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Towards a Consistent Approach in Breach and Termination of Contract at Common Law:
RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd

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Introduction

The question, when at common law does a breach of contract enable the innocent party the right to treat the contract as terminated, receives a mixed reply depending on when and to whom the question is asked. Asked in the days of old, the answer would inevitably have been phrased in unfamiliar terminology which might elicit a look of bewilderment on the face of the modern law student. However, the present article is more concerned with the contemporary response to the question in the Singapore context. Indeed, asked in present times, the answer will depend on to whom the question is posed. There will be those who will reply that the answer depends on whether the specific contractual term breached is a ‘condition’ or a ‘warranty’, with the breach of the former allowing a right of termination to accrue on the part of the innocent party (hereafter referred to as the ‘condition-warranty approach’). Then there will be those who will point to the seminal English Court of Appeal decision in Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd as requiring an analysis of the effect of the breach of contract (hereafter referred to as the ‘Hongkong Fir approach’). Another view, described as being ‘equally

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2 For an excellent overview of the terminology used in times of old, see, in particular, J W Carter and C Hodgekiss, ‘Conditions and Warranties: Forebears and Descendants’ (1977) 8 Syd LR 31. A very brief overview of the terminology used may be found in G H Treitel, ‘Some Problems of Breach of Contract’ (1967) 30 MLR 139, where the learned author observes thus: ‘The conceptual apparatus which has been built up for these purposes is formidable and confusing. Thus it is said that the effects of a breach depend (at least sometimes) on whether it is “fundamental” or “goes to the root of the contract”; on whether it “substantially” deprives a party of what he or she contracted for; on whether promises are “independent” or “concurrent”; on whether the performance of one party’s promise is a “conditional precedent” to the liability of the other; or on whether the breach is one of “condition” or only one of “warranty”.

sustainable’, is that Hongkong Fir introduced a third type of term, viz, the ‘intermediate’ or ‘innominate’ term, which in actuality reduces to a consideration of the effect of the breach although phrased in terms of the condition-warranty approach. It would be fair to conclude that there is no one illuminatingly clear answer to the question. Indeed, despite the preponderance of these possible answers, little has been said about the relationship between the approaches canvassed, which have hitherto been regarded as providing for distinct approaches towards the termination upon breach question. The lack of integration, explanation and rationalisation has contributed to the perception that this is a ‘confused and confusing area of contract law’.

In a judgment delivered by Andrew Phang Boon Leong JA, the Singapore Court of Appeal has in RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd provided its own answer to the question mentioned above: rather than view the condition-warranty approach and the Hongkong Fir approach as being wholly discrete, they should now be combined in what is an integrated approach, designed to achieve certainty and, above all, justice and fairness (hereafter referred to as the ‘integrated approach’). The court’s decision contains so much perceptive analysis that it cannot be allowed to slip us by without comment, although the present piece will only focus on the issue of breach, particularly whether the condition-warranty approach and the Hongkong Fir approach can in fact be satisfactorily integrated as was done in RDC Concrete. It will be suggested that the court’s integrated approach is to be welcomed as it heralds a consistent approach in the breach and termination of contracts at common law. Such an approach recognises that there is a place for both the condition-warranty approach and the Hongkong Fir approach in the analytical framework towards deciding when an innocent party can terminate the contract for breach at common law. In this respect, then, the approach

6 See below, n 7 at [88].
7 Hereafter referred to as ‘the court’ unless otherwise specified.
8 [2007] SGCA 39, later reported as [2007] 4 SLR 413 and also as (2008) 115 Con LR 154. See also J W Carter, ‘Intermediate Terms Arrive in Australia and Singapore’ (2008) 24 JCL 226 at 243. The other members of the court were Chan Sek Keong CJ and V K Rajah JA. Reference may also be made to the later decision of the same court (Andrew Phang JA likewise delivering judgment) in Man Financial (S) Pte Ltd v Wong Bark Chuan David [2008] 1 SLR 663; [2007] SGCA 53 which explained the relevant factors in ascertaining whether or not a given contractual term is a condition (at [159]–[174]).
9 [2007] 4 SLR 413 at [109].
10 To borrow the words used by Professor Andrew Phang (writing before his appointment to the Singapore Bench) in ‘Contract Formation and Mistake in Cyberspace’ (2005) 21 JCL 197. Coincidentally, Professor Phang was then commenting on a decision of V K Rajah JC (as he then was), viz, Chwee Kin Keong v Digilandmall.com Pte Ltd [2004] SLR 594, now his judicial colleague in the Singapore Court of Appeal who was also one of the judges in RDC Concrete.
taken in *RDC Concrete* would also clear up the confusion evident in the mixed perspectives taken of the relationship between the condition-warranty approach and the *Hongkong Fir* approach. However, as will be seen, it will also be suggested that the conceptual rationale for the integrated approach can perhaps be further elaborated upon so that a truly consistent approach in termination for breach of contract can be taken.

**RDC Concrete: Its Facts and Holdings**

But, first, as is custom for pieces of this nature, a brief citation of the facts in *RDC Concrete*, summarised for present purposes. These were that Sato Kogyo (S) Pte Ltd, a contractor, was engaged by the Singapore Land Transport Authority to construct a public transport train station. In order to complete its work, Sato Kogyo contracted to purchase ready-mixed concrete from *RDC Concrete* Pte Ltd. As it turned out, the Authority instructed Sato Kogyo to suspend RDC’s supply of concrete due to the concrete being unsatisfactory in quality. Sato Kogyo obtained all its concrete from another supplier during this period of suspension. When the Authority approved Sato Kogyo’s subsequent request to allow RDC to resume its supply of concrete, RDC failed on many occasions to supply concrete ordered by Sato Kogyo. RDC’s failure was due to shortages in the supply of raw material and manufacturing difficulties caused by plant breakdowns. Sato Kogyo therefore turned to alternative suppliers of concrete at a higher cost. Pursuant to cl 8 of its contract with RDC, Sato Kogyo deducted all the cost differentials incurred as a result from the outstanding sums it owed RDC. Sato Kogyo then withheld payment to RDC after RDC refused to pay an administrative charge imposed unilaterally by Sato Kogyo. RDC eventually suspended its supply of concrete and Sato Kogyo terminated the contract pursuant to cl 8 shortly thereafter on two grounds: first, that RDC had continuously fallen short in supply and was unable to supply the concrete (even before RDC’s suspension); and, secondly, that RDC’s supply of concrete was unable to meet the Authority’s requirements.

Sato Kogyo instituted proceedings to claim damages for breach of contract and RDC counterclaimed for amounts due for concrete supplied. Before the trial judge, the parties raised several issues, but the one that concerns us is whether Sato Kogyo was entitled to terminate the contract after RDC’s suspension of supply. On this particular issue, the trial judge held in favour of Sato Kogyo and RDC appealed. The court dismissed RDC’s appeal and upheld the trial judge’s decision on this issue. It resolved this particular issue narrowly: it found that, pursuant to cl 8 of the contract between the parties, Sato Kogyo was expressly entitled to terminate the contract if RDC was unable to provide uninterrupted supply as promised under the contract and to meet the Land Transport Authority’s requirements. Accordingly, as RDC was

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11 Clause 8 of the contract provided as follows: ‘In the event that your supply is unable to meet LTA’s requirements, or you are unable to continue your supply, Sato Kogyo (S) Pte Ltd reserves the right to terminate your contract and retain and use both the retention sum and any outstanding payment due to you to seek for alternative source of supply. In addition, Sato Kogyo (S) Pte Ltd also reserves the right to seek from you any direct cost incurred due to your non-compliance’.
in fact unable to meet the aforementioned obligations, Sato Kogyo was entitled to terminate the contract.\textsuperscript{12} There was therefore no need to consider whether the parties intended for the term in question to be a condition or warranty, since there was express provision to Sato Kogyo’s right to terminate upon the materialisation of certain events. Needless to say, there was also no need to consider the effect of the breach in question.

Nonetheless, in what would strictly be regarded as obiter comments, the court took the trouble to articulate its views on the general legal position with respect to a breach of contract at common law.\textsuperscript{13} It held that there are two broad categories under which, in the event of a breach of contract, an innocent party is entitled to elect to terminate the contract at common law.\textsuperscript{14} The first category comprises one situation only: where a contract clearly and unambiguously provided for the events pursuant to which a party was entitled to terminate the contract, the innocent party might elect to do so.\textsuperscript{15} The facts in \textit{RDC Concrete} clearly fell within this category insofar as Sato Kogyo was expressly conferred the right to terminate upon RDC’s specific failures.\textsuperscript{16} The second category involves situations where the contract did not provide as such.\textsuperscript{17} Here, the innocent party might elect to terminate the contract in three situations: first, where a party, by its words or conduct, clearly conveyed to the other party that it would not perform its contractual obligations at all;\textsuperscript{18} second, where there was a breach of a term which the parties had designated as so important that any breach of it would entitle the innocent party to terminate the contract;\textsuperscript{19} and third, where the breach in question would deprive the innocent party of substantially the whole benefit of the contract.\textsuperscript{20} It would be obvious that the last two mentioned situations correspond to the condition-warranty approach and \textit{Hongkong Fir} approach respectively. The interesting aspect of \textit{RDC Concrete} is that the court observed that the two approaches ought to be integrated.\textsuperscript{21} It is worth reproducing the material paragraphs stating this approach:\textsuperscript{22}

\begin{quote}
In determining whether an innocent party is entitled to terminate a contract upon breach, the foremost consideration is (and must be) \textit{to give effect to the intentions of the contracting parties}. If so, then the condition-warranty approach must take precedence over the \textit{Hongkong Fir} approach because . . . it is premised on the intentions of the contracting parties themselves . . . In such cases, regardless of the consequences of the breach, the innocent party would be entitled to terminate the contract.

If, however, the term breached is a warranty, we are of the view that the innocent party is not thereby prevented from terminating the contract (as it would have been entitled so to do if the condition-warranty approach operated \textit{alone}). Considerations
\end{quote}

\begin{thebibliography}{9}
\bibitem{12} [2007] 4 SLR 413 at [114], [123] and [138].
\bibitem{13} [2007] 4 SLR 413 at [89]–[114].
\bibitem{14} [2007] 4 SLR 413 at [90].
\bibitem{15} [2007] 4 SLR 413 at [91].
\bibitem{16} [2007] 4 SLR 413 at [116].
\bibitem{17} [2007] 4 SLR 413 at [92].
\bibitem{18} [2007] 4 SLR 413 at [93].
\bibitem{19} [2007] 4 SLR 413 at [97]–[98].
\bibitem{20} [2007] 4 SLR 413 at [99].
\bibitem{21} [2007] 4 SLR 413 at [102]–[110].
\bibitem{22} [2007] 4 SLR 413 at [106]–[107].
\end{thebibliography}
of fairness demand, in our view, that the consequences of the breach should also be examined by the court, even if the term breached is only a warranty (as opposed to a condition). There would, of course, be no need for the court to examine the consequences of the breach if the term breached was a condition since, ex hypothesi, the breach of a condition would (as we have just stated) entitle the innocent party to terminate the contract in the first instance. Hence, it is only in a situation where the term breached would otherwise constitute a warranty that the court would, as a question of fairness, go further and examine the consequences of the breach as well. In the result, if the consequences of the breach are such as to deprive the innocent party of substantially the whole benefit that it was intended that the innocent party should obtain from the contract, then the innocent party would be entitled to terminate the contract, notwithstanding that it only constitutes a warranty. If, however, the consequences of the breach are only very trivial, then the innocent party would not be entitled to terminate the contract.

Accordingly, the integrated approach first requires a consideration, in the light of the parties’ intentions, of whether the term in question is a condition or warranty. If it is a condition, the enquiry ends and the innocent party is allowed to treat the contract as at an end. However, if the term is a warranty or if the parties’ intentions are unclear, the integrated approach then proceeds to ask whether the nature of the breach is such as to give rise to the right to terminate. If the consequences of the breach are such as to deprive the innocent party of substantially the whole benefit that it was intended the innocent party should obtain from the contract, then the innocent party would be entitled to terminate the contract, notwithstanding that it only constitutes a warranty. If, however, this were not the case, then the innocent party would not be entitled to terminate the contract. Most interestingly, the court acknowledged that the integrated approach would result in the concept of the warranty being effectively effaced since ‘there would virtually never be a situation in which there would be a term, the breach of which would always result in only trivial consequences’ (emphasis in original).

Towards a Consistent Rationale Behind the Condition-Warranty Approach and the Hongkong Fir Approach

For present purposes, it may be surmised that the major jurisdictions in the Commonwealth view the condition-warranty approach and the Hongkong Fir approach as being sequentially (and separately) applied, as opposed to the integrated approach in RDC Concrete where the two approaches are combined. For such other Commonwealth jurisdictions, there is a clear distinction between the condition-warranty approach and the Hongkong Fir approach inasmuch as the analysis of the former does not shade into the latter. Thus, in the hitherto English leading case of Bunge Corporation v Tradax

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23 [2007] 4 SLR 413 at [108].
24 See generally, Carter, n 8, above.
SA. Lord Wilberforce stated that if the intentions of the parties as shown by the contract so indicated, the courts should hold that a term is a condition, with the consequence that the "gravity of the breach" approach of the *Hongkong Fir* case . . . would be unsuitable. Similarly, Lord Scarman said that he regarded *Hongkong Fir* as being concerned with two questions: first, whether, upon the true construction of a term and the contract of which it is part, it is a condition, warranty or intermediate term. If, however, the term concerned is not a condition, and breach of it might result in varying degrees of consequences, it would be intermediate, to which the question would then be whether the consequences of the breach were so serious so as to enable the innocent party to terminate. Finally, in the leading speech, Lord Roskill undertook an extensive analysis of *Hongkong Fir* before concluding that Diplock LJ did not intend in *Hongkong Fir* to "afford an easy escape route from the normal consequence of rescission to a contract breaker who had broken what was, upon its true construction, clearly a condition of the contract by claiming that he had only broken an innominate term". He then clarified that the *Hongkong Fir* approach applied only to terms which are intermediate. Accordingly, the speeches in *Bunge Corporation* would seem to indicate that the condition-warranty approach would apply in the first instance and only if the term concerned were found not to be a condition or warranty would it be an intermediate term, to which the *Hongkong Fir* approach would apply. These statements clearly contemplate the condition-warranty approach and the *Hongkong Fir* approach as being applied in some kind of sequential process, with the consequence that the two are not regarded as conceptually identical.

However, while the approach is (arguably) clear, the reason behind the approach is not. Why, for instance, should the condition-warranty approach be applied before the *Hongkong Fir* approach? Also, why ought the *Hongkong Fir* approach be applied where the condition-warranty approach fails? Above all, what is the proper conceptual relationship between these two approaches? As seen above, the court in *RDC Concrete* attempted some answers to these questions in adopting the integrated approach. The court stated that the condition-warranty approach is itself a manifestation of fairness between the contracting parties by giving effect to the intentions of the parties, thereby

26 [1981] 1 WLR 711 at 716.
28 [1981] 1 WLR 711 at 725–7. See also 719 (per Lord Lowry).
29 See now also the similar approach taken by the High Court of Australia in *Koompahtoo Local Aboriginal Land Council v Sampire Pty Ltd* [2007] HCA 61; (2007) 82 ALJR 345. Further, Dharmarana and Papametheos in their casenote point out that two lower Australian courts have applied the principles in *Koompahtoo* (124 LQR 373 at 378–9), namely, *Vella v Aysham* [2008] NSWSC 84 and *Corporate Systems Publishing Pty Ltd v Lingard (No 4)* [2008] WASC 21. See also Carter, n 8, above at 236.
30 Cf the New Zealand position embodied in s 7(3)(b) read with ss 7(4)(a) and 7(4)(b) of the (New Zealand) Contractual Remedies Act 1979 which arguably treats the condition-warranty approach and the *Hongkong Fir* approach as being alternatives, each one applicable in place of the other.
31 [2007] 4 SLR 413 at [109].
uniting it with the rationale behind the *Hongkong Fir* approach, which is to achieve a fair result. Fairness is, of course, that ideal that permeates throughout law itself, not only contract law. It is a concept that courts strive towards, and it certainly encompasses many facets and ideas. Insofar as the condition-warranty approach and the *Hongkong Fir* approach are concerned, it is undoubtedly correct that both of these approaches approximate towards fairness, and fairness being the common denominator, would provide the requisite conceptual foundation on which the integrated approach can be built. Yet, this suggestion, as sound as it is universal, fails for being too wide. Fairness stated in such a general sense is too common a denominator on which to bring together two (seemingly) diametrically opposed approaches. It will now be suggested that a consistent rationale behind the condition-warranty approach and the *Hongkong Fir* approach can in fact be grounded in giving effect to the parties’ intentions, as far as is possible, as is in the first instance evident (whether expressly or impliedly) from the interpretation of the contract itself or, if not, then by the imputation of what is regarded as being objectively appropriate in the circumstances provided for.\(^\text{32}\) In this sense, fairness still bounds the analytical framework, but each approach embodies a different conception of the general concept of fairness. It is from this suggestion that a more complete commentary on the integrated approach in *RDC Concrete* can be undertaken.

**Rationale Behind Both Approaches Reducible to the Parties’ Intentions**

(i) **Condition-warranty approach**

Turning first to the condition-warranty approach, it is clear that, generally speaking and apart from the technical meanings of ‘condition’ or ‘warranty’, courts have always viewed the parties’ intentions as the foremost consideration. It is, in essence, a problem of contractual interpretation rather than a technical pigeonholing into a ‘condition’ or ‘warranty’. As the leading work on breach puts it, whether a contractual term is a condition or warranty depends on the construction of the contract.\(^\text{33}\) Parties can intend almost anything (subject to considerations of illegality and public policy) in contracts. They can expressly or impliedly stipulate a term to have the effect of a warranty (as that is commonly understood to be the case under the traditional condition-warranty approach) even if its breach results in serious consequences. More to the point, and this is a preliminary observation on the

\(^{32}\) See also generally Carter, n 8, above.

\(^{33}\) J W Carter, *Breach of Contract*, 2nd ed, The Law Book Co Ltd, Sydney, 1991, p 72. As is well known, Lord Hoffmann in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 laid down the applicable principles for the contextual approach towards the interpretation of contracts. However, at the same time, there remain certain interpretative canons which still operate, but perhaps only after the attempts to objectively ascertain the parties’ intentions in light of the context have been exhausted. See also the recent Singapore Court of Appeal decision of *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] SGCA 27. Although see Lord Devlin’s comments in ‘The Treatment of Breach of Contract’ [1966] *CLJ* 192 at 196 where he alludes to the difficulty of ascertaining the nature of terms.
court’s opinion on the end of the concept of the warranty in *RDC Concrete*,\(^\text{34}\) the parties can equally intend that a term have the effect of a warranty regardless of the consequences of breach. Thus in *Bradford v Williams*,\(^\text{35}\) Martin B stated, in a passage cited with approval by Sellers LJ in *Hongkong Fir*,\(^\text{36}\) as follows:\(^\text{37}\)

> Contracts are so various in their terms that it is really impossible to argue from the letter of one to the letter of another. All we can do is to apply the spirit of the law to the facts of each particular case. Now I think the words ‘conditions precedent’ unfortunate. The real question, apart from all technical expressions, is: what in each instance is the substance of the contract.

In another famous passage by Bowen LJ in *Bentsen v Taylor, Sons & Co*,\(^\text{38}\) the same point was made:\(^\text{39}\)

> There is no way of deciding that question except by looking at the contract in the light of the surrounding circumstances, and then making up one’s minds whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability.

Viewed in this light, the condition-warranty approach is predicated upon finding out what the parties intended to accomplish through the contract.\(^\text{40}\) The way this is done is through a construction of the contract, and the parties’ intentions can be deciphered either expressly or impliedly.\(^\text{41}\) The specific conception of fairness given effect to here is respect for the parties’ autonomy and the bargain which they have (it is to be presumed) jointly reached. Fairness demands that this bargain be given effect to, no matter its content (unless, broadly speaking, it is illegal or against public policy), and no matter its consequences. It is on this premise that the starting point, it is submitted,

\(^\text{34}\) See above, n 5.

\(^\text{35}\) (1872) LR 7 Ex 259.


\(^\text{37}\) (1872) LR 7 Ex 259 at 261.

\(^\text{38}\) [1893] 2 QB 274.

\(^\text{39}\) [1893] 2 QB 274 at 281.

\(^\text{40}\) Other examples are too numerous to cite but would include also the Court of Common Pleas decision of *Glasbome v Hays* (1841) 2 M & G 257. In that case, it was stated (at 266) as follows: ‘Whether a particular clause in a charter-party shall be held to be a condition, upon the non-performance of which by the other party, the other is at liberty to abandon the contract, and consider it at an end; or whether it amounts to an agreement only, the breach whereof is to be recompensated by an action for damages, must depend upon the intention of the parties to be collected, in each particular case, from the terms of the agreement itself, and from the subject-matter to which it relates . . . ’.

\(^\text{41}\) There was some initial concern that Diplock LJ’s dicta in *Hongkong Fir* to the effect that ‘. . . the legal consequences of a breach of such an undertaking, unless provided for expressly in the contract, depend upon the nature of the event to which the breach gives rise’ ([1962] 2 QB 26 at 70), might have limited the condition-warranty approach to instances in which the parties expressly stipulated the term as such. However, in *Bunge Corporation*, Lord Roskill made it clear that there was no need for such a requirement ([1981] 1 WLR 711 at 726) and Lord Diplock himself in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 said that parties may by ‘express words or by implication of law’ stipulate that a breach of a particular term should entitle termination regardless of the nature of the breach (at 849).
ought to be the parties’ intentions as given effect to by the condition-warranty approach. Notwithstanding this theoretical ideal, however, in an imperfect world, it is not always true that the parties’ intentions are ascertainable. First, the parties might not have thought of whether a term is to have the effect of a condition or warranty. Second, even when they have done so, that expression of intention might not be evident from either the text or context of the contract, and it leaves the court with the impossible task of resolving that whether expressly or impliedly. Even in these difficulties, the courts are still tasked with resolving disputes brought before it, and it is from this perspective that the Hongkong Fir approach achieves relevance for the resolution of such disputes.42

(ii) Hongkong Fir approach

Turning now to the Hongkong Fir approach, it is likewise suggested that the Hongkong Fir approach is premised on the parties’ intentions, except that the difference here is that the emphasis is on the imputed (and reasonable) intentions of the parties, as opposed to their agreed intentions. The Hongkong Fir approach can be grounded on the court’s perception of what the parties’ intentions ought to be, taking into account considerations of reasonableness in the circumstances and the context of the contract. Within this rationale there can be flexibility, but such flexibility is encapsulated by the larger premise that rests upon the imputed intentions of the parties. As will be elaborated upon, this may be contrasted with the condition-warranty approach, which is concerned with the ascertainment of the parties’ agreed intentions. Some support for this distinction can be found in the decided cases. First of all, in Bunge Corporation, Lord Scarman said:43

... I read the Hongkong Fir case as being concerned as much with the construction of the contract as with the consequences and effect of breach. The first question is always, therefore, whether, upon the true construction of a stipulation and the contract of which it is part, it is a condition, an innominate term, or only a warranty. If the stipulation is one, which upon the true construction of the contract the parties have not made a condition, and breach of which may be attended by trivial, minor or very grave consequences, it is innominate, and the court (or an arbitrator) will, in the event of dispute, have the task of deciding whether the breach that has arisen is such as the parties would have said, had they been asked at the time they made their contract: ‘it goes without saying that, if that happens, the contract is at an ends.

A key part of the passage is at its end, where a familiar expression can be found, viz, ‘it goes without saying’. Indeed, this approximates to the language of the officious bystander in the test for implied terms,44 which, on one level of analysis at least, is a manifestation of the imputation of intention.45 Yet

42 Cf Carter, n 8, above at 246 where the learned author puts this another way by saying that there are broadly speaking only three possible intended outcomes in relation to promissory terms. In this sense then, the parties’ intention would always be ascertainable.
44 Shirlaw v Southern Foundries (1926) Limited [1939] 2 KB 206 at 227 per MacKinnon LJ.
45 However, the analogy with implied terms might not be complete, since where implied terms are concerned, the court adopts the parties’ agreed intentions as evinced from the contract. Under terms implied in fact, the underlying rationale is still to approximate to the parties’ intentions as agreed but not explicitly spelt out. It is still, in the final analysis, premised on
another instance of support can be found similarly in Lord Diplock’s speech in *Photo Production Ltd v Securicor Transport Ltd*, where he stated as such:

The exceptions are: (1) Where the event resulting from the failure by one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract, the party not in default may elect to put an end to all primary obligations of both parties remaining unperformed. (If the expression ‘fundamental breach’ is to be retained, it should, in the interests of clarity, be confined to this exception.) (2) Where the contracting parties have agreed, whether by express words or by implication of law, that any failure by one party to perform a particular primary obligation (‘condition’ in the nomenclature of the Sale of Goods Act 1893), irrespective of the gravity of the event that has in fact resulted from the breach, shall entitle the other party to elect to put an end to all primary obligations of both parties remaining unperformed. (In the interests of clarity, the nomenclature of the Sale of Goods Act 1893, ‘breach of condition’ should be reserved for this exception.)

It can be seen that Lord Diplock referred to the ‘intention of the parties’ when he spoke of the *Hongkong Fir* approach in the context of the two exceptions in which the primary obligation to perform the contract would no longer apply. But what is the ‘intention’ here when the court is effectively conducting an ex post facto evaluation of the situation after ascertaining that the parties have not intended for the term in question to have the effect of either a condition or warranty? If the parties cannot foresee the precise nature of the breach (and this is in fact the oft-cited reason for the *Hongkong Fir* approach), it would be inaccurate to speak of the parties intending that the innocent party be allowed to terminate should a particular breach occurs. It would be better to speak of this as allowing for termination because the courts deem this as an appropriate situation under which it is reasonable to allow for termination, thereby imputing an intention to the parties as opposed to ascertaining what they intended.

Finally, the distinction between the agreed and imputed intentions of the parties is also supported by Diplock LJ’s own words in *Hongkong Fir* itself, where he said:

There are, however, many contractual undertakings of a more complex character which cannot be categorised as being ‘conditions’ or ‘warranties’, if the late nineteenth-century meaning adopted in the Sale of Goods Act 1893, and used by Bowen LJ in *Bentsen v Taylor, Sons & Co* be given to those terms. Of such undertakings all that can be predicated is that some breaches will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract; and the

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legal consequences of a breach of such an undertaking, unless provided for expressly in the contract, depend upon the nature of the event to which the breach gives rise and do not follow automatically from a prior classification of the undertaking as a ‘condition’ or a ‘warranty’.

Here, Diplock LJ’s use of the word ‘expressly’\(^49\) is perhaps a hint of his view that the condition-warranty is founded on the parties’ intentions as objectively ascertained, whether expressly or impliedly, whereas the Hongkong Fir approach imputes the intention judicially.

Accordingly, as suggested earlier, while the condition-warranty approach and the Hongkong Fir approach can both be grounded upon the contracting parties’ intentions, the difference between the approaches is premised on the distinction between the ascertainment of agreed intention and the imputation of intention. For agreed intention, the ascertainment of such intention can be by way of express or implied reading of the contractual terms, prior to the event of breach. On the other hand, for an imputation of intention, the concern is not with the ascertainment of what was agreed but with the imputation of what the court believes to be reasonable in the circumstances, as an approximation to what the parties ought to have intended. Put another way, agreed intention can be express or implied but imputed intention is not that agreed between the parties but is imposed by the courts.\(^50\)

Applied to the Hongkong Fir approach, this would be an imputation of intention not tailored to the facts but of one objective standard: it must be that if the breach were serious enough (as described by the colourful metaphors), then the parties must have thought that the innocent party ought to be discharged. It is a fallback rule after attempts at ascertaining the parties’ agreed intentions, whether express or implied, have failed.\(^51\) By this rationalisation, the Hongkong Fir approach is only adopted where it is not possible to ascertain whether a given term is a condition or warranty, as indicated expressly or impliedly. The condition-warranty approach should be given precedence because that approach gives effect to the parties’ intentions in the ‘real’ sense.

\(^49\) See also see per Lord Wilberforce in Bunge Corporation [1981] 1 WLR 711 at 716: ‘But I do not doubt that, in suitable cases, the courts should not be reluctant, if the intentions of the parties as shown by the contract so indicate, to hold that an obligation has the force of a condition, and that indeed they should usually do so in the case of time clauses in mercantile contracts. To such cases the “gravity of the breach” approach of the Hongkong Fir case [1962] 2 QB 26 would be unsuitable. I need only add on this point that the word “expressly” used by Diplock LJ at p 70 of his judgment in Hongkong Fir should not be read as requiring the actual use of the word “condition”; any term or terms of the contract, which, fairly read, have the effect indicated, are sufficient. Lord Diplock himself has given recognition to this in this House: Photo Production Ltd v Securicor Transport Ltd [1980] AC 827 at 849’.

\(^50\) The difference is in imputation, and not ascertainment, even if the latter can take effect by implication. This also explains why, on the Hongkong Fir approach, events happening after the conclusion of the contract, viz, the seriousness of the actual breach, can be taken into account, whereas, strictly speaking, such events cannot be taken into account when applying the condition-warranty approach. See Carter, n 34, above, pp 111–112.

\(^51\) See also Roger Brownswood, ‘Chapter 1: General Considerations’ in Michael Furmston (ed), The Law of Contract, 3rd ed, LexisNexis Butterworths, London, 2007, p 69, wherein the learned author draws attention to reasonableness as a supplementary principle, in that the law falls back on this standard in cases where the express terms of the contract (in conjunction with any settled implied terms) fails to offer clear guidance as to the parties’ intentions. See also the same book at pp 65–8 for different perceptions of the ‘reasonableness’ concept.
Accordingly, it is suggested that the imputation of the parties’ intentions in this sense is a necessary one because, as mentioned earlier, the theoretical ideal of always being able to ascertain the parties’ actual intentions must be tampered with judicial reality and a fallback test must be devised. But, and this is to be emphasised, this is not a fallback test ungrounded in principle; it is, instead, premised on a similar (if imputed) premise as that which applies to the condition-warranty approach. It is the second best approach which approximates as best as it can to the parties’ agreed intentions. In this way, the conception of fairness which demands resolution of disputes in a principled way is given effect to. Thus, the application of the condition-warranty approach and the *Hongkong Fir* approach sequentially in the other major Commonwealth jurisdictions can in fact be explained by the courts’ desire to give effect to the parties’ intentions as far as is possible. This takes the form of, broadly speaking, a two-stage analytical framework. In the first instance, this involves an objective interpretation of the contract to ascertain if the parties intended, expressly or impliedly, for a particular term to be a condition or warranty (or, to be more precise, to have the effect of these characterisations). If not, or if the intention is truly unascertainable because of evidential problems, the court then imputes a wholly reasonable intention to them, in that, they would surely have intended for the innocent party to be able to terminate if the consequences of the breach are sufficiently serious. The imputation is necessary because the courts still need a principled method of resolving the disputes before them. How serious would depend on the aims and purposes of the contract, but it would not be correct to say this is still premised on the parties’ agreed intentions (whether express or implied), rather this is predicated on the courts’ imputation of such intention as a fallback position. This suggested rationalisation provides a suitable basis upon which the courts can base their analyses and avoids confusion whereby one approach shades into the other with no perceptible reason why. Such a rationalisation, it will now be briefly suggested, also finds expression in other areas of contract law.

**Recognising Parties’ Intentions Where Specified But Retreating to Objective Implication Where Not Specified**

Indeed, the universal theme across contract law seems to be that the law will be anxious to recognise the parties’ intentions where such can be accurately and objectively ascertained in the light of the available evidence. However, where such a task is not possible, the law, burdened with the judicial duty to resolve duties, retreats to certain default rules which have the effect of imputing a reasonable intention divorced from they might have agreed, taking into the behaviour of reasonable persons, as well as the factual matrix at hand.

As an example, this theme is illustrated in the division between express and implied terms, although not fully. It has always been acknowledged that particular terms might be implied into particular contracts. However, in order

52 See also Reynolds, above, n 23, at 542–3 and 545.

53 See also Carter, above, n 31, p 159, wherein the learned author suggests that the authorities justify the view that where a term cannot be categorised as a condition or a warranty it can be assumed that a sufficiently serious breach will give rise to a right to terminate.
not to undermine the concept of freedom of contract itself, terms would be implied only rarely — in exceptional cases where, as one famous case put it, it was necessary to give ‘business efficacy’ to the contract. There is another equally famous test by MacKinnon LJ in the English Court of Appeal decision of *Shirlaw v Southern Foundries (1926) Limited* this was the famous ‘officious bystander’ test. Thus, where it is possible to ascertain the parties’ intentions by the express terms of the contract, the courts will do so. But where it is not, the courts will imply into the contract certain terms which are founded inasmuch on necessity as on reasonableness. In this regard, it is acknowledged that conditions and warranties might be ‘implied’ into contracts as well — that is well and correct, but it does not detract from the suggestion that the *Hongkong Fir* approach serves a secondary role to the condition-warranty approach, which is premised primarily on the parties’ agreed intentions.

The Integrated Approach in RDC Concrete

A Suggested Improvement

Having regard to the analysis above, some specific comments may now be made on the integrated approach adopted by the court in *RDC Concrete*. The first is that the integrated framework, whilst slightly different from the approaches taken in other Commonwealth jurisdictions, is largely consistent with the rationalisation of the condition-warranty approach and *Hongkong Fir* approach proffered above. It proceeds ostensibly on the basis that the parties’ agreed intentions be considered first, before the *Hongkong Fir* approach is considered. However, this would be wholly true only if a slight improvement was made to the integrated approach, and this suggestion is explored by way of the following observation.

Indeed, the second observation that may be made is in relation to the conceptual rationale underpinning the integrated approach: do the condition-warranty approach and the *Hongkong Fir* approach lend themselves conceptually to such a union? Prima facie, such integration is permissible if the two approaches are not regarded as being alternatives. In this respect, quite clearly, in the scheme of things, one must take precedence over the other, and if it is regarded as the law’s task to first ascertain what the parties agreed, then the condition-warranty approach should be applied first. This was what the court in *RDC Concrete* did. However, the court then stated that even if the parties intended a particular term to be a warranty, this should not matter and the *Hongkong Fir* approach applies. This is presumably where the *Hongkong Fir* approach is ‘integrated’ with the condition-warranty approach. With respect, it is suggested that this ought not to be the case. If the parties quite clearly intended for a particular term to be a warranty (and have its attendant effect on breach), then the court should recognise this and not subject the analysis to the *Hongkong Fir* approach. If this is the integration, then perhaps this is an integration best refined. This may be contrasted with the English position where the question of whether a particular term is a warranty is

54 Per Bowen LJ in the English Court of Appeal decision in *The Moorcock* (1889) 14 PD 64.
55 [1939] 2 KB 206.
generally left out entirely: there it is equally suggested that the status of a term as a warranty be enquired. If the question is whether an innocent party be allowed to terminate, it is true that that party can only do so, based on the broad analytical framework, if the term breached is a condition or the term breached resulted in so serious a consequence that the party be allowed to terminate. However, surely equally relevant to the analysis, is whether the parties agreed that the term breached would not allow for termination in any circumstances? If it is asserted that a term which is not a condition is not necessarily a condition, then it must be questioned whether the term was in fact a warranty before proceeding to the Hongkong Fir approach.

Thus, it is suggested that the ‘integration’ of the two approaches in RDC Concrete, if indeed such integration is to be preserved, could be further refined in that where the parties can be shown to have evinced an intention that a term be a condition or a warranty, the Hongkong Fir approach should have no place in the analysis. The court evidently saw that even if the parties had intended a term to be a warranty, that ought still to be subject to the Hongkong Fir approach. Such an approach would not be in line with any conceptual basis other than the court’s (important, it must be said) desire to do ‘justice’. But, if it is accepted that the parties’ intention that a term be a condition be given effect to, surely the same must be said of the intention that a term be a warranty. If this analysis is correct, then the resultant approach is similar to that of the other major Commonwealth jurisdictions, save for one major benefit. This is that, in stating that the condition-warranty approach and Hongkong Fir approach are ‘integrated’, such a label might raise awareness of the rationale behind applying these approaches sequentially in a particular order, as the other Commonwealth jurisdictions have done. The true utility of the integrated approach, subject to the suggested improvement, may well lie in its implicit acknowledgement of the common denominator that binds the condition-warranty approach and Hongkong Fir approach even if their practical application would not be truly ‘integrated’ inasmuch as they are applied sequentially and separately.

Balance Between Certainty and Fairness

Having suggested that the underlying (and consistent) rationale of the condition-warranty approach and the Hongkong Fir approach would be in recognising, as far as possible, the true intentions of the parties, what of the court’s observation that the integrated approach would achieve a balance between predictability and certainty on the one hand and fairness on the other? This seems to suggest two things, both of which must be ascertained for their accuracy. First, whilst the condition-warranty approach assures certainty, it could lead to unfairness. Second, and this is the corollary of the preceding point, whilst the Hongkong Fir approach leads to fair results, it is uncertain. However, are these propositions true such that the integrated approach really leads to the appropriate balance between certainty and fairness?

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56 See Carter, above, n 31, p 152.
57 The point was also incisively made in Carter, n 8, above at 246.
58 [2007] 4 SLR 413 at [109].
Turning first to the court’s view on certainty, it has always been thought that the rationale behind the condition-warranty approach is to ensure ‘certainty’. Yet, what does this mean? The first point is a general one and pertains to the definition of ‘uncertainty’, which itself is a concern that resonates similarly with the courts of other jurisdictions in other branches of contract law. In England, for example, Lord Hobhouse in *Shogun Finance Ltd v Hudson*\(^{59}\) referred to the rule that other evidence may not be adduced to contradict the provisions of a contract as the reason why English commercial law is preferred to other systems ‘which do not provide the same certainty’. In this regard, it is important to recognise that certainty is not an amorphous word incapable of precise meaning; on the contrary, it is submitted that it is important to realise which aspect of certainty is of concern. The present fascination with certainty as guaranteed by the condition-warranty approach is result-based: it focuses on the premise that the classification by the parties, as understood by a reasonable person (the character underpinning the objective theory of contract law), will be conclusive of its meaning and hence yield consistent and predictable results when it comes to the question of whether termination is allowed following a breach. Yet, it fails to recognise that even under the condition-warranty approach, the court may, in some cases, adopt different interpretations of the terms as contained in the contract, simply because there is a range of acceptable, objective and reasonable meanings which a court can come to. Consistency and predictability in the result of litigation cannot be assured. This may imply that the certainty of real concern is not in the result, but in the approach, in that the courts will adopt a consistent set of rules in ascertaining the status of a term. If this is correct, then it is difficult to see why the *Hongkong Fir* approach, a method of ascertainment as much as the condition-warranty approach, will lead to ‘uncertainty’, as the court in *RDC Concrete* (as well as the courts of other jurisdictions) has pointed out. The *Hongkong Fir* approach, if applied consistently, will yield certainty in approach as much as the traditional approach. While it could lead to uncertain results, that is a result of the judicial decision-making process rather than any inherent fault in the methodology.

The second, specific, point is a continuation of the first. It is that the cases bear out the suggestion that the condition-warranty approach does not assure certainty. It is only necessary to cite *Wickman Machine Tool Sales Ltd v L Schuler AG*\(^{60}\) in support of this argument. Even if the parties set out to demarcate a certain term a ‘condition’, that is still liable to revision by the courts. Certainty is not certain here (unless the condition-warranty approach is followed strictly). As such, certainty is as much to do with the approach as the result. If the court persists with the integrated approach or the condition-warranty approach or the *Hongkong Fir* approach, an important aspect of certainty is guaranteed: legal advisors know how to advise their clients because they know the framework which would be consistently used by the courts. There would be no compromise to certainty in this sense.

Turning then to fairness, while the court spoke of the integrated approach

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59 [2004] 1 AC 919 at 944.
bringing with it greater fairness,\textsuperscript{61} it might be recalled that another facet of fairness is to hold the parties to their bargain reached, absent arguments of duress and undue influence, under circumstances which must be presumed as fair. This was actually what the court itself recognised.\textsuperscript{62} Thus, if the parties had intended a particular term as not allowing for termination no matter how serious the breach turned out to be, then the court ought to recognise this. Thus, it might not be wholly correct to think of the \textit{Hongkong Fir} approach as being ‘fairer’ than the condition-warranty approach because it is more flexible. Flexibility is still dependent on the set of circumstances presented before the court. If the effects of the breach are not serious, then there is not much flexibility to be had. Perhaps it is flexible in that it allows a court to depart from the parties’ intentions if the result is, to its mind, unfair. But that would be to wholly disregard the central tenet in contract of recognising the parties’ intentions and be, in effect, a manifestation of ‘palm tree justice’. Flexibility is constrained by the parties’ intentions and can only be resorted to if such intentions are not expressly or impliedly indicated in the contract. Viewed this way, there is no true ‘flexibility’ to speak of insofar as the courts are guided by a set of objective criteria.

Thus, in the end result, there might not be an approach which ‘best’ achieves a balance between certainty and fairness. These two terms are capable of so many meanings that it might be difficult to articulate the proper ‘balance’ to be struck between competing notions of these terms. Indeed, either the condition-warranty approach or the \textit{Hongkong Fir} approach may each, on its own, be capable of striking the appropriate balance. The important thing is for the courts to faithfully adopt a given approach integrated with secondary rules in case the primary ones fail.

\textbf{Concluding Observations}

What does this mean for the integrated approach in \textit{RDC Concrete}? The answer must be that, as the court pointed out, there is room for both approaches towards determining the right of termination upon breach. However, to give effect to the underlying rationale of the condition-warranty approach, it may be that (with respect) the approach not be ‘integrated’ with the \textit{Hongkong Fir} approach in the way adopted by the court, viz, to apply the \textit{Hongkong Fir} approach to a term which was intended by the parties to be warranty. Inasmuch as the condition-warranty approach is premised on the parties’ agreed intentions, it must be that whether the parties intended for a term to be a warranty is an essential question in the analytical framework. It is only where it is impossible to ascertain whether the parties expressly or impliedly agreed that a term is to be a condition or warranty (in most cases it will be because they have not turned their minds to this matter), that the issue falls to be resolved by the fallback \textit{Hongkong Fir} approach. In this sense, there is still integration, but the integration is not in the approaches but in the rationale underpinning the approaches, viz, to give effect to the parties’ intentions as far as possible. Ultimately, insofar as the court’s concern about the balance between certainty and fairness is concerned, for any framework to

\textsuperscript{61} [2007] 4 SLR 413 at [109].
\textsuperscript{62} [2007] 4 SLR 413 at [109].
work, the courts applying it will need to stay away from wanting to do ‘justice’ on its own terms. In the present context, this means that even if the outcome is sufficiently serious from an objective point of view, this should not detract from the parties’ intentions that no termination is possible, if this is decipherable from the contract. It is only if the approach adopted is faithfully adhered to, that certainty and, indeed, fairness, can be given effect to. This then will truly ensure the proper balance between certainty and fairness and, quite certainly, the integrated approach, subject to the slight improvement suggested above, is one in which this balance may be reached.

**Conclusion**

In the final analysis, the significance of the integrated approach in *RDC Concrete* is not so much the promulgation of a new approach which represents a normative improvement over the existing condition-warranty approach and the *Hongkong Fir* approach, but rather in the bold (and perhaps implicit) proclamation of the relationship of both these approaches. However, it has also been suggested that, in order to fully rationalise the conceptual underpinning of the integrated approach, the warranty should be re-emerged as an important element of the analysis. This would give effect to the suggested rationalisation of the condition-warranty approach and the *Hongkong Fir* approach based on the parties’ intentions: whether agreed (and ascertained expressly or implicitly) or imputed by the courts. The question, then, when at common law does a breach of contract enable the innocent party the right to treat the contract as terminated, might now receive an answer more grounded in conceptual clarity and practical utility.