is submitted, flows from the intention of the parties. We have been

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[34] In particular, see Lord Kilbrandon's statement to this effect, *supra* note 30.
[35] *Supra* note 29, at 258, [1973] 2 All E.R. at 51.
[36] *Id.* at 265, [1973] 2 All E.R. at 56 (Lord Reid).
[37] *Id.* at 265, [1973] 2 All E.R. at 56 (Lord Simon).
[38] *Id.* at 263, [1973] 2 All E.R. at 63 (Lord Kilbrandon).
[39] *Id.* at 263, [1973] 2 All E.R. at 55.

talking so far about the enforcement of "agreements" and "bargains", but these notions assume a common intention; fundamentally, we are talking about the enforcement of the common intention of contracting parties. So before we can evaluate the judicial techniques used in *Schuler v. Wickman* we must first establish the intention of the contracting parties in using the word "condition" in clause 7(b).

This is not easily done, for the range of logically possible combinations of intention is broad. It is logically possible for neither party to apply his mind to the meaning of a word, for one party only to do so, or for both parties to do so. Where neither party considers the meaning of a word, no one has *any* intention as to its meaning. Where one party considers the meaning of a word, there is at least some intention, but it can hardly be described as a common intention. Where both parties consider the meaning of a word, there is intention on both sides, but not necessarily a common intention, for the parties may ascribe different meanings to the word. Such are the logically possible combinations of intention at the time of the agreement. However, by the time the dispute reaches court, neither side will be likely to admit that it had no intention; both parties normally claim to have had some intention or other. It is therefore vital to distinguish between the two phases of intention: first, the real intention (or non-intention) of the parties at the moment of agreement; second, the alleged intention that the parties advance in court.

In *Schuler v. Wickman* the problems arising from the two phases of intention were typical. There the parties alleged certain clear intentions. Schuler argued that the word "condition" in clause 7(b) was intended in its technical sense; Wickman argued that it merely emphasized the importance of the clause, and said that they would not have been prepared to sign the agreement had they supposed that the word was intended in the sense urged by Schuler.[40] But, contrary to these after-the-fact assertions, the real intentions of the parties were and still are totally unclear. It is no exaggeration to say that what the parties intended at the time of the agreement is anybody's guess. That being so, a judge faces a number of options. Basically, there are four types of techniques for dealing with this problem.[41]

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[40] For more details of Wickman's contention, see Brownsword, *supra* note 31. In brief, Wickman alleged that "condition" in clause 7(b) indicated that the "visiting" obligation was an important one when viewed in the light of clause 11(a)(1). Clause 11(a)(1) provided for either party to have the right to determine the agreement in the event of a "material" breach being committed and remaining unremedied within 60 days of a written notice to remedy the breach. Thus, "condition" in clause 7(b) was seen as an indication of the relatively light burden of proving that a breach of the clause counted as a "material" breach.

[41] Some further reflections on the four techniques:

(1) So far as finding intention is concerned, there are both clear and difficult cases. Our four techniques are essentially ways of handling difficult cases, but Type D introduces the added complication of the hard case, *i.e.*, the conflict between perceived intention and a reasonable result.

(2) Where the difficult case is met by a reasonable results approach (Types A and B), then the hard case cannot arise. But where the difficult case is met from

(i) *Type A* (the "Reasonable Settlement" technique). The judge makes an attempt to determine the real intention of the parties, abandons the task as hopeless, and simply imposes a reasonable settlement of the dispute. Lord Denning's judgment in *Schuler v. Wickman* at the Court of Appeal stage comes near to this type of approach, especially in the following statement: "Where a word like this word 'condition' is capable of two meanings, one of which gives a reasonable result, and the other a most unreasonable one, the court should adopt the reasonable one." [42]

(ii) *Type B* (the "Reasonable Settlement Rationalized" technique). As in the Type A approach, the judge seeks in vain for the real intention of the parties, but when he abandons the task, he does not announce that the search is over. Instead, after imposing his idea of a reasonable settlement, he rationalizes the result by inventing an appropriate real intention.

(iii) *Type C* (the "Resolute Search" technique). The judge seeks the real intention of the parties, determined to find it regardless of the difficulties. Having found what he (rightly or wrongly) perceives to be the real intention, the judge pushes it through to its logical conclusion. This type of approach is, of course, the one that effectuates the principle of freedom of contract. [43]

(iv) *Type D* (the "Keeping-Your-Options-Open" technique). As in Type C, the judge sets out to discover the real intention of the parties, and, again as in Type C, having rightly or wrongly done so, he pushes that intention through to its logical conclusion. The result so obtained is the judge's first option, and if it appeals to his sense of reasonableness, he will adopt it. If he does so, the ensuing judgment will be virtually indistinguishable from a judgment employing Type C. [44] However, if the result does not appeal to the judge's sense of reasonableness, he can reject it, replace it with his own idea of a reasonable result, and rationalize that result by inventing an appropriate real intention. If the judge elects this second option, the ensuing judgment will be virtually indistinguishable from a judgment employing Type B. [45]

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the intention baseline (Types C and D), then of course the hard case may be encountered. Type C is committed to following intention, whereas Type D goes for the reasonable result (although *see infra* note 87).

(3) How would the techniques deal with the clear but hard case? Types A and B seem to be committed neither to intention nor to reasonable results; Types C and D seem to be committed respectively to intention and to reasonable results.

[42] [1972] 2 All E.R. 1173, at 1181, [1972] 1 W.L.R. 840, at 851 (C.A.). Lord Denning also says: "So the evidence was not helpful, save to show that we must go by the reasonable interpretation of the words and not by any supposed common intent . . . ." *Id.* at 1179, [1972] 1 W.L.R. at 849.

[43] For amplification of this point, see text *infra* between notes 57 and 59.

[44] "*Virtually* indistinguishable" because in Type D (first option) there might be some loose statements made about reasonable results (anticipating the second option).

[45] "*Virtually* indistinguishable" because in Type D (second option) there might be evidence of the first option having been rejected. In both Type B and D (second option) the rationalization might, of course, be rather crude; in particular, statements about reasonable results tend to devalue statements about the parties' intentions. In *Schuler v. Wickman*, for instance, we find Lord Kilbrandon purporting to find the

It is tempting to assert that one of the preceding techniques has more merit than the others, but we must resist the temptation to set up a statement of value as a statement of fact. No assertion about the relative merits of the techniques is factually verifiable. This much we can say; of the four techniques, Types A, B, and D push towards a result that seems reasonable to the judge on the facts of the case. Type C pays no attention to the reasonableness of the result. Types A and C are candid, whereas Types B and D are clandestine.

Returning now to the question of whether or not in *Schuler v. Wickman* the majority rejected freedom of contract, we find ourselves in some difficulty. The difficulty is not in knowing the real intention of the parties, for in this context their real intention is not directly relevant. [46] The difficulty is knowing what the majority thought was the real intention of the parties. Sift through the judgments as much as we like, we shall not discover this. Yet, though the judgments may contain no clues at all, they are all we have. With much diffidence, it is suggested that the judgments indicate that the majority adopted the approach either of Type B or Type D, [47] thereby turning

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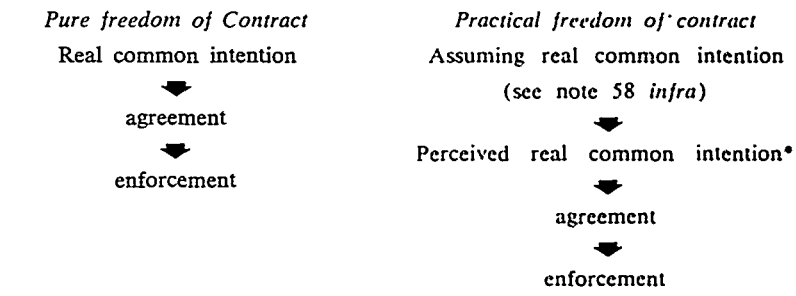
parties' intention and at the same time saying: "One must, above all other considerations as I think in a case where the agreement is in obscure terms, see whether an interpretation proposed is likely to lead to unreasonable results, and if it is, be reluctant to accept it." *Supra* note 29, at 272, [1973] 2 All E.R. at 63.

[46] When, from his abstract heights, the advocate of freedom of contract talks about enforcing the common intention of the parties, the process sounds mechanical. This is most misleading, for the real intention—if there is any—is not presented to the judge at the beginning of the trial. It is up to the judge to ascertain the real intention; in practical terms he must effectuate what he *perceives to be* the parties' real intention. Despite this emendation to take into account the human element, we can, of course, still recognize the separate existence of a pure principle of freedom of contract, which requires the real intention—and nothing less—to be effectuated. Schematically we can represent our analysis thus:



* For the judge who is prepared not only to recognize that he may sometimes perceive no real common intention, but also to face this problem head-on, the doctrine of freedom of contract offers absolutely no assistance. Such a judge is left to choose between Types A and B, or conjure up a decision in line with the spirit of contractual freedom.

[47] This view is supported by the fact that the judgments run together the question of the parties' intention with the desirability of reaching a reasonable result. For example, Lord Reid says: "The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it . . . ." *Supra* note 29, at 251, [1973] 2 All E.R. at 45.

their backs on the principle of freedom of contract. If the majority did adopt Type B, they can be criticized for disingenuousness, for maintaining the fiction of the ever-present common intention, and for failing to adapt the principle of freedom of contract to difficult circumstances; but against all this it can be said that they were endeavouring to do justice between the parties. We can scarcely impeach such an endeavour; but of course we might wish to question whether the requirements of justice were satisfied by the means employed and by the eventual outcome of the case.

It is suggested, however, that the majority did not adopt Type B; rather, they worked along the lines of Type D, taking the second option. [48] If this is correct, then the majority are again open to the charge of subterfuge, but this is not the principal criticism. It is that, having proceeded to ascertain the "real" intention of the parties, the majority then jettisoned that finding because of the "unreasonable" result it would lead to, preferring rather to invent another intention which would lead to a "reasonable" result. This form of judicial thinking is objectionable because it is paternalistic. Any form of paternalism should be treated with caution, but nowhere more so than in the judicial decision-making process. It is one thing for Parliament to restrict contractual freedom by enacting legislation with a paternalistic rationale; it is quite another thing for the courts to resolve hard cases by a resort to paternalism. We know where we stand with legislation, provided it is prospective and not *ex post facto*, even if we do not agree with its underlying policy. But paternalism in judicial decision-making is introduced at the last possible moment and is always *ex post facto.* When the long-standing judicial policy has been to promote contractual freedom within defined limits, this introduction of paternalism poses a threat to commercial certainty. [49] We all know that a court "mends no man's bargain", [50] but it comes as a surprise to see it wrecking a bargain.

Lord Wilberforce, the one dissenting judge in *Schuler v. Wickman*, appears to have adopted the Type C approach. [51] It will be remembered that he spoke very strongly against imposing one standard upon the parties, the standard of "the ubiquitous reasonable man", when they clearly intended to adopt a quite different standard, namely that of "aggressive, insistent punctuality and efficiency". Having rightly or wrongly discovered the real intention of the parties, Lord Wilberforce pushed this intention through to its logical result. The Type C approach might appear to be preferable to

[48] This view is supported by three factors: (i) Lord Wilberforce's dissenting judgment, which comes out very strongly in favour of the view that the parties set themselves a high standard of efficiency; (ii) the general recognition that, in Lord Simon's words, the "primary legal sense" of "condition" is that which was urged by Schuler (*i.e.*, a vital term); and (iii) the diffidence with which the majority express their finding of the parties' intention.

[49] This problem is exacerbated by the covert nature of the judicial technique, unless it is common knowledge that judicial statements about contractual freedom are a complete sham.

[50] Maynard v. Moseley, 3 Swan. 651, at 655, 36 E.R. 1009, at 1011 (Ch. 1676).

[51] This view is supported strongly by Lord Wilberforce's dictum, *supra* note 39.

the Type D, but Type C is not free from its own difficulties. In particular, the critical determination of the parties' real intention may be wrong, yet, notwithstanding, the judgment moves inexorably towards its determined conclusion on that false basis. Since Types C and D appear to be the principal techniques employed in *Schuler v. Wickman*, and since both techniques suffer from imperfections, a closer analysis of these imperfections is required. While it may be meaningless to assert the superiority of one approach over another, we ought nevertheless to understand precisely what is at stake in using either of these two techniques.

Type D, apparently adopted by the majority in *Schuler v. Wickman*, embodies a covert form of paternalism. The objections to the covert method are self-evident; equally obvious are the objections to *ex post facto* lawmaking. But the paternalistic rationale for this technique requires further examination. If contractual freedom is regarded as an absolute value, then any encroachment on that freedom, whether paternalistic or otherwise, will be resisted. If freedom is regarded as a value to be weighed against other values, then some encroachment will be allowable, though that encroachment, if based upon paternalism, will generally be viewed with the utmost suspicion. However, paternalism may be more acceptable when it rests upon principle and not simply upon the conduct in question. To put the matter bluntly, supporters of contractual freedom might argue that the majority decision is nothing more than arbitrary interference with one of our most highly respected values.

Can the paternalism found in *Schuler v. Wickman* possibly be divested of this arbitrariness and so made more acceptable? Surely not; Wickman were labouring under no incapacity, and Schuler did not use sharp practice or treachery. Nor did their mutual exercise in freedom of contract carry harmful social effects (the other acceptable ground for judicial intervention). Finally, the court had no objection in principle to the right of the contracting parties to stipulate that a particular term should be treated as a condition.[52] The decision to intervene was made simply because the result that would otherwise have ensued was inimical to the court's sense of reason and justice; Schuler's argument simply did not lead to a reasonable result. No doubt the majority had a very sharp sense of justice, but one recalls the comment by Lord Wilberforce that it was a funny sort of justice to leave the innocent party without a remedy "in respect of admitted and by no means minimal breaches".[53] The important point is that the majority, by using a Type D approach, introduced a decisive element of arbitrary paternalism into the case. The principle of freedom of contract was jettisoned simply because,

[52] Another possible element of social harm is the encouragement of sharp dealing, but this possibility can be ruled out for two reasons: (i) on the facts, there was no suggestion of sharp dealing, and (ii) there was no evidence of this construction in the judgments.

[53] *Supra* note 29, at 263, [1973] 2 All E.R. at 55.

in Lord Radcliffe's words, the contract showed "a rough edge to one side or the other". [54]

The Type C approach, apparently adopted by Lord Wilberforce in *Schuler v. Wickman*, has a lot to be said for it. It makes no inroads into contractual freedom and indeed does everything to respect that freedom. Unfortunately, there is no guarantee that the judge who adopts Type C will arrive at and effectuate the common intention of the parties. The real intention of the parties is an elusive object, and the practitioner of Type C, no matter how well-meaning, can easily go wrong. But before we assess the significance of judicial error in ascertaining the real intention of the parties, we must draw some further distinctions with respect to Type C. Within Type C there are in fact three basic sub-types:

(i) *Type C-1.* The judge believes that there is always a common intention to be found, and he sets out to find it.

(ii) *Type C-2.* The judge recognizes the difficulty of determining real intention (*i.e.*, given the actual non-intention or the differing intentions of the parties), but he nevertheless prefers to assume that there is a common intention. He determines the common intention by what he *thinks* the parties would have intended (when they did not actually intend anything) or by what *one* of them intended (when their intentions were different). In making this finding, the judge pays no attention to the results that follow from it.

(iii) *Type C-3.* The pattern is exactly as in C-2, except that here the judge does pay attention to the results that follow from his finding. However, he does not apply his own standards of reasonableness to these results but the standards of the parties as he perceives them. If the parties do not appear to have common standards of reasonableness, the judge must presumably inject his own standards of reasonableness, and here lies the boundary with Type D. [55] Lord Wilberforce was probably using the approach of this third sub-type.

Having delineated these three sub-types of Type C, we can now return to the matter of judicial error in determining the common intention of the parties. This can best be discussed by assuming first that there is a real common intention and then that there is not.

(i) Where the parties actually possess a common intention there is no material difference between the sub-types of Type C. Each sub-type gives the judge the same opportunity to ascertain correctly the common intention, but, equally, each has the same potential for error, which it is foolish to underestimate. The judge can, after the best of efforts to discover the true intention of the parties, end up effectuating a bargain that was never intended. When the parties actually possessed no real common intention capable of being found or effectuated, one can sympathize with the judge

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[54] *Supra* note 27.

[55] And also with Types A and B; for the boundary lies at the point where the judge acts upon his own idea of a reasonable result. *See supra* note 41.

who makes a bad job of an impossible task. But where there is a common intention, the task is possible, and the judge who performs incompetently is less forgivable.

(ii) Where the parties possess no common intention the task of finding and effectuating any such intention is *ex hypothesi* impossible. The judge who adopts the approach of sub-type C-1 may be able to fool himself that he has found the common intention of the parties, but he will fool no one else. To ask of the judge's determination, "How close was it?" will be as bizarre as asking how close an archer came to hitting the "bull's eye" when there wasn't even a target to hit. Our approval of the end result will be entirely fortuitous.

Like sub-type C-1, sub-types C-2 and C-3 must inevitably result in a false statement of the intention of the parties. However, the practitioner of sub-type C-2 is a sceptic, unlike the practitioner of C-1. As before, we can do little more than expose the technique for what it is; if the use of C-2 throws up a result which we approve of, that is purely fortuitous. Sub-type C-3 is a different matter altogether; under it the statement of the parties' common intention is not treated as an end in itself, but as a means of achieving a reasonable result according to the standards of the parties. Assuming, then, that the parties have such common standards, these can be either correctly or incorrectly perceived by the judge. As in determining the common intention of the parties, here too the judge may, after the best of efforts, go astray, and in analogous ways. Thus, of the three sub-types, it is only sub-type C-3 that, regardless of the actual existence of a common intention, endeavours to do something which is possible.[56] Even when no such intention exists, and false statements must necessarily be made regarding it, the approach of sub-type C-3 means pushing towards a true statement of the parties' common standards of reasonableness.[57]

Before leaving Type C, a final point must be made. It will be remembered that Type C was said to effectuate the principle of freedom of contract. Exactly what is the relationship between this principle and Type C? It can now be seen that all three variants of Type C attempt, where there is a real common intention, to effectuate that intention, and this is what freedom of contract requires. Where there is no real common intention, sub-types C-1 and C-2 produce nothing very constructive. C-3, however, has nothing to do with this conceptual symmetry; recognizing the absurdity of casting around for a non-existent common intention, it goes for the next best thing, common standards. After all, freedom of contract, while an attractive idea, can only be validly realized where the parties possess a real com-

[56] Unless, of course, there are no common standards.

[57] Although we might not criticize the falsity of any statements about intention, it can be argued that the statements are still harmful, in that they tend to perpetuate the myth of real common intention. Of course, there is no reason why the judge who adopts sub-type C-3 should not state frankly in the difficult cases that he is basing his judgment on perceived common standards.

mon intention capable of being found and effectuated. [58] In the problem situations it cannot work, and, as a guiding principle, can only lead one on the most ridiculous of intellectual excursions. Only the approach of subtype C-3 is capable of keeping faith with the spirit of freedom of contract, while at the same time making it viable.

Thus, at the end of the day the adoption of either Type C or Type D is very much a matter of faith. The judge who uses Type C must have faith in his power to identify the common intention of the parties, or, failing that, to find the common standards of reasonableness of the parties (C-3). By contrast, the judge who opts for Type D must have faith in his own ability to do justice between the parties; he must himself believe in the reasonableness of the result. Whether judges are more competent at determining intention or at administering rough justice is something about which we all have our own opinion. [59]

C. *Summary*

(i) The principle of freedom of contract enjoys a very limited operation in the area of remedy-stipulation. In the case of penalty clauses, the courts have overridden the principle and have done so quite openly. In *Schuler v. Wickman*, where the remedy-stipulation in question was a power to elect between repudiation and affirmation, the court also appears to have turned away from freedom of contract, but covertly.

(ii) The rationale for restricting the freedom of the parties to stipulate penalty clauses might be either the strictly paternalistic desire to protect the parties from themselves, or the more general desire to protect society as a whole from the harm of enforcing such clauses. The decision in *Schuler v. Wickman* rests solely upon the former basis, and, moreover, embodies an arbitrary, rather than principled form of paternalism.

(iii) The principle of freedom of contract takes for granted the presence of a real common intention between contracting parties. Where they actually do possess such an intention, the principle displays a pleasing conceptual symmetry, although that cannot, of course, prevent judges from wrongly identifying that intention. Where there is no real common intention, however, freedom of contract breaks down altogether, and there is a serious danger that a judgment mechanically espousing that principle (ra-

[58] This is necessarily the case with respect to the pure principle of freedom of contract. It is submitted that the principle in its amended practical form also supposes the existence of a real common intention. If it did not make this supposition the principle would be hollow, since it would direct a judge to effectuate the perceived real common intention even though such real intention might or might not exist. However, this basic supposition cannot be justified, and so in the final analysis the principle is indeed hollow in the situation where there is no real common intention.

[59] This is not to suggest that finding and effectuating intention are wedded to injustice.

tionalized or otherwise) [60] will conceal the real difficulties in determining contractual intention.

(iv) Where the parties possess no real common intention, it is *ex hypothesi* impossible to effectuate their intention. Here, real freedom remains immune from judicial reach. Even so, it is perfectly possible for the court to abandon the practical principle of freedom of contract in such circumstances. For, in practice, freedom of contract demands that the *perceived* real intention be effectuated—notwithstanding the absence of real intention—and to fail to do this is to betray the principle. [61] However, as we have said, none of this affects real freedom and the pure principle of freedom of contract. [62]

(v) Where real intention is difficult, if not impossible, to ascertain, four major techniques are open to the court. Broadly, the techniques are aimed either at ascertaining the parties' intentions or at achieving a reasonable result. Where the parties possess no real common intention, no technique is adequate. Where they do possess such an intention *and* where the court believes it can identify that intention, [63] then to ignore it in favour of obtaining a reasonable result is questionable; it is a deliberate withdrawal of the parties' freedom [64] and an opening for the thin end of the wedge of arbitrary paternalism.

(vi) The explanatory powers of freedom of contract do not appear to count for very much in this area of remedy stipulation. It is nonsensical to regard the penalty clause cases as examples of the enforcement of a bargain. We can all see that the courts are doing quite the opposite; they are refusing to enforce the bargain agreed upon. It may be that the obviousness of this contradiction is explained by a confusion between freedom of contract and sanctity of contract, the latter notion being totally unhelpful in this context. If we look instead to the former notion (in the narrow sense) we may better understand the judicial refusal to enforce penalty clauses. Freedom of contract stands for a minimum of restrictions on contractual freedom, but not for a total absence of such restrictions. Penalty clauses can be seen as one such permissible restriction, but one whose ra-

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[60] *I.e.*, a judgment genuinely or ostensibly proceeding from the perceived intention to the logically consequent result. Types B, C and D take this form, although sub-type C-3 can expose the difficulties of finding contractual intention.

[61] The court does not, of course, have the benefit of our initial postulate that there is no real common intention. See *supra* notes 46 and 58.

[62] However, the judgment might be seen as being relevant to the future exercise of real freedom by contracting parties in analogous situations.

[63] Where the court does not feel able to identify any common intention, the push towards a reasonable result does not represent a refusal to effectuate the parties' intention; thus any restriction of contractual freedom can only be construed as accidental. Of course, such accidental events might be regarded as undesirable.

[64] This is necessarily a restriction on freedom as perceived by the judge, and, where the judge correctly perceives the real intention, it is also a diminution of real freedom. Where there is no real common intention, a refusal to implement the perceived intention is of no immediate significance, but it bodes ill for the advocates of contractual freedom.

tionale the principle of freedom of contract tells us nothing about. That principle entreats the courts to impose as few restrictions as possible, but it does not explain the basis of any particular restriction. It is equally unhelpful in explaining those cases in which there is no real common intention. Indeed, in such cases the traditional theory obfuscates rather than illuminates. There is, however, one facet of judicial activity which might be explained by freedom of contract. The influence of that principle on judicial thinking would account for (i) judicial reluctance to admit that freedom is being restricted and (ii) judicial reluctance to recognize that the parties' bargain is not being enforced. In short, freedom of contract as a shibboleth would account for the covertness of the majority judgments in *Schuler v. Wickman.* As for the overtness of the rule against penalty clauses, one can only assume that that rule is so well-established that the judges need not resort to subterfuge.

III. Remedy Restriction

A. *Damages*

The courts, as we have seen, refuse to enforce penalty clauses; and in *Schuler v. Wickman* [65] the court refused to enforce an attempt to extend the right of repudiation. But, whereas the courts' approach to penalty clauses is overt and explicit, in the latter case it was covert and enveloped in the misleading language of freedom of contract. As we now begin to examine remedy-stipulations which restrict the rights of the innocent party, the lines of our enquiry are already fixed. In particular, we shall be alert to the twin possibilities of judicial covertness and the camouflage provided by the language of freedom of contract.

Whereas a penalty clause, if enforced, would operate in favour of the victim of the breach, a clause prescribing a lesser remedy than the courts would allow operates to his detriment. The innocent party would be denied damages that he would otherwise be able to recover from the offending party. Such a clause might either set damages at an unnaturally low figure or might nullify them altogether, but for our immediate purposes the distinction is unimportant. [66] What matters is that the clause is restrictive. Despite the severity with which these limitation and exemption clauses operate, the courts have not felt able to openly challenge their legitimacy. Considering the uninhibited attack on penalty clauses, this judicial restraint is strange, a fact which has not escaped judicial notice. In *Robophone Facilities, Ltd. v. Blank* [67] Diplock L.J. (as he then was) said: "[The rule against penalty clauses] seems to be sui generis. The court has no general jurisdiction to reform terms of a contract because it thinks them unduly onerous on one of

[65] [1974] A.C. 235, [1973] 2 All E.R. 39.

[66] The distinction between nullification and limitation assumes importance once we distinguish between promises sanctioned by no remedy whatsoever, and promises sanctioned by some remedy, albeit limited in extent.

[67] [1966] 3 All E.R. 128, [1966] 1 W.L.R. 1428 (C.A.).

the parties—otherwise we should not be so hard put to find tortuous constructions for exemption clauses, which are penalty clauses in reverse; we could simply refuse to enforce them." [68]

Exemption clauses have in recent years virtually monopolized the attention of those academics interested in contract law. This is perfectly understandable in a turbulent period when judicial ingenuity has been stretched to the limit. It is beyond the scope of this article to relate the full history of the courts' struggle against exemption clauses, an event which, in any case, is excellently documented elsewhere. [69] However, when time has performed its winnowing tasks we shall be able to see in the fight against exemption clauses two central judicial strategies: first, the strategy of "tortuous constructions", referred to by Diplock L.J., and second, a more bruising strategy by which exemption clauses are treated with as little respect as penalty clauses.

Before turning to the case law, I must note that selecting cases for analysis is itself a serious preliminary problem. In this area of law, unlike the ones previously dealt with, there is a plethora of case material; this is a field of dynamic judicial activity. Upon what principles, then, are the cases to be selected? Our principal concern here is to describe the situation at present, not the events of the past or the developments of the future. The cases themselves assist this focus; the decision of the House of Lords in *Suisse Atlantique* [70] has taken the sting out of many of the earlier precedents. [71] We shall therefore concentrate on the post-*Suisse Atlantique* cases.

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[68] *Id.* at 142, [1966] 1 W.L.R. at 1446.

[69] *See, e.g.*, B. COOTE, EXCEPTION CLAUSES (1964). For succinct account of the doctrine of fundamental breach, see LAW COMMISSION, WORKING PAPER 39, Appendix D (1971).

[70] Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale, [1967] 1 A.C. 361, [1966] 2 All E.R. 61.

[71] The central target here was Karsales (Harrow), Ltd. v. Wallis, [1956] 2 All E.R. 866, [1956] 1 W.L.R. 936 (C.A.), where it was suggested that there was a rule of law, rather than a rule of construction, against wide exemption clauses. In *Karsales*, Lord Denning said: "[Exemption clauses] do not avail [the contracting party] when he is guilty of a breach which goes to the root of the contract." *Id.* at 868-69, [1956] 1 W.L.R. at 940. Similarly, Parker L.J. said: "In my judgment, however extensive the exception clause may be, it has no application if there has been a breach of a fundamental term." *Id.* at 871, [1956] 1 W.L.R. at 943. This idea was relied upon in a number of subsequent cases, spectacularly so in Charterhouse Credit Co. v. Tolly, [1963] 2 Q.B. 683, [1963] 2 All E.R. 432, [1963] 2 W.L.R. 1168 (C.A.), where Lord Donovan declared that he did "not find it necessary to determine the true construction of [the] clause" since "a fundamental breach of contract, that is, one which goes to its very root, disentitles the party in breach from relying on the provisions of an exempting clause . . .". *Id.* at 703-04, [1963] 2 All E.R. at 438.

In *Suisse Atlantique*, their Lordships were at pains to repudiate the suggestion that any such rule of law existed. For instance, Viscount Dilhorne said: "In my view, it is not right to say that the law prohibits and nullfies a clause exempting or limiting liability for a fundamental breach or breach of a fundamental term. Such a rule of law would involve a restriction on freedom of contract . . . ." *Supra* note 70 at 392, [1966] 2 All E.R. at 67. Similarly, Lord Reid felt that "no such rule of law ought to be adopted". *Id.* at 405, [1966] 2 All E.R. at 76. Although this effectively killed off the *Karsales* line of authority, the spirit of *Karsales* was not so easily buried. Thus,

It might be objected that such a narrow range of material cannot possibly do justice to the diversity of judicial ingenuity. But present in the post-*Suisse Atlantique* period, as in any other, are both the controlling strategies allowed to the judiciary by the logic of contract. For the courts must say about exemption clauses the same things they say about all other undesirable clauses—either "You cannot do this" or "You did not intend this".

In the post-*Suisse Atlantique* period, *Harbutt's "Plasticine" Ltd. v. Wayne Tank and Pump Co.*[72] is most important. Accordingly, we shall start by examining this controversial decision of the Court of Appeal. The plaintiffs in *Harbutt's* manufactured plasticine at an old mill in Somerset. A waxy substance called stearine was used in the manufacturing process. Although the stearine was delivered to the factory in a liquid state, it was stored in large drums where it solidified. When the stearine was required for use it had to be melted, and then was carried in buckets to the mixing machines. The plaintiffs decided to streamline this rather inefficient procedure by keeping the stearine in a liquid form throughout. The defendants, specialists in this type of work, submitted to the plaintiffs the design for a system suitable for conveying the liquid stearine from the storage tanks to the mixing machines. In due course the plaintiffs engaged the defendants to install the system.

Between the storage tanks and the mixing machines the stearine was to run along a heated pipeline. The defendants specified that this pipeline was to be made of a plastic material called durapipe; this was the defendants' first serious blunder. Durapipe distorts at 187° F, and the liquid stearine running through the pipeline was to be maintained at 120 to 160° F, leaving very little margin for safety. The defendants' second mistake was also linked to their specification of durapipe. The pipeline was to be heated by an electric heating tape wrapped around it, the temperature being controlled by a thermostat fitted on to the pipe. However, another feature of durapipe is its low thermal conductivity; thus the thermostat was useless. As Lord

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in Harbutt's "Plasticine" Ltd. v. Wayne Tank & Pump Co., [1970] 1 Q.B. 447, [1970] 1 All E.R. 225 (C.A. 1969), Lord Denning claimed that in his view the effect of *Suisse Atlantique* was to affirm "the long line of cases in [the Court of Appeal] that when one party has been guilty of a fundamental breach . . . so that the contract comes to an end . . . then the guilty party cannot rely on an exception or limitation clause to escape from his liability for the breach". *Id.* at 467, [1970] 1 All E.R. at 235. Moreover, the proscriptive spirit of *Karsales* is evident in the Supply of Goods (Implied Terms) Act 1973, c. 13, for this Act renders void some attempts by sellers to contract out of implied statutory conditions: s. 4. To sum up, although the *Karsales* version of proscription is no longer in fashion, proscription itself is still very much alive. What, then of *Suisse Atlantique*? First, as we have indicated, its influence has not been decisive, for proscription is still clearly in evidence. Second, although *Suisse Atlantique* marks an important stand against proscription, and although it speaks the language of freedom of contract, it does *not* surrender all judicial control over exemption clauses. Granted, the construction approach advocated in *Suisse Atlantique* is a more subtle form of control than blunt proscription, but it is control none the less. In short, *Suisse Atlantique* is not as "liberal" as it seems. For further discussions, see *infra* note 88.

[72] [1970] 1 Q.B. 447, [1970] 1 All E.R. 225 (C.A. 1969).

Denning explained: "If the thermostat was placed on the pipe at a point away from the tape, it would show a low temperature, whereas, at a point directly under the tape, the temperature might be dangerously high. This was a serious defect. It made the thermostat useless." [73]

Had the defendants realized the unsuitability of durapipe, they could have substituted stainless steel piping. Such a substitution would have cost some £150 and would have caused a delay of only a few days. Unfortunately, the defendants did not foresee the catastrophic potential of their installation, and prepared to test the equipment. Here they made their third mistake. To expedite the tests the following morning, the defendants switched on the heating tape overnight so that the stearine would liquefy and fill up the pipeline. This idea was sound enough, but the defendants made a bad mistake in leaving the pipeline unattended. The durapipe became distorted and cracked, the stearine escaped and ignited, and the ensuing fire gutted the factory. The plaintiffs sought compensation from the defendants.

The defendants replied to this catalogue of errors by basing their defence upon one of the printed conditions of the contract. This term, clause 15, [74] purported to limit the defendants' liability to the value of the contract, some £2,330. At first instance Stephenson J. rejected the defence and entered judgment for the plaintiffs, the damages being assessed at some £146,581 plus interest. The defendants appealed. As there was no dispute about the incorporation of the conditions, the Court of Appeal was left to settle only the two central issues:

> (a) Did the contract under its proper construction limit the liability of the defendants to an amount equal to the value of the contract (namely, £2,330) under clause 15? (b) If so, [had] there nevertheless been a fundamental breach of the contract on the defendants' part which [had] been accepted by the plaintiffs so as to determine the whole contract, and, with it, clause 15? [75]

What was the proper construction of clause 15? It was agreed that it related to the period before the plant was taken over by the plaintiffs, but within this period, how wide was its protection? The clause purported to cover "accidents and damage", but did this embrace both contractual and tortious claims? Cross L.J. (as he then was) said that the question of con-

[73] *Id.* at 462, [1970] 1 All E.R. at 231.

[74] So far as is material, clause 15 provided:

Liability for accidents and damage. Until the goods shall have been taken over . . . our sole liability for accidents and damage is as follows: (1) We will idemnify you against direct damage or injury to your property or persons or that of others caused by the negligence of ourselves or of our servants, but *not otherwise*, to the extent of repairing the damage to property or compensating personal injury, provided that such damage or injury is not caused or does not arise wholly or partially from your acts or omissions of others, or is not due to circumstances over which we have no reasonable control, *provided always* that *our total liability* for loss, damage or injury *shall not exceed the total value of the contract.*

[75] *Supra* note 72, at 470, [1970] 1 All E.R. at 237-38.

struction was "whether the clause [covered] accidents or damage flowing from defects in the plant itself, as opposed to accidents or damage caused by the negligence of the defendants in or about its erection or testing". [76] It was the plaintiffs' contention that the clause was concerned only with tortious claims and thus was of no avail to the defendants in an action in contract. Widgery and Cross L.JJ. had no difficulty in rejecting the plaintiffs' interpretation of the clause. The former saw "no reason to [so] limit the clause" and no reason "to distinguish between a fire caused by a discarded match, a fire caused by the incorrect connection of an electrical circuit, or a fire caused by some error in the design of the plant". [77] For the latter it was "quite natural for clause 15 to cover all damage to person or property occurring during the period of installation and testing without specifying whether it flowed from defects in design, or negligence in the installation or testing". [78] Lord Denning, on the other hand, vacillated. Although he found the conditions "difficult to construe", [79] his inclination was towards the plaintiff's view. At the end of the day, however, he did not feel sufficiently confident of this interpretation to base his judgment upon it. Therefore, allowing for the possibility that clause 15 might cover the situation, he moved on to the second question.

The court answered the second question with one voice. The defendants had committed a fundamental breach of contract, the contract was at an end, and thus it was not open to the defendants to plead the exemption clause; so far as the defendants were concerned, clause 15 was a victim of the conflagration. Although this part of the decision is full of "nice" points, it is adequate for our purposes to sketch the outlines of the judicial strategy. The court's reasoning proceeded along the following path: (1) the defendants were in breach of contract; (2) the breach was fundamental; (3) in the circumstances of the case the plaintiffs had no option but to treat the contract as at an end; and (4) the contract being at an end, the defendants were unable to rely on the exemption clause. The first step was dealt with most clearly by Widgery L.J., who was prepared to consider that there had been no breach by the defendants. Was this not an experimental installation where errors might be expected? If so, the defendants would be in breach only if design errors remained uncorrected after the plaintiffs had taken over. Although Widgery L.J. thought that this "might well have been the intention of the parties", [80] there was no evidence of it in the documents; and so, with the other members of the court, he concluded that the defendants' failure to supply an installation that was reasonably fit for its purpose was a breach of contract. There was little doubt that the breach was funda-

[76] *Id.* at 473, [1970] 1 All E.R. at 240.
[77] *Id.* at 470, [1970] 1 All E.R. at 238.
[78] *Id.* at 474, [1970] 1 All E.R. at 241.
[79] *Id.* at 463, [1970] 1 All E.R. at 232.
[80] *Id.* at 471, [1970] 1 All E.R. at 238.

mental. Applying the famous *Hongkong Fir* test, [81] the court found a breach with catastrophic consequences, an innocent party deprived of substantially the whole benefit of the contract, and an event which would have frustrated the contract had it occurred without the fault of either party. At the third stage, Lord Denning drew the distinction between "a fundamental breach which still leaves the contract open to be performed, and a fundamental breach which itself brings the contract to an end". [82] In the former case the innocent party can elect between repudiation (disaffirmation) and affirmation, but not in the latter—the contract is automatically at an end. In *Harbutt's* the mill was burnt to the ground. Clearly it was a case of the latter variety and thus the contract was at an end. Finally, the court held that in this situation, as indeed in the case of repudiation by election, the party in breach is disentitled from relying on an exemption clause. The core of the doctrine of fundamental breach was summarized by Lord Denning: "[Where the contract is at an end, either by election or automatically, the] innocent party is entitled to sue for damages for the breach, and the guilty party cannot rely on the exclusion or limitation clause: for the simple reason that he, by his own breach, has brought the contract to an end; with the result that he cannot rely on the clause to exempt or limit his liability for that breach." [83] Thus the defendants could not rely upon clause 15, and their appeal was unsuccessful.

If we stand back from the "technicalities" of *Harbutt's*, we shall see the pattern of the courts' approach to exemption clauses. First there is the question of intention, and then there is the question of policy; the former relates to the construction of clause 15, the latter to its strength. Indeed, in *Harbutt's* we see in operation the two central controlling strategies to which we have already referred ("tortuous constructions" and open disregard). To be sure, policy towers over intention, but both are sufficiently dealt with in this case to warrant further attention.

First the question of intention. We have already examined the judicial techniques available for dealing with the problems of intention. Broadly speaking, in both the difficult and the "hard" cases the judge has a choice: he can secure a reasonable result or he can attempt to honour the intentions of the parties. This choice will not necessarily be made overtly. Within this framework, what was the court's approach in *Harbutt's*? Unfortunately, it is not possible to answer this question directly. Either our framework is inadequate or the judgments in *Harbutt's* are elusive, probably both. Two factors contribute to make the judgments elusive. First, in none of them is the question of intention critical. Even Lord Denning, who found against the defendants on the construction of the clause, was "by no means confident" of his interpretation and was "not prepared to base [his] judgment on

[81] *I.e.*, the test enunciated by Lord Diplock in Hongkong Fir Shipping Co. v. Kawasaki Kisen Kaisha Ltd., [1962] 2 Q.B. 26 at 66, [1962] 2 All E.R. 476 at 485 (C.A. 1961).

[82] *Supra* note 72, at 464, 1[970] 1 All E.R. at 233.

[83] *Id.* at 466, [1970] 1 All E.R. at 234.

it". [84] Secondly, none of the judgments give reasons as to why one interpretation is preferred to another. The emphasis tends to be on the linguistic possibilities rather than the parties' intentions. Perhaps the most explicit statement is made by Cross L.J.: "No doubt common form clauses of this sort introduced by suppliers to limit their liability ought to be construed strictly, but to my mind there is not any real doubt that what happened in this case fell within the clause." [85] It is tempting to interpret this as a commitment to enforcing the parties' intention. Cross L.J. looks as though he might be sacrificing policy to intention; but is he really? One must consider that the construction of clause 15 was not critical for the decision *actually* reached, and, moreover, the result *actually* reached was as clear a manifestation of policy as one could wish to see. When the crunch came, policy prevailed, and a "reasonable result" was obtained.

Despite our lack of success in placing *Harbutt's* within our framework of judicial techniques, we can nevertheless learn something from the case. For instance, what does Cross L.J. mean when he says that "common form clauses . . . ought to be construed strictly"? Is this a statement about some statutory directive, a statement of personal values, or a statement about judicial practice? It is without doubt the latter. And what is the implication of Lord Denning's statement that if clause 15 is ambiguous it cannot avail the defendants? "[The defendants] cannot, by a printed clause like this, exclude or limit their liability, unless the words are clear and unambiguous." [86] This is to blur the question of intention with the desire to obtain reasonable results, a confusion which is most often provoked by the standard form contract and the exemption clause. Consider the classic "hard" case in contract. The unscrupulous vendor has sold something utterly defective to the unfortunate purchaser. The purchaser sues, but the vendor seeks refuge behind a wide exemption clause. Perhaps the clause is part of a long standard form contract which the purchaser, quite unwittingly, has signed. The courts' first reaction to such a case might well be favourable to the vendor, but, after stomaching a heavy dose of similar cases, the judicial mood becomes defiant. The courts begin to seek a reasonable result; the judicial approach moves form Type C to Type D. Enter the strategy of "tortuous constructions". After a while, the proliferation of Type D produces a sinister progeny, the *presumptions* of intention. [87] The

[84] *Id.* at 464, [1970] 1 All E.R. at 233.

[85] *Id.* at 474, [1970] 1 All E.R. at 241.

[86] *Id.* at 464, [1970] 1 All E.R. at 233.

[87] See text *infra*, section III B. This progression from Type C, through Type D, to the presumptions of intention turns upon the idea of reasonable results. It will be recalled that the feature of Type C is that it allows the parties to follow their own intentions. Once we move away from this guiding principle and in its place impose upon the contracting parties our own conception of reasonableness, then we are into Type D. Type D as depicted in Part One has two options, but we would suggest that a third option now can be identified. The third option is this: the judge effectuates the perceived real intention not because it accords with his sense of reasonableness, but because he cannot bring himself openly either to opt for a reasonable result or

beauty of the presumptions is that they severely limit the operation of exemption clauses and give the judgment the appearance of being firmly grounded on intention.

Thus the ostensible search for the real intention of the parties becomes a charade; the rules of the search are heavily loaded against allowing an exemption clause and in favour of reaching a reasonable decision. *Harbutt's* is a timely reminder of the existence of the presumptions and tells us something vitally important about our framework of intention; namely, that judicial techniques are not static. Our framework rests upon the assumption that, at the outset, there is a genuine search for the parties' real intention. As soon as the presumptions of intention take control, this premise is destroyed. To be sure, there is as ever talk of intention, but this is lip-service; the true goal is obtaining reasonable results, not finding inten-

to rationalize the result, since in this latter case the rationalization involves doing too much violence to the language of the contract. Thus, the judge is worried here about the credibility of his judgment. As soon as we introduce the presumption that the parties intend their contract to be endowed with results which mirror the courts' ideas of reasonableness, we vitally assist credibility. Even so, notwithstanding the presumption, where the contract bears only one credible interpretation, the judge who uses Type D may still find himself pushed back to the third option. In other words, although the presumption assists the credibility of Type D (second option), it may be unable to prevent the judge from digging himself into the hole represented by the third option. The trouble with Type D is that its origins lie in the quest for real intention. Once we change the framework of the dispute, once we put up a different backcloth, we can act out another drama altogether. Thus we scrap any idea of looking for real intention; instead, we emphasize from the beginning that the parties are presumed to intend that the contract shall bear reasonable results. This generates a series of sub-presumptions all aimed at excising anything tending towards an unreasonable result; the particular words used are played down, and the purpose of the type of contract is brought into the foreground. The ubiquity of the reasonable results presumption is highlighted by Lord Denning in Gillespie Bros. v. Roy Bowles Transp. Ltd., [1973] Q.B. 400, [1973] 1 All E.R. 193 (C.A.): "The judges have, then, time after time, sanctioned a departure from the ordinary meaning. They have done it under the guise of 'construing' the clause. They assume that the party cannot have intended anything so unreasonable. So they construe the clause 'strictly'. They cut down the ordinary meaning of the words and reduce them to reasonable proportions. They use all their skill and art to this end." *Id.* at 415, [1973] 1 All E.R. at 200.

A final point of clarification: although we are concerned here with the use of the presumption as a means either of countering "hard" cases or of eliminating such cases altogether, the presumption has a further use in the "difficult" case. Here we are thinking of the case where the judge is unable to identify from among a number of possible interpretations of the contract the one representing the real intention of the parties. Therefore, in order to cut the knot, he tests the interpretations against a criterion of reasonable results. In *Gillespie*, Buckley L.J. talks in these terms: "It is not in my view the function of a court of construction to fashion a contract in such a way as to produce a result which the court considers that it would have been fair or reasonable for the parties to have intended. The court must attempt to discover what they did in fact intend. In choosing between two or more equally available interpretations of the language used, it is of course right that the court should consider which will be likely to produce the more reasonable result, for the parties are more likely to have intended this than a less reasonable result." *Id.* at 421, [1973] 1 All E.R. at 205. So, although Buckley L.J. is willing to countenance the use of the presumption in the difficult case, thereby securing—but only incidentally—a reasonable result, he disapproves of its use in order to eliminate the "hard" case.

tion.[88] From this point of judicial boldness it is indeed only a short step to complete candour in dealing with the problem. The courts would then openly declare that, as a matter of policy, they were no longer prepared to enforce a particular contractual manifestation. In the case of exemption clauses the progression from real intention to presumed intention to proscription would have a nice evolutionary logic.

In a curious way the court's attempt in *Harbutt's* to construe clause 15 seems anachronistic, especially in view of its treatment of the question of fundamental breach. The rationale of the doctrine of fundamental breach is one of policy—to supress the wide-ranging exemption clause. Without exploring all the niceties of the *Harbutt's* version of fundamental breach, we can see that it hinges on the idea of the contract being "at an end". Although the linking of the ideas of "repudiation" and the contract being "at an end" is ingenious, the doctrine of fundamental breach is no more than a means of suppressing wide exemption clauses. The doctrine seems to have little connection with enforcement of the bargain struck between the contracting parties. Having set up a clause to cover the sort of situation which arose, the defendants in *Harbutt's* could hardly have intended that the protection of the clause should then be denied to them. Lord Denning's justification for such a denial—that the defendants by their own breach had brought the contract to an end—undoubtedly would be seen by the defendants as the very reason the clause *should* be available to them. After all, if the contract had come to an end through some other cause, for example frustration, the defendants would not have needed the protection of the clause. The internal logic of the doctrine also looks rather suspect. If the contract is at an end so that the guilty party cannot set up the exemption clause, how can the innocent party set up the breach? The answer to this would presumably be that at the time of the breach, the contract was still in existence; only after the breach did the contract come to an end. But this reply does not explain how the exemption clause was wiped out. For, if the contract still existed at the time of the breach, then the exemption clause

[88] The distorting effect of the presumptions of intention is dramatically illustrated by Pearson L.J.'s classic dictum in U.G.S. Fin. Ltd. v. Nat'l Mortgage Bank of Greece, [1964] 1 L.L. Rep. 446 (C.A. 1963): "As to the question of 'fundamental breach', I think there is a rule of construction that normally an exception or exclusion clause or similar provision in a contract should be construed as not applying to a situation created by a fundamental breach of the contract. *This is not an independent rule of law imposed by the Court on the parties willy-nilly in disregard of their contractual intention. On the contrary it is a rule of construction based on the presumed intention of the contracting parties.* It involves the implication of a term to give to the contract that business efficacy which the parties *as reasonable men* must have intended it to have. This rule of construction is not new in principle but it has become prominent in recent years in consequence of the tendency to have standard forms of contract containing exceptions clauses drawn in extravagantly wide terms, which would produce absurd results if applied literally." *Id.* at 453; emphasis added. Ironically, the dictum was enthusiastically approved in *Suisse Atlantique, supra* note 70, at 393, [1966] 2 All E.R. at 68, this latter case supposedly exuding the philosophy of freedom of contract.

must also have done so. We can make sense of this only if we allow that the contract could come to an end at different times for the respective contracting parties. If we swallow this, we must also surely swallow the fact that the doctrine is truly aimed at limiting the effectiveness of exemption clauses. In short, the doctrine is the courts' way of saying that freedom of contract shall not be used to sanction exemption clauses in cases of bad breaches of contract.

What if the innocent party elects to affirm the contract? This possibility was discussed fully in *Harbutt's*. Lord Denning said:

> If the innocent party, on getting to know of the breach, does not accept it, but keeps the contract in being . . . then it is a matter of construction whether the guilty party can rely on the exception or limitation clause, always remembering that it is not to be supposed that the parties intended to give a guilty party a blanket to cover up his own misconduct or indifference, or to enable him to turn a blind eye to his obligations . . . So, in the name of construction, we get back to the principle that, when a company inserts in printed conditions an exception clause purporting to exempt them from all and every breach, that is not readily to be construed or considered as exempting them from liability for a fundamental breach; for the good reason that it is only intended to avail them when they are carrying out the contract in substance: and not when they are breaking it in a manner which goes to the very root of the contract. [89]

Notice the subtle change from presumed to real intention. The passage may be paraphrased as follows: (1) Where the innocent party affirms the contract, the fate of the exemption clause is a matter of construction. (2) In construing the clause we *presume* that the parties did not intend to permit the guilty party "to turn a blind eye to his obligations". (3) We do this "for the good reason" that it reflects the *real* intention of the parties. In reality it would be more accurate to say that our "good reason" for making the presumption is that it facilitates the restriction of exemption clauses. Presumptions of intention serve a purpose, but let us not delude ourselves that they are an unfailing touchstone of real intention; this is particularly so where, as in this area of remedy-stipulation, the presumptions are fashioned with an ulterior motive in no way linked to the ascertainment of real contractual intention.

Briefly, the conclusions to be drawn from *Harbutt's* are these. The goal of the judicial approach towards exemption clauses is not ascertainment of the real intention of the parties, it is the control of exemption clauses. Where the doctrine of fundamental breach is at its strongest—where repudiation is either automatic or by election—then, contrary to the view of Diplock L.J., [90] it seems that the courts do "simply refuse to enforce" such clauses. The refusal may not be as open as it was for penalty clauses, but it is none

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[89] *Supra* note 72, at 467, [1970] 1 All E.R. at 235-36. *But see* Wathes (Western) Ltd. v. Austins (Menswear) Ltd., [1976] 1 L.L. Rep. 14 (C.A. 1975), and Reynolds, Note, 92 L.Q.R. 172 (1976).

[90] *Supra* note 68.

the less effective. Where the contract is affirmed, the technique employed is that of "tortuous constructions". This technique can be the judge's escape route from the "hard" case, as in Type D, or it can be a way of turning attention away from the specific language of the contract and towards its typical objects and concomitant undertakings. In the latter case the technique presumes that the parties intend their contract to bear reasonable results; in the former case that assumption may not be so obvious, but it is available to strengthen the judgment. [91]

We must now test the accuracy of these hypotheses drawn from *Harbutt's* and examine the rationale of this restriction of freedom of contract. We must ask: (1) is our analysis of *Harbutt's* generally applicable? and (2) what is it about exemption clauses that prompts the courts to assume controlling powers? But before scrutinizing any further cases, we should take note that our intense preoccupation with *Harbutt's* and with the doctrine of fundamental breach may put us in danger of losing our overall orientation. We are concerned with those remedy-stipulation clauses which purport to remove or to limit the innocent party's claim to damages for breach of contract. All breaches of contract sound in damages, but not all breaches are fundamental. Our discussion of exemption clauses has so far concentrated on cases of fundamental breach. This is only part of the picture; it may be the most interesting part and the part that we choose to concentrate upon, but it is not the whole. It will be recalled that in *Harbutt's* the second stage in the court's reasoning was classification of the breach as fundamental. Suppose they had not done so. What is the courts' attitude to exemption clauses when the breach is not fundamental? A thumbnail sketch must suffice, since our main concern is with fundamental breaches.

The simple distinction between breach of warranty and breach of condition is normally made without reference to the concept of fundamental breach. The explanation for this apparent omission is a mixture of convention and convenience. The distinction identifies the remedies available to the innocent party and thus answers the primary question; the concept of fundamental breach comes later and answers the question whether the remedies—whatever they might be—could be defeated by an exemption clause. Now within this framework of warranties and conditions, when an exemption clause is set up against a breach the entire range of breaches, from trivial to severe, is liable to provoke, in one form or another, the strategy of "tortuous constructions". [92] Sometimes the defect in the exemption clause will

[91] See *supra* note 87.

[92] At this point the reader might enquire: "And what exactly do you mean by 'liable'?" We cannot provide a "scientific" answer, for we have chosen the word "liable" advisedly, not in order to gloss over a difficulty, but in order to indicate our uncertainty in the matter. If we conceive of the scale of "liability" as running from "absolutely no chance", through "possible", and then through "likely", until eventually we reach "absolutely certain", then we are thinking in terms of what is "likely". In other words, we could replace our statement in the text by the following: "Within the framework . . . it is suggested that . . . the entire range of breaches . . . is likely to provoke . . . the strategy of 'tortuous constructions'."

be obvious; an exemption of liability for breach of warranty will not avail against a breach of condition, and exemption of liability for breach of an implied term will not avail against a breach of an express term. [93] At other times the defect will be less glaring, but, whatever the level of the breach, the exemption clause will always have to overcome this strategy of "tortuous constructions". But when, in the view of the court, the breach is a breach of warranty only, the exemption clause will not be subjected to the doctrine of fundamental breach. It is, however, vulnerable to a more sophisticated threat, that of being held inoperative as being repugnant to the notion of a contractual promise. Devlin J. (as he then was) once said: "It is illusory to say: 'We promise to do a thing, but we are not liable if we do not do it.' If the matter rested there, there would be nothing in the contract." [94] A contractual promise is a promise sanctioned by a remedy. Now a court may identify the contractual promises without reference to any saving provision. So, if a contractual promise is classified as a warranty, then any explicit provision exempting a party from liability to pay damages is repugnant and of no effect. The logic of this strategy is strong, but if we construe the contract as a whole, rather than piece-meal, an entirely different conclusion results. An exemption clause can then be seen as a cancellation of the initial promise or as evidence of an intention to be bound in honour only. So, too, of conditions, where we are liable to encounter the concept of fundamental breach. That concept does not operate below the level of breach of condition; but there it stands as a second obstacle—the first being the strategy of "tortuous constructions"—to the successful operation of the exemption clause. [95]

Let us apply these observations taken from the *Harbutt's* case to some later cases to see whether they confirm our proposition that where there has been a breach of condition, an exemption clause is likely to be met either by the strategy of "tortuous construction" or the doctrine of fundamental breach. [96] Two cases worthy of our attention are *Farnworth Finance Facilities Ltd. v. Attryde* [97] and *Hollier v. Rambler Motors A.M.C. Ltd.* [98] Both decisions, like *Harbutt's*, come from the Court of Appeal, a fact which may

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[93] *See* the classic cases of Wallis, Son & Wells v. Pratt, [1911] A.C. 394, [1911] L.J.K.B. 1058, and Andrews Bros. (Bournemouth) v. Singer & Co., [1934] 1 K.B. 17, [1933] All E.R. Rep. 479 (C.A.).

[94] Firestone Tyre & Rubber Co. v. Vokins and Co., [1951] 1 L.L. Rep. 32, at 39 (K.B. 1950). The notion of repugnancy suffers from considerable ambiguity. Repugnancy could refer to: (1) conceptual repugnancy, *i.e.*, a contractual promise unsupported by a remedy; (2) inconsistency between two substantive provisions of a contract; (3) inconsistency between an oral undertaking and a written standard form; (4) the *Harbutt's* doctrine; and (5) conflict between the construed main purpose of a contract and an exemption clause. On (2) and (3) see J. Evans and Son (Portsmouth) Ltd. v. Andrea Merzario Ltd., [1976] 2 All E.R. 930 (C.A. 1975). On (1) and (5) see *Vokins*.

[95] See *supra* note 92. Here again we are thinking in terms of what is "likely".

[96] See *supra* notes 92 and 95.

[97] [1970] 2 All E.R. 774, [1970] 1 W.L.R. 1053 (C.A.).

[98] [1972] 2 Q.B. 71, [1972] 1 All E.R. 399 (C.A. 1971).

narrow their significance somewhat. *Farnworth Finance Facilities Ltd. v. Attryde* was a case in which the court had "to apply the principles about fundamental breach, which were recently considered . . . in *Harbutt's* . . .".[99] The facts in *Farnworth* were not as dramatic as in *Harbutt's*—Fenton Atkinson L.J. said that the case came "very near the line [*i.e.*, between fundamental and non-fundamental breach situations]"[100]—and yet they were typical of the sort of facts that give rise to the doctrine of fundamental breach. Mr. Attryde wished to purchase a new motorcycle. He approached some dealers, King's Motors (Oxford) Ltd., who supplied him with a machine on hire-purchase terms. The plaintiffs were the finance company involved in the transaction. After taking delivery of the motorcycle, Mr. Attryde found a number of faults in the machine and so took the motorcycle back to the dealers, who were unable to fix it. Mr. Attryde then twice returned the machine to the manufacturers, who were able to fix some but not all of the faults. All this took three months, after which Mr. Attryde used the motorcycle for about five weeks, recording some four thousand miles. This period was brought to an end when the rear chain broke and knocked a hole in the crank case. At this juncture, the defendant, having had enough of the affair, wrote to the plaintiffs saying that he was not prepared to make further efforts to get the machine repaired, that he would not continue to pay hire charges for a machine which from the outset had been a "troublesome burden", and that the plaintiffs should repossess the motorcycle.

The plaintiffs, who were in receipt of Mr. Attryde's deposit plus four instalments, repossessed the machine and sold it, claiming damages for breach of the hire-purchase agreement. Mr. Attryde counterclaimed for the amount of his own loss. The plaintiffs then joined the dealers as second defendants, asserting that if they (the plaintiffs) were in breach to Attryde they could claim an indemnity from the dealers. At first instance, it was held that the plaintiffs, having supplied a motorcycle which was "disgusting for a new machine", had no claim against Mr. Attryde. Moreover, Mr. Attryde had a perfectly good counterclaim against the plaintiffs, although in respect of this counterclaim the court agreed with the plaintiffs that they were entitled to be indemnified by the dealers. Wishing to escape from the burden of the indemnity, the dealers appealed, on the basis that the plaintiffs were wrongly held liable to Mr. Attryde. This central question of the plaintiffs' liability to Mr. Attryde hinged upon the plaintiffs' attempt to hide behind an exemption clause.

The trial judge found that the machine was not roadworthy at the time of purchase and that the totality of defects constituted a fundamental breach. With the scent of fundamental breach in the air, the Court of Appeal set off on the trail blazed by *Harbutt's*. But first, they asked, were the plaintiffs in breach of contract? Lord Denning said that though there were no express terms concerning the condition of the machine, the contract was nevertheless

[99] *Supra* note 97, at 777, [1970] 1 W.L.R. at 1058.
[100] *Id.* at 779, [1970] 1 W.L.R. at 1060.

subject to the implied term that the motorcycle should be roadworthy. At the very least, the machine should "be a workman-like motorcycle which is safe to be used on the roads". [101] We should note that this question was to be resolved "apart from the exception clauses", [102] such clauses evidently not qualifying in Lord Denning's eyes as express terms relating to the condition of the machine. The plaintiffs, then, were in breach; but was it a fundamental breach? No single defect in the machine was all that serious, but collectively they amounted to a sorry inventory: a pannier fell off; the headlights failed at night, first because of a corroded dip switch and then because the terminals came off the wires; the lubricating system was faulty; the machine was unstable at high speeds and in fact had to be used without the pannier; and the rear chain broke. Taken together, these defects rendered the machine unsafe on the road, indeed had very nearly caused accidents.

The court held that there was a fundamental breach. Lord Denning said: "The breaches were fundamental. They went to the very root of the contract. They disentitled the plaintiffs from relying on their exception clauses, at any rate if [Mr. Attryde] had not affirmed the contract." [103] Had Mr. Attryde affirmed, or was this a case of repudiation, either automatic or by election? Here the facts looked to be against Mr. Attryde. Though there had been no automatic repudiation, the motorcycle not having been destroyed by fire or the like, Mr. Attryde had seemed by his conduct to evince an intention to affirm. He had put some four thousand miles on the motorcycle, three thousand of which had been recorded during the five week spell after the machine had been returned from the manufacturers. Was this not conclusive evidence of affirmation? The court thought not. Lord Denning said that the innocent party could only affirm the contract when he knew of the defects. Not until the rear chain broke was knowledge of the defects truly "brought home" to Mr. Attryde; then he was entitled to throw up the hiring, which he did. In the face of Mr. Attryde's repudiation the finance company was disentitled from relying upon its exemption clauses; it was liable to Mr. Attryde, and the appeal failed.

Two features of *Farnworth* are striking, and both support our general thesis. The first is the ease with which the court denied that the contract had been affirmed, and the second is the way in which express exemption clauses were relegated to a status inferior to that of implied terms. The former observation should not be surprising in light of *Harbutt's*. It will be recalled that the court in that case held that an exemption clause is of no effect where the contract has been repudiated; where it has been affirmed, an exemption clause may succeed but is subject to the rules of construction. In practice this might well be a distinction without a difference, [104] but in theory it is crucial to the innocent party. If he chooses the right path, re-

[101] *Id.* at 777, [1970] 1 W.L.R. at 1058.

[102] *Id.*, [1970] 1 W.L.R. at 1058.

[103] *Id.* at 778, [1970] 1 W.L.R. 1059.

[104] That is, even in an affirmation situation, the rules of construction might invariably put the exemption clause "out of contention".

pudiation, the case is over. The court in *Farnworth* thus found it necessary to give Mr. Attryde a helping hand up the path of repudiation in order to neutralize the exemption clauses that would otherwise deprive him of his remedy. The court's finding might possibly be justified otherwise—by de-emphasizing the total mileage recorded on the motorcycle and emphasizing instead Mr. Attryde's prompt and persistent complaints about the machine. [105] The facts might arguably support the view that Mr. Attryde repudiated almost immediately, but that repudiation was surely conditional rather than absolute. Mr. Attryde in effect said: "This machine is defective. I am not prepared to continue with the hire arrangement (*i.e.*, I am repudiating) *unless* you put things right." When, eventually, Mr. Attryde wrote to the finance company, it was to indicate that the condition had not been satisfied and to make the repudiation absolute. But this analysis is bought at a price. Was Mr. Attryde faced with a repudiatory breach so early in the transaction? Does the law permit anything short of an outright repudiation or affirmation? What happens if the condition is met, but the innocent party nevertheless insists upon repudiating the contract? These are conundrums indeed, but they are outside the ambit of this article.

The other feature of *Farnworth* is the court's general suppression of the exemption clauses. They are manoeuvered out of the way at every opportunity. The reader forms the impression that they are peripheral to the main argument. Two instances of this "Alice in Wonderland" approach may be cited. The first is where the court must decide whether there has been a breach of contract by the plaintiffs. Lord Denning says: "As between the plaintiffs and the first defendant, *there was no express term about the condition of the machine.* But there were implied terms." [106] These implied terms are of central importance to the argument. But the question cries out: what, if not an express term about the condition of the machine, was the stipulation that the machine was "not supplied subject to any condition that [it was] fit for any particular purpose"? [107] Clearly this stipulation was both relevant to the condition of the machine and was express; why was it not an "express term about the condition of the machine"? The impartial observer would surely say that it was and would not expect an esoteric distinction to be drawn between ordinary contractual terms and exemption clauses. But this is precisely what Lord Denning does. He distinguishes two types of promise, the positive and the negative. A contractual provision such as "This motorcycle is fit for use on the road" constitutes an express term, but a provision such as "This motorcycle is not fit for any particular purpose" is merely an exemption clause. The distinction is, to say the least,

[105] To the same end, we could argue that it is one thing to affirm the contract as regards patent defects, but quite another thing to affirm it as regards latent defects. Thus there would be two separate acts of affirmation; Mr. Attryde had affirmed only with respect to patent defects.

[106] *Supra* note 97, at 777, [1970] 1 W.L.R. at 1058 (emphasis added).

[107] The contract provided in condition 5: "The said vehicle is not supplied subject to any condition that the same is fit for any particular purpose . . . ."

odd; it makes sense only as part of a campaign against exemption clauses. But any strategy which has the effect of treating an implied term as more important than an express provision turns the contract world on its head and must be viewed with suspicion.

The second illustration of this "Alice in Wonderland" approach comes from the judgment of Fenton Atkinson L.J.: "We heard interesting arguments on the true construction of cl. 4 and 5 of the exception provisions of the hire-purchase agreement; but in the result those difficulties in my view do not have to be resolved." [108] The "result" referred to is the finding that there had been a fundamental breach of contract by the plaintiffs. This finding effectively sounds the death-knell for the exemption clause. If we swallow the approach found in *Harbutt's*, Fenton Atkinson L.J.'s dictum might seem unexceptionable, but, simply to consider it according to the principles of contract law, it is heresy. We could rephrase the dictum thus: "The true construction of the relevant express provisions of the contract is difficult, and we have heard some interesting arguments on these points. However, ignoring these provisions, it is clear that the contract has been broken. That being so, we need no longer ask ourselves what the parties really intended."

Farnworth is a straight application of *Harbutt's*, and, moreover, conforms to our analysis in *Harbutt's* of the proscriptive doctrine of fundamental breach. The exemption clauses are sidelined at the first opportunity and then eliminated altogether. Indeed, so strong is the proscriptive atmosphere that the strategy of "tortuous constructions" is not even required. It would have made little difference even had the court decided that Mr. Attryde had affirmed the contract, for, though the strategy of "tortuous constructions" would then have been applied, Lord Denning said that "even if the first defendant had affirmed the contract . . . [the] exception clauses would not protect the plaintiffs". [109]

The second case for consideration is *Hollier v. Rambler Motors (A.M.C.) Ltd.* [110] Like *Harbutt's*, *Hollier* arose out of a catastrophic fire. The plaintiff's car was in need of repairs. The defendants agreed to effect the repairs, such agreement being formed during the course of a telephone conversation between the parties. While the car was at the defendants' garage, a fire occurred which caused substantial damage to the car. The plaintiff sued the defendants, claiming that the fire and the ensuing damage were caused by the defendants' negligence. The defendants replied by asserting (1) that they had not been negligent, and (2) that even if they had been negligent, they were protected by an exclusion clause. At the trial the judge found clear proof of the defendants' negligence; seemingly the "electric wiring of their premises was faulty in design and was not properly inspected or maintained". [111] However, the judge then held that the de-

[108] *Supra* note 97, at 779, [1970] 1 W.L.R. at 1060.
[109] *Id.* at 778, [1970] 1 W.L.R. at 1059.
[110] *Supra* note 98.
[111] Cited by Salmon L.J., *id.* at 75, [1972] 1 All E.R. at 401.

fendants were indeed protected by their exclusion clause. This conclusion entailed holding (1) that the clause in question had been incorporated into the contract and (2) that the clause carried the meaning given it in argument by the defendants.

The plaintiff's appeal, which turned upon the judge's findings on these points, was successful. The Court of Appeal lost no time in eliminating the exemption clause by holding that it had not been incorporated into the contract. There is no more effective method for controlling exemption clauses, but the facts have to permit such an approach. [112] The contract between the parties was made over the telephone; the exemption clause was contained in an "invoice" form normally signed by the customer; on the occasion in question, the plaintiff did not sign the form, but on at least two of the three or four occasions in the past when the defendants had carried out work for the plaintiff, the form had been signed; these previous dealings between the parties spanned a period of five years. On the strength of these sparse and perhaps inconsistent previous dealings the defendants contended that the exemption clause was incorporated into the oral contract. Such a contention flew in the face of a strong line of authority and the court "without any hesitation" rejected it. [113] Despite having this solid ground for their decision, the court went on to consider the true construction of the exemption clause, and the bulk of the judgments are given over to this issue. Thus, although it might be objected that this part of the decision is simply *obiter,* the thoroughness of the judicial treatment requires our attention.

We are of course interested in the question of construction. The question of incorporation may well be an interesting product of the tension between freedom of contract and exemption clauses, but it is beyond the present enquiry, which is concerned with the judicial response to those remedy-stipulations which are in fact accepted as terms. In *Hollier* the exemption clause read: "The company is not responsible for damage caused by fire to customer's cars on the premises. Customer's cars are driven by staff at owners' risk." What did this terse provision mean? The gist of the court's remarkable answer is conveyed in the statement of Salmon L.J. (as he then was) that "the words of the condition would be understood *as being meant to be a warning* to the customer that if a fire does occur at the garage which damages the car, and *it is not caused* by negligence of the garage owner, then the garage owner is not responsible for damage". [114] But what liability would the garage owner have if he was not negligent? None. This is a

[112] The Court of Appeal used the "not incorporated" strategy to great effect in Thornton v. Shoe Lane Parking Ltd., [1971] 2 Q.B. 163, [1971] 1 All E.R. 686, (1970).

[113] *Supra* note 98, at 78, [1972] 1 All E.R. at 404. The "strong line of authority" was McCutcheon v. David MacBrayne, Ltd., [1964] 1 All E.R. 430, [1964] 1 W.L.R. 125, and Hardwick Game Farm v. Suffolk Agricultural Poultry Producers Ass'n, [1969] 2 A.C. 31, [1968] 2 All E.R. 444—a short line, no doubt, but nevertheless a strong one.

[114] Strangely enough, although this statement is to be found at [1972] 1 All E.R. at 406 (emphasis added), it does not appear in [1972] 2 Q.B. 71 or [1972] 2 W.L.R. 401.

very benevolent exemption clause. Not only does it nullify liability in a situation where no liability exists; it also serves the purpose of instructing the intelligent lay customer in the nature of a bailee's liability. [115] Such a construction defies belief and suggests that the strategy of "tortuous constructions" is at work.

Lord Justice Salmon delivers the most comprehensive judgment on this point. He starts by saying that it is "well settled" that a clause purporting to exclude liability for negligence "should make its meaning plain on its face to any ordinarily literate and sensible person". [116] This principle does not require an express exclusion of negligence, "but in order for the clause to be effective the language should be so plain that it clearly bears that meaning". Certainly we are driven towards this meaning where negligence is the only head of liability relevant to the party who pleads the exemption clause, but unless there is an express reference to negligence, we are free to construe the clause in other ways. Thus, while it is easier to give effect to the exemption clause where negligence is the sole head of liability, we have to remember that "in every case it comes down to a question of construing the alleged exemption clause". [118] This cautious beginning testifies to the power of the presumptions against exclusion clauses. Instead of asking "What was the common intention or understanding behind this clause?" the court announces that the party pleading the clause is going to have to overcome a number of obstacles to its enforcement. For Salmon L.J. the justification for so loading the dice against the exemption clause is that "defendants should [not] be allowed to shelter behind language which might lull the customer into a false sense of security by letting him think—unless perhaps he happens to be a lawyer—that he would have redress against the man with whom he was dealing for any damage which he, the customer, might suffer by the negligence of that person". [119] Here we see the familiar bias in favour of the consumer which has been so prominent in this area; together with the general presumption against exemption clauses and the willingness to construe such clauses, it makes Salmon L.J.'s remarks ominous to the advocate of freedom of contract.

The foreboding grows when Salmon L.J. turns to the leading cases dealing with clauses that purport to exclude liability for negligence. In *Rutter v. Palmer*, [120] the exemption clause did not specifically refer to negligence; it said that customers' cars were driven "at customers' sole risk". According to Salmon such a provision effectively excludes liability for neg-

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[115] In Rutter v. Palmer, [1922] 2 K.B. 87 (C.A.), Bankes L.J. noted such a consequence: "If [the stipulation] is not introduced for the purpose of protecting the garage proprietor from the negligent acts of his driver, it is hard to see what effect it has beyond being a mere statement of the general law." *Id.* at 91.

[116] *Supra* note 98, at 78, [1972] 1 All E.R. at 404.

[117] *Id.*, [1972] 1 All E.R. at 404.

[118] *Id.* at 79, [1972] 1 All E.R. at 405.

[119] *Id.* at 78, [1972] 1 All E.R. at 404.

[120] *Supra* note 115.

ligence, for such is "the obvious meaning of the clause". [121] Apparently the "ordinarily literate and sensible person" would realize that "the garage could not conceivably be liable for the car being damaged in an accident unless the driver was at fault". [122] Thus the customer would realize that the clause could have only one meaning—to exclude liability for negligence. *Alderslade v. Hendon Laundry, Ltd.* [123] is similarly explained in terms of the ordinary customer's—there the ordinary housewife's—understanding of the clause. Salmon L.J. says: "I think that the ordinary sensible housewife, or indeed anyone else who sends washing to the laundry, who saw that clause must have appreciated that almost always goods are lost or damaged because of the laundry's negligence, and therefore this clause could apply only to limit the liability of the laundry, when they were in fault or negligent." [124] These cases would seem to favour the defendants in *Hollier*; if Mr. Hollier was an ordinary customer, then he must have appreciated that the defendants were excluding their liability for negligence. But such optimism does not take into account judicial ingenuity.

Lord Justice Salmon manages to slide around some awkward dicta in *Alderslade* and to apply the "reasonable customer" principle from the cases so as to defeat the exemption clause. In *Alderslade* Lord Greene had suggested that where the claim would sound in negligence alone, then a limitation clause *must* be construed as covering such liability; if the clause were not so construed it would lack subject-matter. [125] Salmon L.J. fires a salvo of arguments against this notion: too literal an interpretation of Lord Greene's words should be eschewed, for the passage appears in an unreserved judgment, not in a statute; Lord Greene's intention was to restate the law, and not to extend it; finally, if we followed his suggestion, "it would make the law entirely artificial by ignoring that rules of construction are merely our guides and not our masters; in the end you are driven back to construing the clause in question to see what it means". [126] These arguments are assailable. For instance, what is this principle limiting the effect of unreserved judgments? And accepting that Lord Greene was concerned simply to restate the existing law, does his actual statement indeed amount to an extension of the law? Isn't the real objection to Lord Greene's suggestion, not that it makes too much of a rule of construction, but that the rule itself is unacceptable?

Having set up the ordinary customer test, Salmon L.J. somehow has to escape applying it in this case. He does so by arguing that the ordinary

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[121] *Supra* note 98, at 79, [1972] 1 All E.R. at 405.

[122] *Id.*, [1972] 1 All E.R. at 405.

[123] [1945] 1 K.B. 189, [1945] 1 All E.R. 244 (C.A.).

[124] *Supra* note 98, at 79, [1972] 1 All E.R. at 405.

[125] Lord Greene said: "The effect of those authorities can I think be stated as follows: where the head of damage in respect of which limitation of liability is sought to be imposed by such a clause is one which rests on negligence and nothing else, the clause must be construed as extending to that head of damage, because it would otherwise lack subject matter." *Supra* note 123, at 192, [1945] 1 All E.R. at 245.

[126] *Supra* note 98, at 80, [1972] 1 All E.R. at 406.

car owner would appreciate that fires "can occur from a large variety of causes, only one of which is negligence on the part of the occupier of the premises". [127] The car owner would accordingly deduce, not that the garage was excluding its liability for negligence, but that it was disclaiming responsibility for fires caused in ways other than through its own negligence. In short, the garage was warning the customer about the risks of a bailment. The case was said to differ from *Alderslade* and *Rutter*, where the parties "would have known that all that was being excluded was the negligence of the laundry, in the one case, and the garage, in the other". [128] That this really is the most whimsical of interpretations can be seen when we look at the exclusion clause in its entirety. The first sentence refers to the fire risk; the second stipulates that cars are to be driven at the owners' risk (a stipulation on all fours with the one in *Rutter*). If we allow Salmon L.J.'s construction, we must accept the bizarre idea that the customer upon reading the whole exclusion clause would think to himself: "Ah, the garage will be responsible if the car is damaged by a fire caused through their negligence but not if the fire is the result of any other cause, though if the car is damaged by the negligent *driving* of one of the garage's employees then they will not be liable." Why would the garage accept liability for one sort of negligence but not for another?

It is suggested with some confidence that Salmon L.J.'s interpretation of this exclusion clause is an exercise in the strategy of "tortuous constructions". We might call it a classic in the genre except that it does not even make a pretence of honouring the intention of the parties. First we see the general presumption against exclusion clauses; then we are told that the words of the provision "can be given ample content by construing them as a warning"; [129] finally, the construction of the clause, rather than being referred to the real or the presumed intention of the parties, is made to rest upon the understanding of the "ordinarily literate and sensible person". [130] If indeed Salmon L.J. was afraid that the customer might be lulled into a false sense of security by some vague and loose provision, could that fear not have been related to the question of what the parties intended?

The other judgments add little to the argument. Stamp L.J. agrees with Salmon, although he sees his conclusion as being reached by "a slightly different route". [131] The judgment turns upon two principles. One is the familiar proposition that "where *in a contract such as this* you find a provision excluding liability capable of two constructions, one of which will make it applicable where there is no negligence by the defendant, and the

[127] *Id.* at 81, [1972] 1 All E.R. at 406.

[128] *Id.* at 80, [1972] 1 All E.R. at 406.

[129] *Id.* at 81, [1972] 1 All E.R. at 407.

[130] Of course, we can link this with the parties' intentions by stipulating that the understanding of the "ordinarily literate and sensible person" is a sound basis for ascertaining the parties' *presumed* intention, and that the parties' *real* intention always coincides with their *presumed* intention. To say the least, this is a convenient progression.

[131] *Supra* note 98, at 83, [1972] 1 All E.R. at 408.

other will make it applicable where there is negligence by the defendant, it requires special words or special circumstances to make the clause exclude liability in case of negligence". [132] The other is the novel idea that "where the words relied upon by the defendant are susceptible either to a construction under which they become a statement of fact in the nature of a warning or to a construction which will exempt the defendant from liability for negligence, the former construction is to be preferred". [133] The principles point to only one construction, namely, treatment of the clause as a statement of fact, a warning. This approach is far more straightforward than Salmon L.J.'s; it dispenses with the need to explain the pressing cases since these can be seen as being concerned with clauses excluding liability and therefore as irrelevant in construing a clause that simply issues a warning. Finally, Latey J.'s judgment is simply a miniature of Salmon L.J.'s. Latey J. concludes that the clause does not exclude liability for negligence since the intelligent layman would not realize that that was its purport; plainer words would be required to accomplish this.

It is submitted, then, that wherever a remedy-stipulation clause purports to restrict the claim for damages, it will at the very least encounter the strategy of "tortuous constructions". This will not usually occur by way of a search for the real intention of the parties, but rather their presumed intention. Freedom of contract is out of the picture, not because it would be difficult to determine the real intention of the parties (though it might be), but simply because the courts' real concern is in arriving at a reasonable result. There are both "difficult" and "hard" cases, and exemption clauses often give rise to the paradigmatic "hard" cases. After leaping through the hoop provided by the strategy of "tortuous constructions", exemption clauses must also, if there has been a breach of condition, face the doctrine of fundamental breach. [134] This doctrine operates in the same way as the ban on

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[132] *Id.*, [1972] 1 All E.R. at 408 (emphasis added).

[133] *Id.*, [1972] 1 All E.R. at 408.

[134] See *supra* notes 92 and 95. Although we argue that *Suisse Atlantique* has failed to stem the proscriptive tide, there is no doubt that one of the reasons we are reluctant to set up fundamental breach as anything more than a "likely" hurdle is our awareness of *Suisse Atlantique* lurking in the background. Indeed, on some occasions it springs into the foreground. Thus, in Kenyon, Son & Craven Ltd. v. Baxter Hoare & Co., [1971] 2 All E.R. 708, [1971] 1 W.L.R. 519, the decision rested upon *Suisse Atlantique*. Briefly, in *Kenyon* the plaintiffs were suing the defendant warehousemen for damage caused to their groundnuts during the period of warehousing. Donaldson J. held that the defendants had "failed to use reasonable skill and care in and about the custody and preservation of the nuts" (*id.* at 716, [1971] 1 W.L.R. at 529) and that the defendants' carelessness "was the carelessness of the fatalist and the defeatist . . . but it was not a reckless carelessness" (*id.* at 717, [1971] 1 W.L.R. at 529). The defence was that the defendants were protected by one of the conditions of the contract, such condition excluding liability for loss or damage to goods in the defendants' custody or control "unless such loss or damage [was] due to the wilful neglect or default" of the defendants. The main authority for the defence was *Suisse Atlantique*. Against this, the plaintiffs, relying on *Harbutt's* and *Farnworth*, argued that the defendants were in fundamental breach with the result that the exemption clause was of no avail to the defendants. Donaldson J. found for the *defendants*, by revitalizing *Suisse Atlantique*. He argued thus: (1) the defendants were not guilty of wilful

penalty clauses, though less overtly. Once the court characterizes a clause as belonging to the general category of penalties or exclusions, it no longer matters what the parties intended; the clause will not be enforced. *Harbutt's* and *Farnworth* exemplify this proscriptive strategy, *Hollier* the strategy of "tortuous constructions".

What is the rationale for the judicial dislike of exemption clauses? If we abstract the exemption clause from its commercial setting, it appears as a harmless device for allocating the various contractual risks. But once we return to the real world, we see that it is commonly used as a protective device in standard form contracts. The protection it affords, moreover, always serves the interest of the stronger party, the contract being in no real sense the outcome of bilateral negotiation. The courts might originally have refused to enforce exemption clauses on the particular merits of individual cases, but at some stage general rules militating against their enforcement were developed. Paternalism might well have been the driving force behind this development; the courts may have felt that the unsuspecting consumer simply did not know what was good for him when faced with the guile of sharp dealers. But we cannot eliminate the possibility that the courts saw themselves as doing something more than affording the consumer paternalistic relief from a burdensome transaction. Perhaps the courts felt that suppressing the exemption clause would go some way towards discouraging the arguably harmful practice of supplying shoddy goods and services, and so protect the public at large. [135] What really matters is that we should be able to identify the extent of the courts' encroachment on freedom of contract, whatever the rationale behind it. What are the courts' criteria for enforcing or failing to enforce exemption clauses? The court usually asks itself a number of questions. Was a standard form contract being used? Was the innocent party a consumer and the guilty party a dealer? Was there an inequality of bargaining power between the parties? Finally, in deference to *Harbutt's*, was the effect of the exemption clause to afford protection against a very large claim? Judicial support for this sort of inventory can be found in Lord Reid's judgment in *Suisse Atlantique*:

> Exemption clauses differ greatly in many respects. Probably the most objectionable are found in the complex standard conditions which are now

neglect; (2) the applicability of exemption clauses is a matter of construction unless there is a total deviation from the contemplated contractual performance; (3) the defendants were not guilty of such a total deviation; (4) the applicability of the condition turned therefore on its construction; and (5) the clause on its true construction protected the defendants. The second stage of the argument was built on Lord Wilberforce's judgment in *Suisse Atlantique*, and against this framework both *Harbutt's* and *Farnworth* were explained as cases of total deviation. Finally, Donaldson J. expressed some doubts about the correctness of Lord Denning's view in *Farnworth* that "in deciding whether a contract is broken in a fundamental respect one ignores the exception clauses" (*id.* at 720, [1971] 1 W.L.R. at 532); the judge felt that his statement was *obiter* and "inconsistent with *Suisse Atlantique*" (*id.*, [1971] 1 W.L.R. 532).

[135] *Arguably*" because we are unsure about the economic arguments that surround this issue.

> so common. In the ordinary way the customer has no time to read them, and if he did read them he would probably not understand them. And if he did understand or object to any of them, he would generally be told he could take it or leave it. And if he then went to another supplier the result would be the same. Freedom to contract must surely imply some choice or room for bargaining.
>
> At the other extreme is the case where parties are bargaining on terms of equality and a stringent exemption clause is accepted for a quid pro quo or other good reason. [136]

What role does statute law play in this area? In *Suisse Atlantique* Lord Reid suggested that the problem of exemption clauses was extremely complex and that its solution "should be left to Parliament". [137] He thought that there was a need "for urgent legislative action", such action not being "beyond reasonable expectation". [138] This forecast was well-founded, for in 1973 the Supply of Goods (Implied Terms) Act was enacted. The Act amounts to a vindication of the longstanding judicial campaign against exemption clauses. Section 4 of the Act replaces section 55 of the Sale of Goods Act 1893; [140] it limits the power of the seller of goods to contract out of his statutorily implied obligations. Any attempt to contract out of the implied undertakings as to title is void. [141] Of greater interest to us, however, is the restriction placed on the seller's power to contract out of the implied undertakings as to quality and fitness. Here the restriction operates at two levels. In the case of a "consumer sale" any attempt to contract out is void; [142] in all other cases the exemption will "not be enforceable to the extent that it is shown that it would not be fair or reasonable to allow reliance on the term". [143] How is the court to determine whether it is fair and reasonable to allow reliance? The Act provides that "regard shall be had to all the circumstances of the case", [144] but the court is referred in particular to the following matters: [145] the relative bargaining strength of the parties,

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[136] *Supra* note 70, at 406, [1966] 2 All E.R. at 76. Similarly, see Donaldson J. in Kenyon, Son & Craven Ltd. v. Baxter Hoare & Co., *supra* note 134: "If [the exemption clause] occurred in a printed form of contract between parties of unequal bargaining power, it would be socially most undesirable . . . ." *Id.* at 720, [1971] 1 W.L.R. at 533. The idea of relative bargaining strength was explicitly adopted in British Crane Hire Corp. v. Ipswich Plant Hire Ltd., [1974] 1 All E.R. 1059, [1974] 2 W.L.R. 856 (C.A. 1973). Lord Denning said: "The plaintiff [in *Hollier*] was not of equal bargaining power with the garage company which repaired the car. The conditions were not incorporated. But here the parties were both in the trade and were of equal bargaining power." *Id.* at 1061-62, [1974] 2 W.L.R. at 861.

[137] *Supra* note 70, at 406, [1966] 2 All E.R. at 76. See also Kenyon, Son & Craven Ltd. v. Baxter Hoare & Co., *supra* note 134, at 720, [1971] 1 W.L.R. at 533.

[138] *Supra* note 70, at 406, [1966] 2 All E.R. at 76.

[139] C. 13.

[140] 56 & 57 Vict., c. 71.

[141] *See* the new s. 55(3) (as set out in the Supply of Goods (Implied Terms) Act 1973, c. 13, s. 4).

[142] *See* the new s. 55(4).

[143] *See* the new s. 55(4).

[144] *See* the new s. 55(5).

[145] *See* the new s. 55(5).

taking into account, *inter alia*, the availability of suitable alternative products and sources of supply; any inducements made to the buyer to accept the exemption clause; the buyer's knowledge of the term; the reasonableness, in the case of time limits or the like, of the buyer's having to comply with the condition; [146] and whether the goods were specially ordered by the buyer. The resemblance between Lord Reid's statement and the considerations set out in the Act is striking. Moreover, in making the distinction between consumer and non-consumer sales, the Act is endorsing one of the criteria which has been crucial all along in judicial reasoning.

The Supply of Goods (Implied Terms) Act has not, however, rendered our discussion entirely superfluous. Three types of situations arise:

(1) the exemption clause is void by statutory declaration;
(2) the exemption clause is subject to a statutorily authorized judicial discretion; and
(3) the exemption clause is free of statutory control, as in the case of the supply of services. [147]

The first situation is by no means unique; [148] it simply narrows the area in which freedom of contract is to operate. The second situation is also not unknown; [149] however, it poses obvious problems in predictability. The third situation is, as we have seen, riddled with difficulties; this is the price that has to be paid when ailing concepts are relied upon to deal with complex social and economic problems. Future enquiries may well be preoccupied with the exercise of the statutory discretion, but at present this area of the law is better dealt with by a discussion of the leading cases.

Our three leading cases all come from the English Court of Appeal. Are they representative of judicial thought? There is no neat answer to this question, but it must be reiterated that the aim of this article is to sketch the contours of that very large domain of the law concerned with remedy-stipulations. *Suisse Atlantique* presaged a period during which the exemption clause would be controlled by the technique of construction rather than by outright proscription; [150] it supports our thesis of the ubiquitous strategy of "tortuous constructions". But, as subsequent events have shown, covert proscription is still an important part of the judicial armoury, and, moreover, is supported by statutory authority. Thus, although *Suisse Atlantique* draws in graphic terms the distinction between the strong (proscrip-

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[146] *See* the new s. 55(5)(d).

[147] But note the sweeping proposals in THE LAW COMMISSION AND THE SCOTTISH LAW COMMISSION, EXEMPTION CLAUSES. SECOND REPORT, LAW COM. No. 69, SCOT. LAW COM. No. 39 (1975).

[148] *See, e.g.*, the Road Traffic Act 1960, 8 & 9 Eliz. 2, c. 16, s. 151, and, more recently, the Defective Premises Act 1972, c. 35, s. 6(3).

[149] *See, e.g.*, the Misrepresentation Act 1967, c. 7, s. 3.

[150] See *supra* note 71.

tion) and weak (construction) forms of control, [151] its total commitment to the latter no longer wholly reflects the present state of the law. [152]

B. *The Election to Repudiate or to Affirm the Contract*

One further kind of remedy-stipulation is a stipulation purporting to restrict the innocent party's right to elect between repudiation or affirmation of the contract. The downgrading of what would otherwise be a condition to the status of a warranty is one form of restrictive stipulation; but it is not the only form. If one of the parties to a contract is prepared to insist that for the breach of a certain term he shall be liable only in damages (that is, the term is to be treated as a warranty) he may well wish to go one step further and insist that he shall not be liable even in damages. In other words, though they need not occur together, the two forms of restrictive remedy-stipulations may be wedded in the same exemption clause. For instance, a clause which negatives liability for breach of some term may deny to the innocent party both the election between repudiation and affirmation and any claim to damages. To these two categories of restriction we can add a third: the placing of a time limit on the exercise of a remedy.

Before examining the courts' reaction to an attempt to exclude the right to repudiate we must first examine a "repudiation situation". Such a situation exhibits three elements: first, the term broken must, in the absence of a contrary stipulation, be a condition; secondly, the innocent party must desire to exercise its right to repudiate; and finally, the offending party must seek the protection of an exemption clause. Such a situation constitutes a powerful invitation to apply the *Harbutt's* approach, under which the innocent party's right to repudiate would be quite inviolable.

The strategy of that case was to put the exemption clause to one side; the court asks whether there has been a breach, whether the breach is fundamental, and whether that fundamental breach is one "which still leaves the contract open to be performed" or one "which itself brings the contract to an end". [153] But in any case, if the contract is brought to an end, the "innocent party is entitled to sue for damages for the breach, and the guilty party cannot rely on the exclusion or limitation clause". [154] This procedure does not directly deal with the central question, "Can the right to repudiate

[151] Lord Hodson said: "Sometimes it has been declared that where a fundamental breach of contract had occurred an exceptions clause could not as a matter of law be relied upon, but the better view . . . is that as a matter of construction normally an exception or exclusive clause or similar provision in a contract should be construed as not applying to a situation created by a fundamental breach of contract." *Supra* note 70, at 410, [1966] 2 All E.R. at 78.

[152] But note here the Draft Exemption Clauses (England and Wales) Bill 1975 *in* THE LAW COMMISSION AND THE SCOTTISH LAW COMMISSION, *supra* note 147, Appendix A, which proposes (1) that a wide range of exemptions be void, (2) that there be a general test of reasonableness, private transactions excluded (clause 1(3)), and (3) that the *Harbutt's* version of proscription be eliminated where the test of reasonableness applies (*see* clause 15). Control by construction will continue.

[153] *Supra* note 72 at 464, [1970] 1 All E.R. at 233.

[154] *Id.* at 466, [1970] 1 All E.R. at 234.

be excluded?" Yet *Harbutt's* is a case where the point is so obvious that we may miss it altogether, since the entire analysis proceeds upon the assumption that the right to repudiate is inviolable. Indeed the right to repudiate, far from being at the mercy of the exemption clause, does itself determine the fate of the exemption clause. For, if the situation falls in Lord Denning's first group, the innocent party has the usual election—"either to *affirm* the contract or to disaffirm it" [155]—while if the situation falls in the second group, the contract is automatically repudiated; and repudiation, whether by election or automatically, spells the doom of the exemption clause. So the only option denied to the innocent party is affirmation, and then only if the situation falls in the second group. [156] This limitation, moreover, is not the work of the exemption clause. The effect of *Harbutt's*, then, is to settle the questions of breach and repudiation without the assistance or hindrance of the exemption clause, the relevance of which is reduced to the question of damages, and only there when the innocent party, having the election to affirm or disaffirm, has elected to affirm.

The next question is, does every "repudiation situation" attract the approach taken in *Harbutt's*? Though the *Suisse Atlantique* decision was treated as being mainly of historical interest, that decision nevertheless coloured our discussion of *Harbutt's*; rather than assert that *Harbutt's* would always be followed, we more cautiously submitted that it seemed to be the critical trend. [157] *Harbutt's* may be the key decision, but, having assumed the inviolability of the right to repudiate, it does not squarely face the question of whether the right to repudiate may be excluded. We thus feel justified in resurrecting Lord Wilberforce's judgment in *Suisse Atlantique*. The judgment is extremely sensitive to the problems raised by exemption clauses, and it seems to us to provide an illuminating contrast to the inflexible approach taken in *Harbutt's*.

In *Suisse Atlantique* Lord Wilberforce says that the expression "fundamental breach" is used "to denote two quite different things, namely, (i) a performance totally different from that which the contract contemplates, (ii) a breach of contract more serious than one which would entitle the other party merely to damages and which (at least) would entitle him to refuse performance or further performance under the contract". [158] This is potentially confusing; the first meaning concerns the applicability of the exemption clause, whereas the second meaning identifies a situation in which the innocent party enjoys the right to repudiate. To say that a breach is fundamental could mean either (1) that the exclusion clause cannot be relied upon, or (2) that the innocent party has the right to repudiate if he so elects. The real danger in the ambiguity, however, is not so much that there might be a

[155] *Id.* at 464, [1970] 1 All E.R. at 233.

[156] So far as the innocent party is concerned, this must seem like a small price to pay for the guaranteed right of repudiation, plus, in the event of repudiation, a guaranteed right to damages.

[157] See *supra* note 134.

[158] *Supra* note 70, at 431, [1966] 2 All E.R. at 91.

problem in communication, but that we might, quite mistakenly, believe that there is a necessary coincidence between the two senses of the term. Lord Wilberforce is at pains to disabuse us of any such view:

> For, though it may be true generally, if the contract contains a wide exceptions clause, that a breach sufficiently serious to take the case outside that clause, will also give the other party the right to refuse further performance, it is not the case, necessarily, that a breach of the latter character has the former consequence. An act which, apart from the exceptions clause, might be a breach sufficiently serious to justify refusal of further performance, *may be reduced in effect, or made not a breach at all, by the terms of the clause.* [159]

Since the exemption clause now participates in the construction of the contract, the doctrine of fundamental breach is prevented from applying to all breaches of condition. According to Lord Wilberforce we must distinguish the operation of two types of exemption clause: the type which renders the supposed breach of condition "not a breach at all" and the type which causes the breach to be "reduced in effect". Since under the former type of exemption clause there is no obligation and thus no breach, that type cannot assist us in answering the question, "Can the right to repudiate be excluded?" If there is no breach, then clearly there can be no question of repudiation. It is the latter type of exemption clause that interests us.

Lord Wilberforce's suggestion that the breach may be "reduced in effect" hints at the possibility of totally excluding the right to repudiate. But the hint is a gentle one and must be squared with his Lordship's later statement that contracting parties do not intend the exclusion clause to

> have so wide an ambit as in effect to deprive one party's stipulations of all contractual force: to do so would be to reduce the contract to a mere declaration of intent. To this extent it may be correct to say that there is a rule of law against the application of an exceptions clause to a particular type of breach. But short of this it must be a question of contractual intention whether a particular breach is covered or not . . . . [160]

It is suggested with some trepidation that Lord Wilberforce's dicta are reconcilable under the proposition that the right to repudiate may not be excluded by a *blanket* exemption clause. However, it may be possible for a blanket exemption clause to effectively *stop* the other party from repudiating (this is not as contradictory as it sounds), [161] and for a *weaker* exclusion clause to leave open the innocent party's claim to damages while removing his right to repudiate. The problem raised by Lord Wilberforce's dicta is that of the relationship between blanket exemption clauses and the concept of the contractual promise. The problem will have to be re-examined, for it leads us to our second type of restrictive remedy-stipulation, the downgrading of a condition to a warranty.

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[159] *Id.*, [1966] 2 All E.R. at 92 (emphasis added).

[160] *Id.* at 432, [1966] 2 All E.R. at 92.

[161] See text *infra* between notes 170 and 171.

Lord Wilberforce's dicta may be paraphrased and extrapolated as follows:

(1) An exemption clause may be so specific as to define the obligation(s) of one of the contracting parties. Thus, the exemption clause will assist in determining what sort of performance is contemplated under the contract and in deciding whether or not there has been a breach. For example, a term in a contract for the sale of a "car" might provide that the vendor gives no undertaking as to the roadworthiness of the "car". [162] Rather than view this as a wicked exemption, Lord Wilberforce would ask us to view it as part of the process of rendering more explicit the vendor's obligation(s). Of course, such an approach makes a lot of sense where the sale is between a vendor and a scrap dealer who pays a nominal sum for the "car", or where the "car" is sold in the ordinary way but at a fraction of the prevailing market price. But the difficulty arises when normal market price is paid; the approach would then require us, against our better instincts, to hold that the purchaser paid the price of a roadworthy "car" and still took the risk that the "car" was not roadworthy. Naturally there is no difficulty if we treat the purchaser as a fool who merits the raw deal that he has struck.

(2) Although a specific exemption clause can identify the sort of performance contemplated under the contract, it cannot afford any protection in respect of conduct that is a deviation from that contemplated performance. This is a truism; the clause could only afford such protection if it were wrongly interpreted in formulating the performance contemplated by the parties. Thus, in our earlier example, the term denying any undertaking as to the roadworthiness of the "car" would be no protection for the vendor should he deliver a sack of potatoes. Suppose the term provided that the vendor should not be liable if, instead of delivering a "car", he delivered a sack of potatoes? This would take us back to the question of the contemplated contractual performance.

(3) Although a specific exemption clause can assist the determination of what has been promised under the contract, the clause must nevertheless leave intact some sort of legal promise (that is, a promise sanctioned by a remedy), for contracts are concerned with secured promises. A blanket exemption clause would therefore not avail our "car" vendor, for such a clause would reduce a supposedly contractual agreement to a "gentleman's agreement". [163]

(4) If the exemption clause merely narrows the range of remedies available to the innocent party and does not eliminate them altogether, then it does not violate the idea of a contractual promise and can be supported.

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[162] The term "car" is tendentious, and so we are assuming that, by giving no undertaking as to roadworthiness, the vendor is not involving himself in a crude self-contradiction.

[163] We are assuming that the blanket exemption clause denies all liability for any breach of any (or all) of the contractual obligations.

Though our "car" vendor will be unable to set up a blanket exemption clause, he *will* be able to rely upon a clause stipulating that damages are the sole remedy for the breach in question. [164]

Of these four propositions, the third is the most tricky. The court assumes that the parties intend to legally bind themselves, an assumption that common sense will normally support. But if we took the exemption clause squarely into consideration, instead of relying on the generally formal nature of the contract as proof that the parties intended to legally bind themselves, we would ask a further question: "If one of the parties saw fit expressly to provide that he should not be liable for departing from the arrangement, does that show an intention *not* to create legal relations?" Taken together with all the other evidence, it probably would not. [165] If we really felt that there was no intention to be bound we would have no problem; [166] our difficulty would lie in those cases where one side only had the intention. [167]

Before we leave this third proposition we should clarify our use of the term "blanket exemption clause". We have so far consistently used the term to signify an exemption clause which strikes not only at damages but also at the right to repudiate, but we have yet to distinguish between the wide and the narrow forms of this type of exemption. This distinction does not affect our earlier conclusion, based upon Lord Wilberforce's dicta, that a blanket exemption clause will not have the effect of excluding the right to repudiate; it simply means that the blanket exemption clause has more than one form. The wide blanket exemption clause nullifies any liability for any breach of any contractual obligation. The narrow one nullifies liability for any breach of one or more, but not all, of the contractual obligations. Thus, if A agrees that in consideration of B paying him £1000 he will sell a car to B and paint B's garage, a blanket exemption clause might consist of (1) a disclaimer by A of any liability for any breach of any of the obligations relating to the sale of the car or the painting work, or (2) a disclaimer by A of any liability for any breach of the painting obligations only. The first form would be a wide blanket exemption clause, the second form a narrow blanket exemption clause. While the wide form of blanket exemption would

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[164] Two tricky cases should be noted here, for they may controvert the general proposition: (1) the blanket exemption clause which operates on less than all of the contractual obligations: and (2) the downgrading provision which operates against the one and only condition, or all of the conditions, of the contract.

[165] After all, is it not correct to say that the traditional sort of exemption clause is a very odd way indeed of indicating that no legal proceedings are contemplated? On the contrary, is it not the case that legal proceedings are contemplated and that the exemption clause is inserted in order to stifle such proceedings? The acid test no doubt is to ask the party who has inserted the exemption clause how he would react if the other party failed to perform his side of the agreement.

[166] If the parties genuinely intend to be bound in honour only, then no matter how advantageous a legal remedy subsequently might be, there can be no question of a remedy. The parties cannot have things both ways.

[167] This is yet another manifestation of the difficulty of grounding rules on common intention. Of course, apart from generating a difficult case, this situation also might produce a "hard" case.

surely fall foul of Lord Wilberforce's dicta, the narrow form would not so obviously do so. It could be treated in a number of ways; [168] it could, for example, be treated simply as negating any intention to be bound by a particular obligation. Thus in our example the binding relationship would be reduced by the exemption clause to an obligation to sell the car; the exemption clause would be treated as defining the terms of the agreement, clarifying exactly what was promised. This approach would leave us with some embarrassing questions about the difference, if any, between this type of exemption and the kind envisaged in the first proposition above. [169] If we treat it like the wide clause, it fails altogether. [170]

To summarize; a wide blanket exemption will fail as being repugnant to the notion of a contractual promise, and the right to repudiate will remain untouched. The narrow form of blanket exemption, negativing all remedies for the breach of one or more, but not all, of the contractual promises, will not exclude the right to repudiate. Yet the exemption clause, though not functioning as a remedy-exclusion clause, is in fact the reason that the remedy is unavailable. Hence our mysterious assertion that although it is not possible through a blanket exemption clause to *exclude* the right to repudiate, it is nonetheless possible that a narrow blanket exclusion clause may have the effect of ruling out any possibility of repudiation. Finally, an exemption clause which leaves damages available for a breach may successfully exclude the right to repudiate. Such an exemption admits the breach and avoids the trap of reducing the transaction to "a mere declaration of intent". [171] This type of clause seems to be what Lord Wilberforce had in mind when he talked about the breach being "reduced in effect", [172] and it constitutes our second category of restriction, that which downgrades an otherwise important obligation to a warranty.

The arguments for and against the viability of such a stipulation seem to be finely balanced. Reading between the lines of *Schuler v. Wickman* might cause us to deduce that such a stipulation is perfectly permissible, [173] but we have to reckon with the decision actually reached in that case; moreover, the case is concerned with the upgrading, not downgrading, of a term. Also arguing against the validity of such a clause is the following statement by Stephenson L.J. at the Court of Appeal stage in *Schuler v. Wickman*: "I can also understand how to describe a term as a warranty can

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[168] With some small modifications these choices would also be open for use against the wide blanket exemption clause. However, we cannot really see the courts opting for a course which gives this clause any effect.

[169] See text *supra* at note 162.

[170] *I.e.*, invalid and ineffective as being repugnant to the notion of a contractual promise.

[171] *Supra* note 70, at 432, [1966] 2 All E.R. at 92.

[172] *Id.* at 431, [1966] 2 All E.R. at 92, [1966] 2 W.L.R. at 987.

[173] Reading between the lines is a hazardous business, and if we argue that *Schuler v. Wickman* (*supra* note 29) hints at the possibility of downgrading we have to stand upon two assumptions: (1) that the statements licensing upgrading are genuine; and (2) that the policy applies to upgrading and downgrading alike.

no longer be said to confer no right to repudiate for a breach of it, because the breach may be so fundamental as to give that right." [174] This looks like a reference to *Harbutt's*, which would, of course, be a serious setback for the validity of such a stipulation. Under the approach taken in *Harbutt's* the stipulation becomes irrelevant. The court would note the label "warranty only" or "liability for breach of this term limited to damages only" and would put the stipulation to one side as being an exemption clause. Next it would determine whether there had been a breach, and, if so, whether the breach was fundamental: if there had been a fundamental breach, the right to repudiate would be available, and the exemption would have absolutely no effect. It could have effect only if it purported to limit the quantum of damages, and if the innocent party elected to sue for damages. Finally, even if the innocent party should affirm the contract, the exemption clause would on its own terms be of no comfort to the offending party. In all this, the only hope for the stipulation would be if the court should decide that the breach was not fundamental. However, were this to happen, the stipulation would probably be redundant anyway, because it might well be a situation in which the court felt that the breach was not sufficiently serious to justify repudiation. Given the facts in *Harbutt's*, that decision would be an obstacle in the path of any stipulation seeking to downgrade a condition to a warranty. [175]

On the other hand Lord Wilberforce's judgment in *Suisse Atlantique* offers support for such downgrading stipulations. The idea that the breach "may be reduced in effect" [176] points strongly to this conclusion but also raises a doubt whether the suggested freedom to downgrade extends to contracts where the provision in question bears on the contract's one and only condition or on all of its several conditions. Suppose a contract contains three conditions, one of which is stipulated to be a mere warranty. In this context the stipulation does not so much point to the performance contemplated by the parties as to the relative importance of the obligations. One assumes that Lord Wilberforce would find nothing objectionable in such a stipulation. However, if there was one condition only, could this one and only condition be successfully stipulated to be a warranty? If so, then for no breach of this particular contract would the innocent party be able to repudiate, a circumstance that might lead the court to adopt another version of the repugnancy idea and quash the stipulation. Under this idea the court would reject the stipulation as being antithetical to the admittedly main purpose of the contract; once that purpose has been identified, a determination in which exemption clauses can of course assist, then it must be treated as a condition and enforced. But despite this limitation, Lord Wilberforce's tolerance of such downgrading stipulations stands in sharp contrast to the

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[174] [1972] 2 All E.R. 1173, at 1189, [1972] 1 W.L.R. 840, at 860 (C.A. 1972).

[175] *Sed quaere*: in *Harbutt's*, how significant within the downgrading context was the fact that there was a ceiling on the damages recoverable?

[176] *Supra* note 70, at 431, [1966] 2 All E.R. at 92, [1966] 2 W.L.R. at 987.

proscriptive approach. There is no obvious ground upon which to base a rapprochement between the two approaches, and it is difficult to know which will prevail. The present trend is very much against the possibility of downgrading, and in *Harbutt's* there is a clear precedent for rejecting such a stipulation. But the law moves in cycles, and because this sort of stipulation is not typical of those used against consumers, the courts may yet take a more sophisticated approach towards exemption clauses, one in which Lord Wilberforce's judgment will provide important guidance. In any event, this protective storm may have blown itself out with the advent of Parliamentary intervention.

We should now consider the developing shape of this area of remedy-stipulation. Blanket exemption clauses may be, following *Harbutt's*, quashed before any question about the legitimacy of excluding the right to repudiate can be asked. This technique, as was mentioned, is not completely overt, but it is a very open form of covertness. By contrast, the *Suisse Atlantique* approach towards blanket exemption clauses produces a maze of possibilities, and it too, no less than the proscriptive approach, threatens freedom of contract. This threat takes two forms. First, there is Lord Wilberforce's statement that exemption clauses are not to be given so wide an ambit as "to reduce the contract to a mere declaration of intent".[177] It would be a serious setback to freedom of contract if the courts should mechanically apply the repugnancy formula in cases where the exemption clause does not purport to cover all the contractual obligations.[178] This would not only subordinate contractual intention to a rigid conceptual framework, it would bode ill for another supposed sanctuary of contractual freedom, namely, the freedom to agree either as a matter of law or simply as a matter of honour.

The second way in which freedom of contract is threatened—under the non-proscriptive approach—is more familiar and more important. It concerns once again the presumptions of intention. Unlike the approach taken in *Harbutt's*, the "liberal" approach of *Suisse Atlantique* allows the exemption clause a role in identifying the contemplated contractual performance. This is, however, not quite so liberal as it seems, for the presumptions of intention also participate in this process of identification, and they operate so as to minimize the effectiveness of the exemption clauses.[179] A neat trap

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[177] *Id.* at 432, [1966] 2 All E.R. at 92, [1966] 2 W.L.R. at 987.

[178] *Quaere*: which choice would Lord Wilberforce opt for? Possibly not the repugnancy option, for he might take the view that the exceptions clause here entailed that the act was "not a breach at all". Another *quaere*: what would happen if the obligations left untouched were simply warranties? Would we then run up against the idea that somewhere in the contract there must be a condition?

[179] First, they will lean on the exemption clauses so as to ensure that, on their own terms, they are given the minimum application. Secondly, if the court comes to the exemption clauses with a statement of the contemplated contractual performance, that is, with a statement of the "main purpose" or "four corners" of the contract, then the appropriate "main purpose" and/or "four corners" presumptions will push the exemption clauses out to the fringe of the dispute; see *infra* note 182.

Seen in this light, there is little to choose between *Harbutt's*, which says that the question of breach is determined independently of the exemption clauses, and

is laid here; if the clause is very general, it is unlikely to strike at the obviously important contractual obligations; whereas if it is very specific, it risks being quashed under the repugnancy formula. Even Lord Wilberforce's position is open to question in this respect. In *Suisse Atlantique* he said that if a contract provided for the delivery of X, and instead Y was delivered, [180] then it would not be hard to hold the exemption clauses inapplicable. What did Lord Wilberforce mean when he said that the exemption clauses would be inapplicable to the case of deviation because "the contracting parties could hardly have been supposed to contemplate such a misperformance, or to have provided against it without destroying the whole contractual substratum . . ."? [181] The implication of this statement is that by the time the exemption clauses are examined, the court will already have determined the contemplated contractual performance; after all, if the court is to characterize some conduct as a "mis-performance" it must have some idea of a "performance". In other words the exemption clause is ruled out as providing a shield for "mis-performance" at a time when we are supposedly still in process of determining "performance". Lord Wilberforce's remarks were probably concerned only with exemption clauses that are very general and very defensive in tenor. These clauses do little to identify the contractual obligations, and therefore the courts come to consider them against the background of an already largely formed notion of contemplated contractual performance. The threat to freedom of contract is that this "hypothesis" may too quickly be adopted as an unchallengeable statement of the main purpose of the contract. Once this happens, the presumptions of intention will empty the exemption clause of all significance. [182]

C. *Time Limits*

Time limits placed upon the exercise of a remedy are another kind of

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Suisse Atlantique, which possibly determines the "main purpose" and/or "four corners" independently of the exemption clauses.

[180] In fact, this is Lord Wilberforce's discussion of the "peas and beans" problem in *Suisse Atlantique*, *supra* note 70, at 433, [1966] 2 All E.R. at 92.

[181] *Id.* at 433, [1966] 2 All E.R. at 93.

[182] Here the "main purpose" and "four corners" presumptions are particularly potent. The former rejects provisions which "are inconsistent with what one assumes to be the main purpose of the contract". Glynn v. Margetson & Co., [1893] A.C. 351, at 357, 9 T.L.R. 437 (Lord Halsbury). The latter holds that if you act outside the "four corners" of the contract, then "you cannot rely on the conditions which were only intended to protect you if you carried out the contract in the way in which you had contracted to do it". Gibaud E. Ry. Co., [1921] 2 K.B. 426, at 435 (C.A.) (Scrutton L.J.). So, once the "main purpose" or the "four corners" are identified, the presumptions start eating into the exemption clauses. The critical issue, of course, is how these two features are identified; in particular, what weight is given to the exemption clauses? Our reading of Lord Wilberforce's judgment is that he would take full account of specific exemption clauses, but that general exemption clauses would have to displace a working assumption of the contractual intention. This working assumption of contractual intention would be ascertained "not just grammatically from words used, but by consideration of those words in relation to commercial purpose (or other purpose according to the type of contract) . . .". *Suisse Atlantique*, *supra* note 70, at 434, [1966] 2 All E.R. at 94.

remedy restriction. We are not concerned with restrictions imposed by law, such as statutory limitation periods or the loss through delay of the right to repudiate, but with restrictions set by the parties themselves which limit the time that otherwise would be available for the exercise of the remedy (which may be either damages or repudiation).[183] In the relatively recent case of *Garnham, Harris and Elton, Ltd. v. Alfred W. Ellis (Transport) Ltd.*,[184] the plaintiffs employed the defendant carriers to collect a load of copper wire from two addresses in London and to carry the load to Glasgow. The defendants, without informing the plaintiffs, sub-contracted the work to a man who was unknown to them and who gave the name of Wallace Transport. In fact there was no such firm as Wallace Transport; the defendants had entrusted the work to the stranger without checking up on the firm, without verifying that the stranger's vehicle had a carrier's licence, without taking the number plate of the vehicle, and without seeing the man's driving licence and insurance documents. The copper wire was collected but it was never delivered. The plaintiffs sued the defendants for the return of the copper wire or its value, or, alternatively, for "damages for fundamental breach of contract".[185] The defendants replied by setting up one of the Road Haulage Association's conditions of carriage, the plaintiffs conceding that these conditions were deemed to be included in the contract between the parties. The condition in question stated:

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[183] As we have indicated in the text, our discussion is concerned with time limits which *shorten* the time otherwise available for the exercise of the remedy. What is "the time otherwise available"? That is, what are the usual limitation periods? With respect to the common law remedies of damages and repudiation, the general rule is that the remedy must be exercised within six years of the breach: *see* the Limitation Act 1939, 2 & 3 Geo. 6, c. 21, s. 2(1). To maintain symmetry, one must also ask: what would be the position in the unlikely event that the parties purported to *extend* the statutory limitation period? The arguments against such a stipulation are: (1) The courts find good sense in the limitation period: *see* C. PRESTON & NEWSOM, LIMITATION OF ACTIONS (3rd ed. Newsom and Abel-Smith 1953). (2) Although the 1939 Act, Part II, provides for certain situations in which the time can be extended, agreement by contracting parties is not one of the situations so specified. (3) A longer limitation period can be secured by contracting under seal: s. 2(3). Despite this formidable array of arguments, we suggest that the stipulation would be enforced. The critical point is this: the courts appear to recognize the possibility of the limitation period's being waived (*see* PRESTON & NEWSOM, at 32-33); *a fortiori*, would they not recognize an express provision in the original contract purporting to extend the time limit? Although both damages and repudiation are subject to the statutory limitation period, repudiation—unlike damages—faces a more immediate deadline. In the case of the sale of goods, the deadline is "acceptance" of the goods; in other cases, the deadline is excessive delay which amounts to evidence of affirmation: *see* Allen v. Robles, [1969] 3 All E.R. 154, at 157, [1969] 1 W.L.R. 1193, at 1196 (C.A.). Can these deadlines be put back? We suggest that they can. Although the Sale of Goods Act 1893, 56 & 57 Vict., c. 71, s. 11(1)(c), provides that the buyer's right to repudiate is lost once the goods have been "accepted", the section ends with the qualification "unless there be a term of the contract, express or implied, to [contrary] effect". Is this not directly on point? Similarly, in other cases, if lapse of time simply constitutes a pointer towards affirmation, is there any good reason why the parties should not be permitted to eliminate this inference?

[184] [1967] 2 All E.R. 940, [1967] 1 W.L.R. 940 (Q.B.).

[185] *Id.* at 941, [1967] 1 W.L.R. at 941.

> The contractor shall in no circumstances whatsoever be liable:—(a). For non-delivery (however arising) of a consignment or any part thereof unless he is advised of the non-delivery at the forwarding or delivery depot within twenty-eight days and receives the detailed claim for the value of the goods within forty-two days after receipt of the consignment by the contractor to whom the same was handed by the consignor . . . .[186]

The plaintiffs advised the defendants of the non-delivery, but not until thirty days after the copper wire had been handed over to the stranger. Thus the plaintiffs were two days late. Was that delay fatal to their claim?

Mr. Justice Paull observed at once that the defence was "clearly a good one unless the plaintiffs [could] establish that there [had been] a conversion of the goods by the defendants or what is called a fundamental breach of the contract between the parties".[187] These alternatives were then telescoped, fundamental breach being said to arise only if there was conversion, and conversion only if the defendants had stepped wholly outside their authority in authorizing the stranger, as they did, to collect the copper wire. Paull J. had little difficulty in holding that this was a case of conversion. The plaintiffs had not expressly agreed to let the defendants sub-contract, nor would they have done so in the case of a load such as this, which to the knowledge of both parties was the "gold of thieves". The defendants must have realized that had they told the plaintiffs of the circumstances in which they proposed to sub-contract the load, the plaintiffs would have been horrified. Thus it was held that, there being no right to sub-contract and the manner of the sub-contracting amounting to "a deliberate interference, without justification, in a manner inconsistent with the rights of the plaintiffs",[188] this was a conversion. Judgment was entered for the plaintiffs.

This account of the case has failed to treat an important step in the judgment. Why should conversion or fundamental breach render the time limit ineffective? Is there a general prohibition against time limits in such cases, or was that result reached only from the construction of this particular contract? Paull J. said that he did not regard mere non-delivery as amounting to a conversion, but since the condition was limited to non-delivery, claims for conversion would be unaffected by the time limit. Conversion would be subject to a time limit only if that were expressly stipulated, something Paull J. considered to be "most unlikely".[189] Although the plaintiffs were in a sense complaining about non-delivery, the true burden of their case was the manner in which the defendants had sub-contracted the work. The issue of the effectiveness of time limits was sidestepped by the familiar judicial strategy of strictly interpreting exemption clauses. However, *Garnham* was concerned with an apparently narrow time limit and, moreover, a time limit that was not unreasonably severe.

In determining the effectiveness of a time limit, three questions must

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[186] Quoted *id.* at 942, [1967] 1 W.L.R. at 945 (Paull J.).
[187] *Id.* at 943, [1967] 1 W.L.R. at 947-48.
[188] *Id.* at 944, [1967] 1 W.L.R. at 947-48.
[189] *Id.* at 943, [1967] 1 W.L.R. at 946.

be asked: (1) Does the time limit run to all or to only some of the possible breaches of contract? (2) Does the time limit strike at repudiation, or damages, or both? (3) Is the time limit of reasonable length? A time limit which covers every breach of contract may be immediately eliminated from consideration. [190]

Let us consider a time limit of reasonable length covering both damages and the right to repudiate. In *Buchanan v. Parnshaw*, [191] a horse sold at an auction was warranted to be six years old and sound. The auction conditions provided that unless returned within two days, the horse was deemed to be sound. Ten days after the sale the plaintiff purchaser, having discovered that the horse was twelve years old, sought to return the animal. The court held that the plaintiff was not time-barred, since the time limit did not apply to complaints relating to matters other than the soundness of the horse. The defendant invited the court to apply the spirit rather than the letter of the time limit, but the court held that both the letter and the spirit of the auction conditions were against the defendant. The court felt that, while a time limit on claims relating to the fitness of the horse was a wise precaution against mischievious claims, there was nothing to be said for such a time limit on claims relating to the age of the horse.

Today's courts might follow this line of reasoning and hold that a time limit on claims relating to the roadworthiness of a vehicle should be enforced as being a safeguard against unjustified complaints about patent defects or as prudently distributing the risk of latent defects. In other words, assuming both a time limit of reasonable length and a situation in which such a time limit is in itself reasonable, the courts should enforce that time limit. In such a situation the courts might even be willing to give the benefit of the doubt to a seemingly short time limit. The view that a time limit which is of reasonable length will be enforced (provided that it covers the subject matter of the claim) is found in both *Atlantic Shipping & Trading Co. v. Louis Dreyfus & Co.* [192] and *Smeaton Hanscomb & Co. v. Sassoon I. Setty Son & Co. (No. 1).* [193] In the former case, the House of Lords held that on its true construction a particular time limit did not apply to claims as to unseaworthiness but that there was nothing intrinsically offensive about a time limit, even though it was in the form of an exemption clause. [194] As Lord

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[190] We say this because the courts, *ex hypothesi* having lost the power to control by construction, might well turn to proscriptive tactics. If the time limit was seen as being of an unreasonable length, this would be an additional spur to proscription, and, given that time limits are treated as exceptions clauses, *Harbutt's* would be at hand ready to gobble up more prey. Should the time limit be seen as being of a reasonable length, the arguments for enforcement would be stronger, but we fear that the courts would at the very least veto enforcement in cases of serious breach, and at worst that they would be stung by the breadth of the time limit into retaliatory proscription regardless of the case at hand.

[191] 2 T.R. 745, 100 E.R. 401 (K.B. 1788).

[192] [1922] 2 A.C. 250, [1922] All E.R. Rep. 559.

[193] [1953] 2 All E.R. 1471, [1953] 1 W.L.R. 1468 (Q.B.).

[194] The status of the time limits in *Smeaton Hanscomb* and *Atlantic Shipping* is not entirely clear. The query about these cases is this: did the time limits run to

Sumner said, the parties were simply providing their own "statute of limitations". [195] In the *Smeaton Hanscomb* case, a fourteen-day time limit was enforced. Devlin J. treated it as an exemption clause and therefore subject to strict construction; thus, if "instead of delivering mahogany logs the sellers delivered pine logs and the buyers inadvertently omitted to have them examined for fourteen days, it might well be that the sellers could not rely on the time clause". [196] In other words, if there was a gross deviation from the main purpose of the contract, the time limit would be inapplicable. On the facts Devlin J. held that there was no such deviation. Coming at a time when the courts were about to become highly proscriptive of exemption clauses, the decision is remarkable for its concentration on construction.

Where the time limit touches only a right of repudiation, the courts should enforce it, though submitting it to the usual strict interpretation. Such a stipulation would be less severe than those touching "all claims", and it is in fact already statutorily implied under our existing sale of goods legislation. [197] As to a time limit touching only an action for damages, it is again difficult to see why, construction apart, the courts should not enforce such a restriction. Reasonableness will always be a consideration of course; presumably the courts would look to the practicability of a claim's being brought within the stipulated time, and it would not be altogether surprising if consumers were allowed to operate at a rather more leisurely pace than businessmen.

In *Atlantic Shipping* Lord Sumner said: "It does not make any difference that the time allowed is considerable or the formality to be complied with not unreasonable . . . ." [198] This suggests that the distinction between time limits of a reasonable and of an unreasonable length may be unnecessary. However, it is submitted that Lord Summer's dictum is to be understood not as a general proposition about the relevance of the length of a time limit, but as a refutation of the argument that the construction of the stipula-

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repudiation as well as to damages? There is no doubt that they covered damages, and we suggest that repudiation also was covered. In *Smeaton Hanscomb*, the buyers claimed *inter alia* that they were entitled to reject the goods; the sellers replied by setting up the time limit. In *Atlantic Shipping*, the charterers do not appear to have claimed back the freight charges which they had paid in full; they simply claimed compensation for the alleged damage to the cargo. Probably the breach would not have justified withholding freight anyway (*see* Lord Dunedin, *supra* note 192, at 257, [1922] All E.R. Rep. at 562), but, this apart, our tentative view is that the clause setting up the time limit would have been wide enough to embrace a claim for repudiation. If we are wrong in so classifying either case (and we have some reservations about our interpretation of *Atlantic Shipping*), then either one or both will serve to support our views on a restriction which touches only a claim for damages.

[195] *Supra* note 192, at 261, [1922] All E.R. Rep. at 564.

[196] *Supra* note 193, at 1473, [1953] 1 W.L.R. at 1470.

[197] It is similar in the sense that under s. 11(1)(c) of the Sale of Goods Act 1893, 56 & 57 Vict., c. 71, where the contract is not severable, the buyer loses the right to repudiate once he has accepted the goods. It is not identical, because we are postulating that the time limit set is reasonable, but is nonetheless *shorter* than would otherwise be available. See also the Misrepresentation Act 1967, c. 7, s. 4.

[198] *Supra* note 192, at 361, [1922] All E.R. Rep. at 564.

tion in that case allowed it to run to claims as to seaworthiness. In short, Lord Sumner was saying no more than that the time limit could not avail the shipowners, notwithstanding that it set the reasonable period of three months. It is submitted that the courts would be astute enough to hold that a clause imposing an unreasonable time limit was not incorporated, or, failing this, that on its true construction it was merely hortatory, or did not apply to the breach in question, or was subject to the doctrine of fundamental breach. This last possibility might follow from *Harbutt's* or, rather, might spring from the idea that at a certain stage a time limit in form becomes a genuine "substantive" exemption clause; the clause could then be treated as being repugnant to the notion of a contractual promise.

This short survey of time limits reveals a fairly clear pattern. Where the time limit is of a reasonable length, then the courts will enforce it subject only to a strict construction of the provision—the strategy of "tortuous constructions". However, where the time limit is unreasonably short, the courts will generally do their utmost to find some ground for refusing to enforce the provision. [199]

D. *Summary*

The assertions, "You are presumed not to have intended this" and "You cannot do this" are the two central strategies available to the courts to control undesirable manifestations of contractual freedom. In the area of restrictive "remedy-stipulations", the former approach has manifested itself in the strategy of "tortuous constructions" with its concomitant presumptions of intention; while the latter approach has manifested itself in the proscriptive doctrine of fundamental breach. The former strategy infringes freedom of contract, because, in its stronger form, it makes no attempt to discover the real intention of the contracting parties, while, in its weaker form, it rides along with the perceived real intention only so long as reasonable results are produced, or the evil of an unreasonable result is outweighed by the evil of an obviously "rigged" decision. The latter technique represents a blunt restriction on freedom of contract; it shrinks the area of contractual freedom and is analogous to the refusal to enforce penalty clauses.

In the strategy of "tortuous constructions" it is obvious that the references to the parties' intention are perfunctory—deferential rather than influential. The proscriptive doctrine is not entirely overt, but it is covertness at its most open. It is located in a conceptual "No Man's Land", neither saying "You did not intend this" nor *explicitly* saying "You cannot do this".

The attack against restrictive remedy stipulations affecting claims to damages and/or repudiation, whether by denial of liability or by time limits, has spanned bailment, shipping, sale of goods, hire-purchase, and work and materials situations. Identifying the rationale of the campaign is inestimably difficult, but several clues have been suggested.

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[199] *Sed quaere* the case of a time limit on repudiation only.

IV. CONCLUSION

A. *Freedom of Contract*

With freedom as our starting point and "remedy-stipulation" as our model, we began with the simple proposition that the contracting parties should be free to write their own remedies. This principle, we suggested, could be limited on the grounds of social harm or paternalism. How did freedom of contract fare? The answer is—very badly. Penalty clauses are a clear and openly admitted exception to contractual freedom; so are wide ranging exemption clauses [200] and lesser exemption clauses in the event of a serious breach. [201] Although what is left is supposedly a free zone where freedom of contract instructs the courts to effectuate the intentions of the parties, even here the evidence points to the courts exercising an ad hoc power of veto. [202] So far as restrictive remedy-stipulations are concerned, the court's use of the strategy of "tortuous constructions" means that at worst real intention simply is not considered, while at best it is considered, but rejected if unacceptable. [203] Similarly, in the remedy extension situations, we find in *Schuler v. Wickman* further evidence of the strength of the presumption that the contracting parties intend their contract to bear results which the courts consider to be reasonable. Thus we see severe incursions into the initial area of freedom, and even though we cannot be sure exactly where freedom begins and proscription ends, in the arguably free zones the critical factor appears to be reasonable results rather than real intention. [204] We are forced to the conclusion that, within the field of remedy-stipulation, the doctrine of freedom of contract enjoys a negligible *substantive* influence; although the doctrine may still influence the style in which judgments are written, it exercises little control over their substance. What then of the explanatory powers of freedom of contract?

It is our view that freedom of contract fails as a description of the reality of the courts' handling of remedy-stipulations. It follows that the doctrine is devoid of any explanatory power; in addition, the doctrine may be dangerous in perpetuating myths such as that the parties always possess a common intention. It is suggested that we now start with the proposition that there is *no* genuine freedom to stipulate contractual remedies in such a way as to deviate from the remedies otherwise available.

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[200] Into this class fall the wide blanket exemption clause and probably the narrow blanket exemption clause which leaves the contract devoid of any conditions.

[201] *E.g.*, limitation clauses, as in *Harbutt's*. *But see* Lord Wilberforce's approach in *Suisse Atlantique*.

[202] *I.e.*, by employing the strategy of "tortuous constructions".

[203] Although notice here Type D (third option). See *supra* note 87.

[204] Here we are thinking primarily of the 'hard" case, but of course in the difficult case the notice of reasonable results can be equally important. In the latter situation, however, the idea of reasonable results is not a criterion to set off against real intention but a criterion to be brought into operation where real intention provides no answers. See *supra* note 87.

B. *Paternalism*

Remedy-stipulation has provided us with its fair share of "hard" cases; the fear in such cases is that the court leans too far towards the merits of the particular case in question and away from rules of general application. Unprincipled paternalism always stands as a threat not only to juristic standards but also to the law's participation in the settlement of commercial disputes. However, though remedy-stipulation has seen considerable judicial interference, for the most part it is not unprincipled. In the case of penalty clauses the extent of the interference is absolutely explicit; in the case of restrictive remedy-stipulations, while the principle behind judicial interference is less than explicit, that interference is nonetheless predictable. However, if we were looking for suspect decisions, we might consider *Schuler v. Wickman*, a case where the majority *were* swayed by the merits of the case at hand, and *Harbutt's*, an unduly severe attack on exemption clauses.

In order to fully grasp the implications of unprincipled paternalism, imagine first that we are asked to advise businessmen as to whether or not they can upgrade a warranty to a condition. We would say that the attempt in *Schuler v. Wickman* was unsuccessful, but the House of Lords indicated that there was no reason why such upgrading should not be permitted, if it were the clearly expressed intention of the parties. We would then conclude by suggesting a form of words which we thought—but could not guarantee—would fit the bill. The only beneficiaries of this exercise are likely to be the lawyers. Imagine also that two businessmen ask us about the effect of *Harbutt's*. We would say that two parties negotiated a contract under which various risks were foreseen and apportioned; no doubt it was understood that the parties would insure against their own risks. When one of the risks materialized one of the parties tried to persuade the court that the agreed apportionment should not stand; the court succumbed to this persuasion, leaving Wayne and their various insurers to sort things out.[205] Because the businessman does not see the "hard" case from the inside, he sees only inconsistency, an absence of clear direction, and decisions that make no sense.[206] Thus the danger inherent in unprincipled paternalism is a total lack of confidence in the courts.

Though Lord Radcliffe warned that the law does not adjust contracts simply because the agreement "shows a rough edge to one side or the other",[207] paternalism of one sort or another—individual or class, principled or unprincipled—plays its part in decision-making. Any sort of paternalism

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[205] For Part Two of the *Harbutt's* story, see Wayne Tank & Pump Co. v. Employers Liab. Assurance Corp., [1974] Q.B. 57, [1973] 3 All E.R. 825.

[206] This lack of confidence is, of course, a very different matter from a simple failure to see eye to eye with judicial policy. For example, if a businessman were to say about *Hollier* (*supra* note 98), "It makes no sense", he could mean one of two things: (1) that he disagrees with the policy of consumer protection; or (2) that he cannot identify the guiding principle behind the decision.

[207] Bridge v. Campbell Discount Co., [1962] A.C. 600, at 626, [1962] 1 All E.R. 385, at 397.

cuts into freedom of contract, but at least principled paternalism is an identifiable opponent, and no threat to the public faith in our judicial process.

C. *Judicial Technique*

We have observed on a number of occasions that "remedy-stipulation" generates both difficult and "hard" cases. We considered the problem of difficult cases at some length in section III, suggesting that where the real intention of the parties is not clear—as in the case of non-existent or unilateral intention—the courts face a limited number of alternatives: they may settle for a reasonable result, rely upon the common standards of the parties, or doggedly plug on after the intention. The traditional pressure to base the judgment upon the parties' intention breeds an unhealthy covertness in judicial technique. Freedom of contract is the source of our trouble here; if it were not for that doctrine, judicial techniques would not look so inadequate. It is suggested that the goal of finding real common intention is sometimes unattainable and consequently produces deleterious effects within the judicial process. Instead, we should pursue a goal that is both attainable and acceptable. Thus, within the area of remedy-stipulation, we should drop as our goal the ascertainment of real common intention; we might replace it with, for instance, a goal of finding common standards, which would make for a more overt approach to the problem. [208] Or we might be altogether more radical. We might suggest that trying to make the "difficult" case that much easier is a poor sort of reform which clings to the traditional idea of respecting the bargain struck by the parties, and therefore gives rise in turn to many "hard" cases. We might set our goal as reasonable results, a goal which has both practicability and justice on its side. Practice may already have taken us to this point; theory must soon follow.

Then there are the "hard" cases, also originating in the principle of freedom of contract but arising only when the parties' intention is clear. We can hardly deny the effectiveness of judicial techniques for sabotaging contractual intention in the name of just results, but where this occurs in the course of an ostensible search for contractual intention, it is undesirable. As in the cases of frustration and misrepresentation, legislation has been introduced to put this judicial quest for justice on a solid and legitimate basis; [209] one hopes that this will herald a new era of judicial candour.

D. *Judicial Policy*

Our conclusion is that the prevailing judicial attitude towards remedy-stipulation is one of control rather than freedom. Legislative interest in

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[208] If common standards elude us, we might then turn to the goal of reasonable results: *see* Gillespie Bros. v. Roy Bowles Transport Ltd., *supra* note 87, at 421, [1973] 1 All E.R. at 205 (Buckley L.J.).

[209] *See* the Law Reform (Frustrated Contracts) Act 1943, 6 & 7 Geo. 6, c. 40; the Misrepresentation Act 1967, c. 7; and now the Supply of Goods (Implied Terms) Act 1973, c. 13.

exemption clauses points to a similar policy on the part of Parliament. Anyone who treats the policy question as being one exclusively of *legal* merit or demerit is unlikely to reach a sound judgment; for the social and economic ramifications cannot be ignored. To take a standard example, what will be the reaction of the laundry proprietor who learns that the courts will be unlikely to uphold his attempt to limit his liability for loss or damage to articles accepted for cleaning? Will he adjust his prices, accept a narrower range of articles, or plough his capital into a less hazardous enterprise?[210] However, if we wish to make an exclusively legal evaluation of the policy of control, we must consider the general philosophy of the law of contract. It is doubtful whether an area subject to control could co-exist with an area where the prevailing philosophy is freedom, particularly if the demarcation lines between the respective areas are not apparent. We might also question the implication that contractual activities are truly discrete: if remedy-stipulation is to be controlled, will this not affect the supposed freedom to choose one's terms? Clearly it will, for it will no longer be possible to count on a stipulation that a risk is assumed only partially; the courts might hold that it is assumed to the full. The policy of control narrows down the range of options open to the parties; if they assume an obligation, then they will risk being held fully responsible for breach of the obligation. Certain dramatic consequences might easily ensue. It is one thing to say that *if the parties assume a certain obligation*, they cannot avoid it by qualifying remedies for breach; but it is quite another matter to say that if the parties enter into a certain type of contract, *they must assume certain obligations*. In practice the transition is not difficult. Once the possibility of qualifying the remedies is eliminated from the equation, all that stands in the way of making the transition is the possibility that the undertaking has not been assumed in the first place. This is easily rectified by importing certain implied terms into the contract. As we have seen, the courts face the choice either of construing such express provisions as remedy-stipulations or of using them in defining the contractual obligations. Does the stipulation indicate that the teeth are being taken out of a promise or that a promise was never made? This seems to us to be one of the most interesting and certainly one of the most significant choices facing the courts today.[211] To be blunt, the courts have sovereignty over remedies; the question now is whether they also want sovereignty over the substantive contractual obligations.

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[210] On the insurance problems here, see LAW COMMISSION, WORKING PAPER 39, *supra* note 69, at 23-24, (1971).

[211] But legislation can blunt both the interest and the significance: *see* the Supply of Goods (Implied Terms) Act 1973, c. 13, especially the new s. 55(9) (contained in s. 4); and the Draft Exemption Clauses (England and Wales) Bill, *supra* note 147, especially clauses 12(1) and 12(2).