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Concurrent and Independent Rights to Terminate for Breach of Contract

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In this article we consider the interaction between an express right to terminate a contract for breach and a termination right conferred by the common law. The article argues that a systematic approach is necessary to deal with the position of a promisee who enjoys multiple termination rights.

Our thesis is based on a distinction between ‘concurrent’ or ‘independent’ and whether the rights at issue are coordinate or discordant. We test the thesis against the recent decision in Stocznia Gdynia SA v Gearbulk Holdings Ltd, three other English decisions, the effect of exercise of the power of resale and the ‘alternative rights’ cases.

Introduction

Consider two travellers, Alice and Bill. Alice passes a signpost pointing to a path ‘To Tweedledum’s House’. Later she stops at a signpost pointing ‘To Tweedledee’s House’. Bill has stopped at a signpost pointing in two directions: ‘To the White Rabbit’s House’ and ‘To the Croquet Lawn’. Given that Tweedledum’s House is also Tweedledee’s House, the signposts that Alice sees point to the same destination. But Bill has two different destinations to choose from. It is also true — as any lawyer would quickly point out — that Alice and Bill actually have another choice. Either may decline the invitations of the signposts and continue on their way.

Promisees not infrequently have similar choices. For example, P1 is a vendor under a contract for the sale of land that provides for payment of the price by instalments and makes time of the essence. If the purchaser fails to make the first payment on time, P1 is entitled to terminate the contract.1 P1 has the same right if the purchaser also fails to make the second payment on time. P1 can choose to exercise either right to terminate. Since the ‘destination’ on termination is the same on either basis — the parties are discharged — P1’s position resembles that of Alice.

A second promisee, P2, is the buyer under a shipbuilding contract which includes an express right to terminate the contract if the builder fails to achieve two consecutive construction milestones on time. If the express right is enlivened, the conduct of the builder may also amount to a repudiation of obligation. Accordingly, P2 may justify termination of the contract by reference to both the express right and P2’s common law right. However, the contract provides that if P2 serves notice under the express right the builder must within three months sell the partially constructed vessel and pay to P2 the sum of:

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1 By ‘terminate’ we mean ‘elect to terminate the obligation of the parties to perform the contract’.

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(1) all payments made by P2 under the contract;
(2) the difference (if any) between the amount received on sale of the partially constructed vessel and all payments made by P2; and
(3) interest (as defined) on all payments made by P2.

It would therefore appear that, like Bill but unlike P1 and Alice, P2’s ‘destination’ on termination differs according to which right is exercised.

Equally, however, P1 and P2 have a third choice, namely, to reject their termination options. Either may, as it is termed, ‘affirm’ the contract.2

All of the above examples are necessarily hypothetical. The allusions to works of fiction3 in the references to Alice and Bill stamp those examples as also occurring in a fictional world, rather than the ‘real’ world of contract law. Nevertheless, the journeys that Alice and Bill may undertake can be envisaged as physical journeys. On the other hand, the ‘journeys’ of P1 and P2 to discharge are metaphorical. So also is the idea that the contract may be affirmed. It would necessarily take some time for Alice and Bill to reach their destinations. But P1 and P2 are instantly ‘transported’ to the point of discharge — as are the purchaser and the builder — on exercise of their termination rights. That is not, of course, to deny the remedies to which P1 and P2 are necessarily entitled. Each is presumed to be entitled to loss of bargain damages, and P2 has specific remedial entitlements under the express right. However, unlike the right to be discharged — which is a self-help remedy4 — those remedial entitlements depend on the cooperation of the purchaser or builder, or an order of a court or arbitrator.

In the recent decision of the English Court of Appeal in Stocznia Gdynia SA v Gearbulk Holdings Ltd5 (Gearbulk), the court referred to, but did not adopt, the idea that exercise of a right to terminate a contract may in certain circumstances amount to affirmation of the contract. That is one issue discussed in this article. From a broader perspective, given the frequency with which courts deal with the interaction between express rights of termination and those conferred by law,6 it is perhaps surprising that the courts have not applied a more systematic approach in analysing the position of promisees such as P1 and P2. The principal purpose of this article is to suggest such an approach.

The Thesis

Labels are necessary to explain situations in which a promisee, such as P1 or P2, enjoys more than one right of termination at a given time.7 In this article, we draw distinctions at two levels. The first level concerns the events which give rise to the right to terminate. This is principally time-related: when do the

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2 By ‘affirmation’ we mean ‘an election to continue with the performance of the contract notwithstanding the right to terminate’.
3 Lewis Carroll’s Through the Looking Glass and Alice’s Adventures in Wonderland.
6 That is, on breach of condition, for repudiation or for the sufficiently serious breach of an intermediate term (‘fundamental breach’).
7 The terminology which we employ has been chosen for reasons of convenience, rather than on the basis that no other labels are permissible.
rights accrue? Drawing upon the analogies above, this is when the travellers, Alice and Bill, reach the signposts, and the time at which the purchaser and builder commit the breaches which entitle P1 and P2 to terminate their respective contracts. At this level, the principal distinction is between concurrent and independent rights, although for completeness we also refer to ‘several’ rights. Whether concurrent or independent, a promisee’s termination rights may be implied by law or expressly conferred by the contract. The main situation with which we deal is where a promisee enjoys two such rights, one implied by law and the other expressly conferred by the contract.

The second level is content-related. This is whether or not the concurrent or independent rights are ‘coordinate’. Drawing on the examples above, ‘content’ comprises the benefit to Alice and Bill of their journeys, or what benefit exercise of their termination rights secure for P1 and P2. If termination rights are coordinate, as is analogous to Alice’s case, a promisee is not required to choose between them. However, when termination rights are not coordinate, they may be ‘discordant’ from more than one perspective. Nevertheless, the mere fact that concurrent or independent rights are not wholly coordinate does not mean that the promisee cannot exercise both simultaneously.

Whether (and when) a promisee must choose between two termination rights depends on whether (and in what respect) they are discordant. Our conclusion is that although in a great many cases the termination rights are coordinate, where they are not it is important to distinguish between inconsistency of exercise and inconsistency of consequences. In other words, inconsistency may relate to the rights themselves or the remedies to which the promisee becomes entitled on exercise of the rights.

On the assumption that more than one right is enjoyed, the systematic approach to dealing with termination rights which we outline in this article may be expressed in the following steps:

1. Are the rights concurrent or independent?
2. Are the concurrent or independent rights coordinate or discordant?
3. If the rights are discordant, in what respect is that the case?

Before explaining the details of our thesis, certain background principles need to be stated. These comprise one set of general principles and four specific principles.

**Background Principles**

**General Principles of Election**

The relevant general principles relate to election between inconsistent rights and remedies. In United Australia Ltd v Barclays Bank Ltd,8 Lord Atkin explained that, in relation to alternative remedies, a plaintiff cannot be required to elect between them until the claim is ‘brought to judgment’. Once made, the election is generally final, whether or not the judgment is satisfied.9

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9 O’Connor v S P Bray Ltd (1936) 36 SR (NSW) 248 at 261–2 (reversed on other grounds (1937) 56 CLR 464).
But, in relation to inconsistent rights, Lord Atkin said\(^\text{10}\) that once a person has ‘done an unequivocal act showing that he has chosen the one he cannot pursue the other’. In this context also, election is generally final, although in the context of the right to terminate a contract, only an election to terminate is necessarily a final election.\(^\text{11}\)

Although easily stated, the distinction between alternative remedies and inconsistent rights is often blurred, particularly in these times of ‘remedial discretion’. Lord Atkin’s statement in relation to alternative remedies\(^\text{12}\) was an explanation of why the plaintiff had not, by bringing proceedings against MFG Trust Ltd,\(^\text{13}\) made an election in relation to its remedy against Barclays.\(^\text{14}\) The need to consider election between remedies rarely arises in the contractual context. However, it occurs where a vendor or purchaser of land brings proceedings making alternative claims for specific performance and damages based on termination of the contract. If the court finds in favour of the claimant, a choice must be made between the remedies.\(^\text{15}\)

Of course, the ability of a promisee to elect between remedies available against a promisor assumes that no prior election has been made by the promisee between the inconsistent rights which underlie those remedies. A vendor or purchaser of land who makes alternative claims for specific performance and damages based on termination of the contract does not make an election between the inconsistent rights of affirmation and termination which (respectively) underlie those remedies.\(^\text{16}\) If the contract is terminated, there is no question of the promisee seeking specific performance; but that is not because the promisee has elected between alternative remedies. At no time could it be said that the promisee was entitled to an order for specific performance. Rather, if the promisee has elected to terminate the contract, the remedy of specific performance is forestalled by the election between rights. The fact that promisees, such as P1 and P2, sometimes enjoy multiple termination rights necessarily raises the questions whether, and when, the promisee must elect between those rights. After all, a contract can be terminated only once! Although, in the context of termination, discussion of election between rights naturally focuses on termination and affirmation as being inconsistent rights, where multiple termination rights arise exercise of one such right may be inconsistent with the exercise of any other right.

**Specific Principles**

Four specific principles are relevant. With one exception, these are applications of or deductions from the general principles of election between

\(^{10}\) [1941] AC 1 at 30.

\(^{11}\) See Yukong Line Ltd of Korea v Rendsburg Investments Corp of Liberia (The Rialto) [1996] 2 Lloyd’s Rep 604 at 607 per Moore-Bick J (‘irrevocable’).


\(^{13}\) MFG Trust Ltd were indorsees of a cheque for £1900 payable to the order of United Australia. The indorsement had been made without authority and the action was for restitution.

\(^{14}\) The claim was for damages in conversion.

\(^{15}\) Lowe v Hope [1970] 1 Ch 94; Rightside Properties Ltd v Gray [1975] Ch 72.

\(^{16}\) Johnson v Agnew [1980] AC 367 at 392; Sunbird Plaza Pty Ltd v Maloney (1988) 166 CLR 245 at 259; 77 ALR 205.
rights. First, where a promisee elects to terminate a contract, what matters is whether the promisee is entitled to do so, not the basis given. As a general rule, the promisee is neither required to specify the ground for termination nor bound by any specification. Therefore, provided that a promisee was entitled to terminate, the termination will be attributed to a valid basis.\(^{17}\) We refer to this as the ‘attribution’ principle.

Second, under the general law an election to terminate a contract merely requires ‘unequivocal’ words or conduct.\(^{18}\) It is therefore sufficient for the promisee to do an unequivocal act even though it may not be done with the intention of electing to terminate. For example, a seller’s refusal to ship goods may be an election to terminate for breach by the buyer.\(^{19}\) We refer to this as the ‘inconsistent act’ principle.

Third, subject to statute, the requirements for an effective election to terminate depend on the intention of the parties. As a default rule, the inconsistent act principle assumes that the contract does not specify a procedure to be followed by a promise when electing to terminate the contract. If the contract does specify the termination procedure, we assume that the specification is mandatory. We therefore term it the ‘mandatory procedure’ principle.

Fourth, the one specific principle which is not derived from principles of election is the ‘presumption in favour of common law rights’.\(^{20}\) In the present context this may manifest itself in a presumption:

1. that any express rights of termination conferred by a contract operate in addition to any common law rights of termination;\(^{21}\) and
2. that the consequences of termination in exercise of an express right do not prejudice the promisee’s common law rights.\(^{22}\)

The second manifestation is, however, a source of some of the confusion in the recent cases.

### Independent and Concurrent Rights of Termination

#### Independent Rights

Rights of termination are independent if they accrue from different events. Almost invariably, such rights will arise at different times. Just as Alice has

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17 British and Beningtons Ltd v North Western Cachar Tea Co Ltd [1923] AC 48 at 71; Shepherd v Felt and Textiles of Australia Ltd (1931) 45 CLR 359; Sunbird Plaza Pty Ltd v Maloney (1988) 166 CLR 245 at 262, 274–5; 77 ALR 205; Stocznia Gdanska SA v Latvian Shipping Co [No 3] [2002] 2 Lloyd’s Rep 436 at 443; [2002] EWCA Civ 889 at [32].
22 Hyundai Heavy Industries Co Ltd v Papadopoulos [1980] 1 WLR 1129; [1980] 2 All ER 29 (recovery of sum due at the time of termination); Progressive Mailing House Pty Ltd v Tabali Pty Ltd (1985) 157 CLR 17; 57 ALR 609 (loss of bargain damages).
two opportunities to visit the house at which Tweedledum and Tweedledee live, so P1 also has two opportunities to terminate its contract with the purchaser. The fact that Alice might choose not to take the path to Tweedledum’s House would not impact on her ability to take the path to Tweedledee’s House. Indeed, she may choose to retrace her steps and take the path to Tweedledum’s House. Similarly, if payment for the first instalment is still outstanding at the time when the purchaser defaults in payment of the second instalment, P1 may exercise the first right of termination. Of course, P1 need not retrace its steps: since termination is not retrospective, it is irrelevant, so far as discharge is concerned, to which of the independent rights the election to terminate is attributed.

The principal significance of rights of termination being independent is that affirmation of the contract in respect of one right will not usually impact on exercise of the other. Therefore, if P1 chooses to accept late payment of the first instalment by the purchaser, that affirmation of the contract will not prevent P1 electing to terminate the contract for the failure of the purchaser to pay the second instalment when it falls due.

Concurrent Rights

Rights of termination are concurrent if they arise from the same event. They will therefore usually arise at the same time. P2 enjoys concurrent termination rights because the (assumed) right to terminate for repudiation accrues in respect of the same event — and at the same time — as the right to exercise the express right. Similarly, Bill enjoys concurrent ‘rights’ to journey to the White Rabbit’s House and the Croquet Lawn.

Of course, because a contract can be terminated only once, the parties cannot be discharged ‘twice over’ from their unperformed obligations. From that perspective, Bill looks to have a right of election. Choice of one path involves the abandonment of the other. However, Bill can in fact journey to both the White Rabbit’s House and the Croquet Lawn because, having visited one, he could return to the signpost and take the other path. That would, of necessity, take Bill on a new and different journey. Therein lies a difference between the physical world and the metaphorical world of contract law. Even if the exercise of termination rights lead to different destinations, a promisee may — unlike Bill — simultaneously travel down two different paths, at least for a time. The extent to which that is the case depends on a further question, namely, whether the rights are coordinate and consistent.

So far as affirmation of the contract is concerned, the main significance of a promisee enjoying concurrent termination rights is that, generally, any affirmation by the promisee will extend to all bases for termination which are

24 See Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd (1938) 38 SR (NSW) 632 at 645 (reversed on other grounds sub nom Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd (1938) 61 CLR 286).
25 Acceptance of the late payment is not an election in respect of any future breach. But P1 might in some circumstances be estopped in relation to exercise of the second right of termination. See Bull v Gaul [1950] VLR 377 (vendor had led the purchaser to believe that she would not insist on punctual payment).
Concurrent and Independent Rights to Terminate

at that time within the promisee’s knowledge. For example, if a seller delivers defective goods, and the buyer with knowledge of the defects accepts the goods, the buyer loses the right of termination. It makes no difference that the goods are not of merchantable (or ‘satisfactory’) quality and also not fit for their purpose. Therefore, affirmation of the contract causes the simultaneous loss of all concurrent rights of termination.

**Several Rights**

For the purposes of this article, ‘several’ rights are concurrent or independent termination rights available against different promisors or in relation to several parts of a contract. If A, B and C enter into a contract under which the obligations are several, the fact that A enjoys a right of termination by reason of a breach by B does not entitle A to terminate the contract with C. More relevantly, where A enjoys several rights of termination against both B and C, A may terminate the contract with B without terminating the contract with C. For example, C may be a guarantor of B’s performance of B’s contract with A.

‘Several’ rights of termination within a contract and against the same promisor are necessarily cumulative, and generally independent rather than concurrent. They may arise at common law. For example, if a contract for the sale of goods by instalments requires payment for each delivery by the seller, the buyer’s entitlement to reject a delivery is a several right of termination. Because the rights are independent, acceptance of one instalment delivery does not prevent rejection of a later delivery, assuming that the right arises.

Alternatively, several rights of termination may be conferred expressly. In some contexts very sophisticated regimes for termination may be agreed. For example, an ‘outsourcing’ agreement under which a supplier agrees to provide various services may provide that if the supplier fails to meet an agreed performance standard in respect of a service the customer may terminate the contract so far as it relates to that service. At any given time the customer-promisee may enjoy two or more several rights. Assuming no affirmation, it may choose to exercise one or more of those rights.

In addition to enjoying a several right of termination — relating to part of a contract — a promisee may enjoy a right to terminate all unperformed obligations under the contract. For example, breach or breaches by the seller entitling the buyer to reject one or more deliveries may also amount to a

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26 *R v Paulson* [1921] 1 AC 271 at 280 per the Privy Council (‘all antecedent breaches of which the promisee was aware').

27 Nor would it matter that the goods were also delivered late. Although the right to terminate for delay will have accrued prior to delivery, and is in that sense an independent right, acceptance of the goods is also an affirmation in respect of that right.


29 Cf *Moschi v Lep Air Services Ltd* [1973] AC 331.


31 *Rosenthal & Sons Ltd v Esmail* [1965] 1 WLR 1117 at 1132.

32 It is conceivable that rights of termination may accrue concurrently, that is, in respect of two or more services at the same time.
repudiation of a contract for the sale of goods by instalments. And where a right of termination arises under the outsourcing contract, the contract may expressly entitle the customer to terminate the particular service to which the breach relates or the contract as a whole. Such rights are concurrent rights, but they are not coordinate rights of termination.

Coordinate Rights

Whether independent or concurrent, where more than one right of termination is available to a promisee at a given time, those rights may or may not be coordinate. It is this level of analysis which is crucial in relation to P2’s termination rights. However, there is no single test for whether rights are coordinate. The starting point — which provides the basis for the discussion below of express rights — is the position in relation to independent or concurrent common law rights.

Subject to two exceptions, common law rights of termination are coordinate in four respects:

1. the requirement for valid exercise of each right — unequivocal conduct;
2. the extent of discharge — both parties are discharged from their unperformed obligations;
3. the remedial consequences of exercise of the right — accrued rights and obligations are not divested; and
4. the accrued rights of the promisee include the right to recover loss of bargain damages.

It follows that if a promisee enjoys independent or concurrent rights of termination at common law, those rights are coordinate and the exercise of one is the simultaneous exercise of all. Common law rights are also coordinate in relation to claims for restitution: termination is a sufficient basis for a claim in restitution. However, because such restitutionary entitlements are not contractual, but instead depend on proof of unjust enrichment, they do not fall within the concept of ‘accrued rights and obligations’.

The first of the two exceptions is that the contract may provide to the contrary. The second is that if a promisee enjoys a right to terminate part of the contract and a right to terminate the contract as a whole, the rights are not coordinate and the extent of discharge will obviously differ according to which right is exercised. It is the first exception which is important. Although even a common law right may be the subject of provisions which affect one

33 Millars' Karri and Jarrah Co (1902) v Weddel Turner & Co (1908) 14 Com Cas 25 at 29, 31.
34 Heyman v Darwins Ltd [1942] AC 356 at 361.
35 McDonald v Dennys Lascelles Ltd (1933) 48 CLR 457 at 470, 477; Photo Production Ltd v Securicor Transport Ltd [1980] AC 827 at 849.
36 McDonald v Dennys Lascelles Ltd (1933) 48 CLR 457 at 476–7; Johnson v Agnew [1980] AC 367 at 396. Such (accrued) rights may be enjoyed by both parties.
39 So also may statute, although this may be ignored for present purposes.
or more of the four respects in which common law rights are coordinate, it is sufficient to focus on express rights which are not coordinate with common law rights.

**Inconsistent Rights and Inconsistent Remedies**

**Introduction**

It follows from the brief discussion above that where a promisee enjoys the benefit of both an express right of termination and a common law right, inconsistency between the two may relate to rights or remedies. Of course, express rights of termination vary considerably. The situations in which they differ from — are not coordinate with — common law rights do not follow a consistent pattern. From the perspective of the four respects in which common law rights are coordinate, the possible permutations are infinite in number.

Nevertheless, in practice express rights of termination and common law rights will be inconsistent in two situations:

1. where exercise of the express right does not bring about immediate termination; and
2. where the remedial consequences differ.

In the second situation there are two possibilities. The first is that the contract is silent on the remedial consequences of the express right. The second is where the express right includes an agreement for remedial consequences of termination which differ from common law entitlements.

**Immediate and Postponed Termination**

An express right to terminate is always to some extent coordinate with any concurrent common law right which the promisee also enjoys. Thus, if the contract does no more than confer a right to terminate for breach,\(^{40}\) termination of the contract is a simultaneous exercise of both the express right and any common law right that the promisee enjoys because an unequivocal act is sufficient to exercise both. Similarly, the combined effect of the inconsistent act principle and the presumption in favour of common law termination rights is that in many cases a promisee who complies with any mandatory procedure (applicable to an express right) will also have complied with the common law requirement of unequivocal conduct. Again, the discharge of the parties is the same, and termination will not affect accrued rights and obligations.\(^{41}\) But an express right will not be coordinate with any common law right which the promisee enjoys if the mandatory procedure principle applies to the express right. For example, the contract may require the promisee to specify the basis for termination. More importantly, these examples assume that the express right provides for immediate termination.

Perhaps the most common form of express right is one which requires the promisee to provide the promisor with a ‘second chance’. For example, the

\(^{40}\) Even if the contract provides that it is to become ‘void’ on breach, election will nevertheless normally be required. See, eg, *Kilmer v British Columbia Orchard Lands Ltd* [1913] AC 319.

\(^{41}\) It is irrelevant whether the contract expressly preserves common law rights: *Stocznia Gdanska SA v Latvia Shipping Co* [1998] 1 WLR 574 at 591–2.
contract may provide for a right of termination in respect of a material or substantial breach, but require the promisee to provide the promisor with a period of, say, 14 days in which to remedy the breach. Alternatively, the contract may require the promisee to provide the promisor with an opportunity to show cause why the contract should not be terminated. Similarly, a contract which confers a right to terminate for failure to pay on time may require the promisee to give a certain period of notice. If the payment is not made, the promisee may terminate the contract on the expiry of the notice. Where such express rights are validly exercised, there is no immediate termination. The election to terminate is — in effect — conditional on the promisor not doing the act required by the clause.

This is in marked contrast with a valid election to terminate in reference to a common law right. Even though the event which activates the express clause may also give rise to a concurrent right to terminate on a common law basis, notice under the clause cannot count as an election to terminate in respect of the common law right. Although the conduct of the promisee is not of itself an affirmation of the contract, having (in effect) served a notice to perform, the promisee is precluded from exercising the common law right unless the contract provides otherwise. It therefore follows that if the promisee activates the express right, and the promisor does the required act, the parties are not discharged. It must also follow that, so far as any concurrent common law right to terminate is concerned, the promisee is in the same position as if it had elected to affirm the contract. In these cases, the principal relevance of concurrent rights of termination is where the promisee does not exercise its express right, or if the attempt to exercise the express right is invalid.

**Remedial Consequences**

The fact that the remedial consequences of the exercise of an express right differ markedly from the common law position following termination does not

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42 See *Western Bulk Carriers K/S v Li Hai Maritime Inc (The Li Hai)* [2005] 2 Lloyd’s Rep 389; [2005] EWHC 735 (Comm) (failure to pay or rectify breach after notice to do so). Cf *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 where, although the contract included an express right of termination for failure to remedy a material breach, the crucial issue was whether termination could be justified on the basis of breach of condition. 43 As in *Amann Aviation Pty Ltd v The Commonwealth* (1990) 92 ALR 601 (affirmed sub nom *Commonwealth of Australia v Amann Aviation Pty Ltd* [1991] 174 CLR 64; 104 ALR 1). See also *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234. 44 As in *Afovos Shipping Co SA v Pagnan* [1983] 1 WLR 195. See also *Schelde Delta Shipping BV v Astarte Shipping BV (The Pamela)* [1995] 2 Lloyd’s Rep 249 at 253. 45 But cf *Legione v Hateley* (1983) 152 CLR 406; 46 ALR 1 (automatic termination on expiry of notice). 46 But cf *Millichamp v Jones* [1982] 1 WLR 1422. 47 Compare the doctrine of *Barclay v Messenger* (1874) 43 LJ Ch 449 at 456. See also *Nichimen Corp v Gatoil Overseas Inc* [1987] 2 Lloyd’s Rep 46. 48 *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 (failed attempt to rely on breach of condition where express right not invoked). 49 *Rawson v Hobbs* (1961) 107 CLR 466 (successful reliance on anticipatory breach where termination in reliance on express right was premature); *Afovos Shipping Co SA v Pagnan* [1983] 1 WLR 195 (failed attempt to rely on anticipatory breach where termination in reliance on express right was premature).
of itself prevent concurrent exercise of the rights. However, because the rights are not coordinate, the differences may require the promisee to elect between the remedial consequences. The difficult issue is when that choice must be regarded as having been made.

The first situation is where the contract is silent on remedial consequences. In this situation, the remedial consequences at common law may be more beneficial to the promisee than those applicable under the express provision. The element of discordance relates to loss of bargain damages. The fact that an express right of termination is activated by breach is not in itself sufficient to entitle the promisee to claim loss of bargain damages. The usual case is where the express right of termination is activated by a failure to pay on time. Unless the contract also makes time of payment of the essence, there is no entitlement to loss of bargain damages. But if the promisee can also establish a repudiation or fundamental breach by the promisor, the promisee may rely on the right to terminate for repudiation or fundamental breach for the purpose of recovering loss of bargain damages.

It might be thought that in this situation if the agreed consequences of the exercise of the express right are the same as those which apply at common law, the express right is coordinate with any common law right. However, since an express agreement for loss of bargain damages may be a penalty, the rights are not coordinate, at least under English law.

Discordance is more obvious where the contract provides for consequences which differ from those applicable at common law. But that does not prevent the simultaneous exercise of rights. Consider the position of P2. If P2 serves notice under the express clause, so that the builder is required to sell the partially completed vessel, this is not of itself inconsistent with exercise by P2 of the right to terminate for repudiation. There are two important points. First, the procedure under which the builder must sell the partially constructed vessel is stipulated to occur after the notice of termination. The right to receive performance of those obligations accrues to P2 because the contract has been terminated. Clearly, P2 has not, by serving notice of termination, affirmed the

50 There is much to be said for the contrary view, namely, that loss of bargain damages are prima facie recoverable. See Larratt v Bankers and Traders Insurance Co Ltd (1941) 41 SR (NSW) 215 at 225–6; Progressive Mailing House Pty Ltd v Tabali Pty Ltd (1985) 157 CLR 17 at 55; 57 ALR 609; AMEV-UDC Finance Ltd v Austin (1986) 162 CLR 170 at 206, 216–17; 68 ALR 185. Indeed, the contrary view was treated as good law in Stocznia Gdańska SA v Latvian Shipping Co [No 3] [2002] 2 Lloyd’s Rep 436; [2002] EWCA Civ 889 (see below, text at n 81).

51 AMEV-UDC Finance Ltd v Austin (1986) 162 CLR 170 at 186; 68 ALR 185. See, eg Financings Ltd v Ballock [1963] 2 QB 104 (late payment under hire-purchase contract); Shevill v Builders Licensing Board (1982) 149 CLR 620; 42 ALR 305 (late payment of rent).

52 Leslie Shipping Co v Welstead [1921] 3 KB 420 at 426 (repudiation of time charterparty by failure to pay two instalments of hire on dishonour of bills of exchange); Financings Ltd v Ballock [1963] 2 QB 104 at 112–13 (dictum in context of hire-purchase contract); Progressive Mailing House Pty Ltd v Tabali Pty Ltd (1985) 157 CLR 17; 57 ALR 609 (repudiation or fundamental breach of lease). The decision in Sotiros Shipping Inc v Suneet Solholt (The Solholt) [1983] 1 Lloyd’s Rep 605 may be explained on the basis that late delivery — which was the subject of the express right — was also a breach of condition.

contract! Moreover, since the notice is an unequivocal act, P2 has (simultaneously) exercised its common law right to terminate for repudiation.

Second, ‘what happens next’ is important. If P2 gives notice of termination under the express right and the builder acts on the notice, by selling the vessel and accounting to P2 in accordance with the clause, P2 ceases to be entitled to invoke the common law consequences to which P2 is entitled on the basis of termination for repudiation. The cause of action which arose on breach by the builder has been satisfied and there is no question of P2 being awarded loss of bargain damages. However, if the builder disputes the notice of termination and refuses to sell the partially completed vessel, there is nothing to prevent P2 from invoking its common law right. Accordingly, P2 may choose to bring proceedings seeking alternative relief, namely:

1. an order that the builder sell the vessel and account to P2 under the contract; and
2. a declaration that the contract has been validly terminated for repudiation and consequential relief, namely, loss of bargain damages.\(^{54}\)

In each case, the election by P2 is between inconsistent remedies.

The best illustrations of the above analysis are the cases on agreed damages clauses.\(^{55}\) A typical situation involves the termination by a finance company under an express clause activated by non-payment of hire under a chattel lease. The fact that the contract provides that exercise of the right entitles the finance company to recover agreed damages is not inconsistent with termination by the finance company on the basis of repudiation or fundamental breach by the lessee. If the lessee chooses to pay the agreed damages that is the end of the matter; the cause of action which arose on breach by the lessee is satisfied. Loss of bargain damages, which the finance company could have sought on the basis of exercise of the common law right, cease to be available. However, if the clause is a penalty, any common law right to loss of bargain damages remains. It follows that if the finance company enjoyed a common law right to terminate, damages are assessed on the basis of exercise of that right.\(^{56}\) If the law were otherwise, that is, if notice under the express provision were regarded as inconsistent with the exercise of the common law right, the finance company would only ever recover sums overdue at the time of termination and nominal damages. That is simply not the law.\(^{57}\)

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54 Although P2 would also be entitled to restitution, an equivalent sum might be awarded as damages. Cf McRae v Commonwealth Disposals Commission (1951) 84 CLR 377 (damages assessed on reliance basis).

55 See also above, text at n 51 (exercise of contractual right to terminate for non-payment).


57 Of course, the finance company is frequently limited to such a claim because of an inability to prove breach of condition, repudiation or fundamental breach. See, eg Bridge v Campbell Discount Co Ltd [1962] AC 600; O'Dea v Allstates Leasing System (WA) Pty Ltd (1983) 152 CLR 359; 45 ALR 632; AMEV-UDC Finance Ltd v Austin (1986) 162 CLR 170; 68 ALR 185.
Illustrations

Introduction

In this section we seek to test our thesis against *Gearbulk* and three other English decisions, the effect of exercise of the power of resale which sellers sometimes enjoy and the ‘alternative rights cases’, that is, cases illustrating exceptions to the attribution principle.

Ennis

The decision in *United Dominions Trust (Commercial) Ltd v Ennis*[^58] (Ennis) concerned the familiar scenario of hire-purchase cases in the 1960s. Mr Ennis (the hirer) took a car on hire-purchase terms from UDT under which he agreed to pay an initial sum (£219) and 48 monthly instalments each of £24 9s 1d. After making the initial payment he fell on hard times and decided to exercise his right to terminate the contract. Clause 10 entitled him to do so, but required return of the car to UDT. Clause 8 provided that if the hirer failed to pay any instalment the company might without notice terminate the hiring. Under cl 11, if UDT exercised its right under cl 8 or if the hirer exercised his right under cl 10, the hirer was required to pay an agreed sum. UDT issued proceedings for the agreed sum. However, following the decision in *Bridge v Campbell Discount Co Ltd*,[^59] in which a provision in the same terms as cl 11 was held to be a penalty, UDT amended its writ to include an alternative claim for loss of bargain damages. Judge Glazebrook in the county court held that the hirer had exercised his right under cl 10 and gave judgment in favour of UDT for £271 16s.[^60]

Three issues arose in the subsequent appeal to the Court of Appeal. First, did the hirer exercise his right under cl 10? It was held that his exercise of that right was invalid because the hirer had returned the car to the dealers, rather than to UDT.[^61] Second, had the hirer repudiated the contract? Lord Denning MR doubted whether there was a repudiation.[^62] However, Harman and Salmon LJJ considered[^63] that the facts disclosed a repudiation.

Third, was UDT entitled to loss of bargain damages? Each member of the court addressed this issue, but the reasoning is not easy to follow. The unifying feature is that UDT had not accepted any repudiation by the hirer. Lord Denning MR said[^64]:

> But even if it be treated as a repudiation, it is clear that the repudiation was never accepted by the finance company. After receiving his letter, they treated the contract as being still continuing. They claimed under the minimum payment clause, which

[^60]: In fact, under cl 11 UDT was entitled to £709 10s 8d. The lesser sum was (in substance) loss of bargain damages and UDT released the hirer from the balance.
[^61]: [1968] 1 QB 54 at 67–8, 69–70. Lord Denning MR considered ([1968] 1 QB 54 at 64–5) that there was no attempt to exercise the right.
[^63]: [1968] 1 QB 54 at 68, 71.
is a thing they could not possibly have done if there had been an acceptance of repudiation. By so doing, they elected to treat it as continuing. [Counsel for UDT] said they accepted the repudiation by retaking possession of the car. But that was not pleaded. Nor has it ever been suggested hitherto. The county court judge said they accepted the repudiation in November 1963, when they amended their pleading. That was far too late. They had already evinced their intention to treat the agreement as continuing. I do not think they can rely on the alleged repudiation.

Harman LJ also concluded that if there was a repudiation it had not been accepted by UDT, saying:

[UDT] elected not to accept [the] repudiation: they elected to treat the agreement as binding and to sue him under it and not to sue him for damages for its breach. Therefore, they cannot rely on repudiation.

Salmon LJ said this:

The judge has found that the alleged wrongful repudiation was accepted by the amendment of the writ nearly four years after it took place. That means that the judge’s finding is to the effect that the agreement continued for a period of nearly four years before being determined by the amendment of the writ, this he found operated as an acceptance of the repudiation made four years previously. Whatever doubt there may be about any of the issues that have been raised in this case, it seems to me there can be no doubt at all but that that finding is wholly untenable. There is no cross-notice setting up any other acceptance of the repudiation, and therefore, even if what the hirer did, as I think, amounts to a repudiation, it was not accepted and therefore is of no effect. Accordingly, the point which has been argued as to the true basis for the assessment of the damages does not arise.

However, if it was correct to assume that the hirer repudiated the contract, it seems obvious that the contract must have been terminated. There was no other basis on which UDT could claim the agreed sum. As in our P2 example, cl 11 dealt with the consequences of termination.

UDT was, therefore, entitled to invoke the attribution principle and to justify its termination on the basis of repudiation. The amendment to the writ which UDT made was necessary only for the purpose of claiming damages. And once that amendment was permitted, UDT had on foot an alternative claim for loss of bargain damages. Those points aside, it is conceptually impossible to say that UDT affirmed the contract. With respect, therefore, the discussion of the issue in Ennis can only be supported on the basis that UDT had elected between the two rights of termination which were available.

Applying the framework suggested in this article, because the contract was terminated, UDT could claim under cl 11 or the common law. If cl 11 had not been a penalty, UDT would have recovered liquidated damages. Such
recovery would have been in place of UDT’s (common law) entitlement to loss of bargain damages for repudiation by the hirer. Therefore, although UDT enjoyed concurrent or independent rights of termination, they were not coordinate. The inconsistency was between remedies. However, because cl 11 provided for a penalty, the parties’ attempt to deal expressly with the consequences of termination failed. All that remained was UDT’s common law right to terminate, on the exercise of which it was entitled to loss of bargain damages. The only rational basis for the discussion of ‘affirmation’ was that by specifying the basis for termination UDT was by its conduct precluded from setting up its common law right. However, that rationalisation was not explored by the court.  

Latco  

In *Stocznia Gdanska SA v Latvian Shipping Co [No 3]*69 *(Latco)* buyers ordered the construction of six reefer vessels from Stocznia Gdanska GA (the builders). An initial five per cent instalment was paid under each contract but, in the course of discussions between the parties, the buyers repudiated all six contracts. Keel laying for two of the vessels later occurred, but the second instalment payment of 20 per cent was not made. The builders then served notices of termination (termed ‘rescission’) under cl 5.05 of the contracts relating to these vessels based on non-payment.  

Subsequently, the builders issued keel-laying notices for the remaining hulls. None of the second instalments were paid, and the builders served notices of termination under cl 5.05 in respect of these vessels as well. In fact, the builders only constructed hulls 1 and 2. For the remaining hulls, the builders had simply renamed hulls 1 and 2, first as hulls 3 and 4, and then as hulls 5 and 6.  

A series of earlier proceedings culminated in the decision of the House of Lords in *Stocznia Gdanska SA v Latvian Shipping Co*70 that the buyers were liable to pay the overdue instalments in respect of hulls 1 and 2, but not the other hulls. Relevantly, the question before the court in *Latco* was whether the builders were entitled to loss of bargain damages for repudiation. It was held that the buyers were so liable notwithstanding the presence in the contract of detailed provisions relating to termination.  

Following termination, cl 5.05 gave the builders71 ‘the full right and power either to complete or not to complete the Vessel and to sell the Vessel at a public or private sale on such terms and conditions as the Seller deems reasonable’. In relation to hulls 1 and 2, the builders had contracted to build two reefer vessels for another purchaser. Rix LJ (with whom Tuckey and Aldous LJJ agreed) held that the builders had sold the two vessels to the third party purchaser and therefore cl 5.05 applied. Accordingly, the builders were to be regarded as having proceeded under cl 5.05 and not by way of the common law. This issue had been raised because the builders were concerned

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that their ‘rights under cl 5.05 were more limited than they would be at
common law in damages for repudiation’.72

For the court the main issue was whether cl 5.05 was a self-contained code
which displaced the builders’ common law rights.73 It was held that it was not.
Rix LJ reasoned that although there was some departure from common law
remedies if a vessel was sold following termination, this was not itself
determinative of whether cl 5.05 was a self-contained code.74 The language
employed in cl 5.05 suggested that it was to be supplemented by the common
law regime. In particular, the clause referred to ‘the recovery of the Seller’s
loss and damage’, and stated that the seller was ‘always obliged to mitigate all
losses and damages due to any such Purchaser’s default’. Likewise, the
language of a ‘deficiency’ which the buyer was required to pay in the case
of a sale could, according to Rix LJ, be supplemented by common law
principles, without which the eventual sum would be difficult to arrive at.75
Similarly, in relation to a ‘net surplus’ on a sale, the calculation of that amount
also required the ‘underpinning of the common law’.76 Finally, since sale was
not mandatory, those aspects of cl 5.05 dealing with sale might not apply.77

Rix LJ therefore concluded that the contract did not state a self-contained code
displacing the builders’ common law remedies. It followed:

(1) in relation to vessels 1 and 2, the builders were entitled to claim
damages for repudiation ‘subject to the provisions of cl 5.05’ in so far
as they related to the proceeds of the sales;78 and

(2) in relation to vessels 3 to 6, the builders could claim loss of bargain
damages under the common law.

In arriving at these results, the court made some quite surprising conclusions
which are appropriately explained by applying the suggested framework in
this article.

The first question was whether the builders enjoyed concurrent rights.
Given the finding that the buyers repudiated all six contracts, it seems
self-evident that they did. However, finding a convincing explanation for the
conclusion that the builders accepted the buyers’ repudiation in respect of
vessels 3 to 6 is another matter. The keel-laying notices were clearly invalid,
as were the notices of termination issued for subsequent ‘non-payment’. Although
the court discussed79 in detail whether those notices amounted to an
‘affirmation’ of the contract, given their invalidity it is difficult to see how they
could be so characterised. The keel-laying notices and the notices which
followed were inconsistent acts sufficient to terminate the contracts.80 If that

74 [2002] 2 Lloyd’s Rep 436 at 448–9; [2002] EWCA Civ 889 at [66]–[69] (referring to certain
passages in Stocznia Gdanska SA v Latvian Shipping Co [1998] 1 WLR 574 which had been
relied on to support a contrary conclusion).
80 Cf South Caribbean Trading Ltd v Trafigura Beheer BV [2005] 1 Lloyd’s Rep 128 at 152,
153; [2004] EWHC 2676 (Comm) at [130], [133].
was not the position, it is difficult to see why the fact that the buyers continued to repudiate their obligations should not have been characterised as an election by them to terminate the contracts.

The second (and more important) issue was whether the builders’ rights under their concurrent termination rights were coordinate. Any doubts on that issue related to the consequences of termination. So far as vessels 1 and 2 were concerned, this issue ought not to have mattered since the court decided that the builders had terminated under cl 5.05. However, as noted above, the court regarded common law principles as relevant so that, it appears, the reference to the ‘Seller’s loss and damage’ in cl 5.05 was to be regarded as a reference to common law damages. It is, of course, a question of construction what loss the parties to a contract intend to be recoverable on termination. But the court appeared to treat that question as resolved by the fact that the clause providing for the payment of the second instalment was a condition, in the sense that the failure to pay within the 21 days of grace was a breach of condition. That seems a very unorthodox conclusion, which may confuse the limitation on termination by the builders under the express provision — expiry of 21 days after breach — with the question whether the time of payment was of the essence. Since time was not of the essence, the rights of the builders under cl 5.05 did not include a right to recover loss of bargain damages. Accordingly, the rights were not coordinate, and since the builders were held to have proceeded under cl 5.05 they could not claim damages for repudiation. In any event, in our view that was irrelevant. To the extent that the builders were entitled to sell the partially completed vessels and to recover the ‘deficiency’ from the buyers, the express right provided for an alternative remedy to the recovery of loss of bargain damages. Thus, in accordance with our analysis above, if the builders took the benefits under the clause their cause of action would be satisfied, and loss of bargain damages for repudiation would not be available. If that is correct, then it is impossible to see how the builders could enjoy the benefit of the express provision as an ingredient of the common law damages regime following termination for repudiation. In electing to sell the vessels, the builders had chosen the remedial consequences of termination. Since cl 5.05 was analogous to a power of sale, the builders were entitled to recover the difference between the contract price and the amount obtained on the resale. That was, in our view, the appropriate construction to place on ‘Seller’s loss and damage’ in cl 5.05. However, according to Rix LJ, the common law supplemented the express remedies

81 See [2002] 2 Lloyd’s Rep 436 at 451; [2002] EWCA Civ 889 at [80], where Rix LJ actually suggested that the ‘express right to withdraw in the case of unpunctual payment . . . is a condition of the contract, breach of which is in itself repudiatory’. Alternatively, the breach was ‘consensually regarded as a repudiatory breach’ ([2002] 2 Lloyd’s Rep 436 at 451; [2002] EWCA Civ 889 at [81]).
82 It is arguably inconsistent with the decision in Afovos Shipping Co SA v Pagnan [1983] 1 WLR 195, and certainly inconsistent with Shevill v Builders Licensing Board (1982) 149 CLR 620; 42 ALR 305.
83 See above, text at n 51. Cf above text at n 72.
84 In Stocznia Gdanska SA v Latvian Shipping Co [1998] 1 WLR 574 the House of Lords held that termination of those contracts did not impact on the builders’ accrued right to recover the overdue payments.
85 See below, text at n 113.
under cl 5.05. This explains why Rix LJ’s reasons for deciding that cl 5.05 was not a self-contained code related to both the right of termination and explaining and giving effect to the builders’ rights under cl 5.05.

Therefore, in stressing the fact that common law rights were not entirely displaced by the express clause — and speaking in terms of supplementation by the common law regime — it is difficult to escape the conclusion that the court actually thought the builders could ‘have their cake and eat it too’. In other words, it seems that the builders were held to be entitled to a portion of each. Yet, it seems clear that if in our P2 example P2 terminates the contract, and requires the builder to sell the partially completed vessel and to account under the clause, P2 would not be entitled to ‘top up’ the amount recoverable under the express regime by reference to the amount of loss of bargain damages.

The position was different in relation to vessels 3 to 6. The contract was clearly severable, and the builders were entitled to pursue their express rights in respect of the contracts for hulls 1 and 2 but to rely on their common law rights for the other vessels in respect of which the express procedure for termination was invalidly exercised. Referring to the builders’ (invalid) claim for payment following the invalid keel-laying notices, and the buyers’ failure to make the payments alleged to be due, Rix LJ stated:

Where contractual and common law rights overlap, it would be too harsh a doctrine to regard the use of a contractual mechanism of termination as unequivocally ousting the common law mechanism . . .

Although that is clearly correct as a general proposition, it is necessarily qualified by the steps taken by the promisee. To the extent that the consequences of proceeding under the express term differed from the consequences of termination under the common law, namely, the ability to recover loss of bargain damages, it was clearly necessary for the builders to choose between them. However, given the decision that the builders accepted the buyers’ repudiation, the consequences of the builders’ election to terminate in respect of hulls 3 to 6 were to be found on the common law.

Dalkia

Dalkia Utilities Services Plc v Celtech International Ltd89 (Dalkia) involved the provision of power by the plaintiffs (Dalkia) to the defendants under a series of agreements. The plaintiffs designed, constructed and operated energy plants. Dalkia contracted with Celtech to provide energy services by means of a heat and power plant for Celtech’s new paper mill. Six agreements were signed. The principal agreement was for an initial period of 15 years. Payment for the energy services was to be by way of annual charges, payable in monthly instalments. These charges consisted of a finance and an operational element.

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87 But see below, text at n 113 (power of sale cases).
88 [2002] 2 Lloyd’s Rep 436 at 452; [2002] EWCA Civ 889 at [88]. The statement was made in the context of discussing whether service of the invalid keel-laying notices was an affirmation of the contracts. It was held that they were not.
Clause 14.4 of the principal agreement entitled Dalkia to terminate for material breach by Celtech. If the agreement was terminated under that provision, cl 15 required Celtech to pay Dalkia a ‘termination sum’, on the payment of which Celtech was to keep the heat and power plant.\(^{90}\) Clause 15.7 stated:

The consequences of termination set out in this clause represent the full extent of the parties’ respective rights and remedies arising out of any termination save for those rights remedies and liabilities which arise prior to termination.

When Celtech failed to pay three monthly instalments in succession, Dalkia terminated the agreements, relying expressly on cl 14.4. Dalkia also sought the termination sum under cl 15. Alternatively, Dalkia argued that Celtech’s failure to pay the three monthly instalments (and associated conduct) amounted to a repudiation of the principal agreement.

Christopher Clarke J gave judgment for Dalkia. He held that Celtech’s failure to pay the three monthly instalments constituted a material breach of its obligations for the purposes of cl 14.4. However, he did not regard Celtech’s conduct as a repudiation of the contract. Also, the termination sum was held not to be a penalty. In reaching these conclusions, Christopher Clarke J considered whether cl 15.7 applied to an accepted repudiation. According to Christopher Clarke J, this involved the question:\(^{91}\)

whether or not cl 15.7 should be interpreted to mean that cl 15 provides a complete code as to the rights and remedies which either side shall enjoy in the event that there is any form of termination or purported termination of the agreement, whether by a notice given under any of the sub-clauses of cl 14, or by reason of the acceptance by one party to the agreement of a repudiatory breach — committed by the other.

He concluded that cl 15.7 was not a complete code. Two reasons were given, based on the presumption in favour of common law rights. First, reading cl 15.7 in its proper context, it was clear that the rights and remedies that would arise in respect of a termination on any of the bases provided for by cl 14 were those specified in cl 15. Second, notwithstanding the reference to ‘any termination’ in cl 15.7, it did not exclude any common law rights on termination for repudiation. It followed that either party would be entitled to terminate the contract for repudiation by the other.

With respect, Christopher Clarke J may have attributed too much weight to the presumption in favour of common law rights. Whether an express right is an exhaustive statement of the bases on which a contract may be terminated is a question of construction. Although there may have been good reasons for reaching the conclusion that the express clause was not exhaustive, as we have sought to explain, that is not a complete answer to the issues which arise. Therefore, Christopher Clarke J’s conclusion on that construction issue was not determinative. There were two further issues, namely, whether any common law right could be exercised concurrently with the express right, and the precise relationship between cl 15 and the common law consequences of termination. Recast in terms of our analysis, this is a question of whether the

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\(^{90}\) The principal agreement was later amended to limit the termination sum to any interest outstanding on the charges.

\(^{91}\) [2006] 1 Lloyd’s Rep 599 at 606; [2006] EWHC 63 (Comm) at [20].
parties’ rights were coordinate and, if not, the extent of inconsistency. There was no doubt that the contract conferred more extensive rights of termination than the common law. Accordingly, the mere fact that an express right was enlivened did not mean that Dalkia also enjoyed a common law right. Thus, Christopher Clarke J said that the contract ‘may more aptly be regarded as giving to Dalkia . . . rights which differ from, and are more extensive than, its common law rights’. He also recognised that where the same facts give rise to express and common law rights the prima facie rule is that the promisee can rely on both. However, Christopher Clarke J concluded that, even if a repudiation had been established, Dalkia’s notice of termination could not, simultaneously, be an acceptance of the repudiation and an exercise of the express right. This was because of inconsistency between the consequences. Indeed, addressing whether the issue of a notice of termination in respect of an express provision would in all cases amount to an acceptance of a repudiation, he explained:

. . . markedly different consequences would arise according to whether or not there was a termination under cl 14.4 or an acceptance of a repudiation. In the former case Celtech would be liable to pay a termination sum and entitled, on payment, to keep the plant. In the latter Dalkia would be entitled to the plant, which either always remained its property (if it was never a fixture) or was something that Dalkia would be entitled to remove; and their claim would not (unless, perhaps, the value of the plant was nil) be in the same amount as the termination sum . . . The same notice cannot operate to produce two so diametrically opposing consequences.

He supported this explanation by reference to Ennis. However, with respect, the explanation is not correct. It mischaracterises a case of inconsistent remedies flowing from concurrent rights as a case of inconsistent rights. As in our P2 example, any inconsistency was in relation to remedies, not discharge. Given that any exercise of the express right clearly satisfied the common law requirement of unequivocal conduct, even if the express right had not been available, the ‘attribution’ principle and the ‘inconsistent act’ principle would have resulted in an effective election to terminate for any repudiation by Celtech. Why should it matter that the express right was validly exercised? The notice given by Dalkia would have operated as a valid exercise of any common right to terminate for repudiation and the right to terminate under cl 14.4.

Gearbulk

Gearbulk concerned three materially identical shipbuilding contracts between Stocznia and Gearbulk for the construction and sale of three vessels. Article 5.10(b) of each contract included a ‘refund guarantee’. It was provided that Stocznia would refund all ‘instalments of the contract price’ paid, and that the obligation was to be ‘secured under and pursuant to the refund guarantee issued in favour of the purchaser’. Article 10.1(c) entitled Gearbulk to terminate the contract if the vessel was not completed 150 days after the
delivery date. Finally, art 10.7 prescribed the effect of termination by Gearbulk ‘in accordance with the provisions of art 10 or any other provision of this contract expressly entitling [Gearbulk] to terminate’ in terms that Stocznia was obliged to repay to Gearbulk all sums previously paid under the contract, together with interest.

Stocznia was unable to complete any of the vessels. Gearbulk elected to terminate the contracts. It received payment under the refund guarantee. The dispute which then arose was whether Gearbulk could recover loss of bargain damages or, as Stocznia argued, Gearbulk was limited to the recovery of money paid. The matter was referred to arbitration, in which Gearbulk prevailed. Burton J allowed Stocznia’s appeal, and Gearbulk appealed to the Court of Appeal. Burton J’s decision was reversed.

In the Court of Appeal, Moore-Bick LJ, with whom Ward and Smith LJJ agreed, held that art 10 did not prevent termination by Gearbulk on a common law basis. The parties’ intention underlying the express termination right was essential in determining the importance of the ‘underlying obligation and the nature of the breach’. As a matter of construction, there was nothing to indicate that the parties intended to displace the common law right to terminate for repudiation or fundamental breach. Indeed, Moore-Bick LJ went as far as to say that:


In my view it is wrong to treat the right to terminate in accordance with the terms of the contract as different in substance from the right to treat the contract as discharged by reason of repudiation at common law. In those cases where the contract gives a right of termination they are in effect one and the same.

With respect, this is a difficult proposition to accept. The contract did not state the events which would satisfy the common law requirements for repudiation or fundamental breach. Nor did the contract include an agreement that conduct which activated the express provision was a repudiation or fundamental breach. Rather, the position, simply, was that the conduct which activated the express right to terminate was found by the court to have amounted to a repudiation of obligation. Given that the clause was activated by 150 days’ delay in delivery, that is hardly surprising. Accordingly, in the terminology adopted above, Gearbulk enjoyed concurrent termination rights. In fact, the notice of termination in respect of one vessel (hull 26) was given in respect of both the express right and any common law right. Therefore, subject to the impact of enforcement of the refund guarantee, it was expressly a simultaneous exercise of both rights. However, in relation to two of the vessels (hulls 24 and 25) the notice of termination expressly related to the express right. Nevertheless, each such notice satisfied the common law requirement for valid termination. Each notice was therefore capable of being characterised as acceptance of any repudiation or fundamental breach by Stocznia.

Turning to Stocznia’s second argument relating to liability for loss of

bargain damages, in terms of our analysis, the issue was whether the two rights of termination were coordinate. However, since there was no mandatory procedure applicable to the express right, any discordance between the rights would relate to their consequences. Gearbulk’s entitlement at common law was to recover loss of bargain damages. Since the contract was construed as one for the sale of goods, because no part of the contract was performed Gearbulk would also be entitled to restitution of the advance payments made under the contract. Under the express provision, the only express right was to enforce the refund guarantee. Since the refund guarantee did no more than secure Gearbulk’s restitutionary right, it was not inconsistent with recovery of loss of bargain damages. However, under art 10.7 the entitlement to enforce the guarantee was stated to apply on ‘termination of this contract by the purchaser in accordance with’ art 10 ‘or any other provision of this contract expressly entitling the purchaser to terminate this contract’. That created a question of construction, namely, whether arts 5.10 and 10.7 were to be applied literally. It seems inherently unlikely that the parties intended that the guarantee would not be available to Gearbulk if Stocznia simply refused to perform the contract. However, even if it was — so that the guarantee was not available to Gearbulk if it terminated the contract on a common law basis — that could have no impact on its ability to claim loss of bargain damages and restitution of payments made.

Moore-Bick LJ analysed the issue in a different way. He accepted that there was ‘no reason’ why the parties could not have agreed that Gearbulk should have no right to recover loss of bargain damages. However, he thought the contract would have been imbalanced since Stocznia retained a right to claim loss of bargain damages. Relying on the presumption in favour of common law rights, Moore-Bick LJ stated that ‘[t]he more valuable the right, the clearer the language will need to be’ in displacing this presumption. On the facts, the presumption was not displaced since it was impossible to construe art 10 as a complete statement of Gearbulk’s rights on termination — whatever the basis.

In this regard, the impact of Moore-Bick LJ’s statement that the rights of termination were ‘in effect one and the same’ was that Gearbulk’s express right was to be equated with the implied right. It is not easy to see the logic of that, or why, if it was correct, there was any need to consider whether the conduct of Stocznia amounted to a repudiation and whether the express regime displaced the common law. If there was only one right, the sole question was what consequences flowed from exercise of that right. That was,
of course, a question of construction. Moore-Bick LJ’s view that the common law right and express rights were ‘one and the same’ can also be contrasted with the view in Leslie Shipping Co v Welstead that express rights exist together rather than overlap in substitution of one another.

Stocznia’s third argument was that by terminating the contracts under art 10 Gearbulk had elected to affirm the contracts and therefore could not subsequently treat them as repudiated. Since art 10 was held to embody the common law right of recovery for repudiation, it was held that Gearbulk was entitled to recover loss of bargain damages. Since its notices of termination were inconsistent with an election to affirm the contracts, there was no affirmation by Gearbulk. Moreover, the ‘commercial context as well as the terms of the contract make it clear that the obligation to repay instalments of the price was intended to survive the termination of the contract’. Accordingly, Gearbulk’s enforcement of the refund guarantee was not inconsistent with the recovery of loss of bargain damages.

Although we reach the same conclusion, our analysis is again somewhat different. In Gearbulk the event which activated the express right was held to be a repudiation at common law. Since the requirements for termination were the same, the notices served by Gearbulk were effective to terminate the contracts on both bases unless the enforcement of the refund guarantee was inconsistent with exercise of the common law right. As explained above, the fact that the contract provided for enforcement of the refund guarantee could not affect the validity of Gearbulk’s election to terminate. Even if Gearbulk breached the contract by enforcing the refund guarantee, that conduct could not be an affirmation of the contract because it occurred after termination.

In order to reach the result contended for by Stocznia, a further conclusion would have to be drawn, namely, that Gearbulk’s cause of action on termination under art 10 was satisfied by refund of the money paid. There was, however, nothing to support that conclusion in the clause. There was no express agreement to that effect. In addition, and in our view more importantly, from the perspective of the common law right to restitution, the refund guarantee did no more than secure the common law right. Accordingly, and unlike the position of P2 in our shipbuilding example, the termination rights were either coordinate or discordant in a way which made it irrelevant which right was exercised.

**Power of Sale Cases**

An express power of resale is common in a sale of land contract. Typically, the power of sale is an alternative right which may be exercised by the vendor following default by the purchaser. It is also, usually, a right which becomes

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107 See [2010] QB 27 at 36; [2009] EWCA Civ 75 at [16] where such an intention was deduced.
109 [1921] 3 KB 420 at 426 per Greer J (not ‘cutting down the rights . . . in the absence of such a clause’).
112 [2010] QB 27 at 45; [2009] EWCA Civ 75 at [40].
available to the vendor after termination, and is made available as an alternative to common law damages.\footnote{See cl 9 of the New South Wales Law Society’s Standard Contract for the Sale of Land, 2005 ed.}

In \textit{Cooper v Ungar},\footnote{\textit{Cooper v Ungar} \cite{CooperUngar} provided that if the purchaser failed to comply with the terms of sale, the vendor could resell the land and claim from the purchaser any deficiency arising from such sale as liquidated damages. When the vendor sued the purchaser under cl 14 for such a deficiency, the purchaser claimed that the vendor had not exercised his power to resell within a reasonable time. In relation to powers of sale, Dixon CJ (for the court) said:\footnote{\textit{Cooper v Ungar} \cite{CooperUngar} at 513.} ... it has been pointed out that such a provision gives a contractual right to the vendor. It is a right in the nature of a power and when he pursues it he is acting under the contract and not in derogation of the contract or on the footing that it is discharged completely.}

and commenting on the vendor’s claim in this case, Dixon CJ concluded:\footnote{\textit{Cooper v Ungar} \cite{CooperUngar} at 514.}

\begin{itemize}
  \item It is hardly necessary to point out ... in so suing the plaintiff was suing upon the contract, that is on a term of the contract and not for unliquidated damages as for a wrongful repudiation of the contract or for a breach in failing to complete it.
  \item Once the land has been resold under the power, the parties are discharged. However, there remains the purchaser’s secondary obligation to pay liquidated damages to the seller. Thus, although the contract is discharged, there remains a contractual regime following termination. However, the vendor was ‘suing upon the contract’ only in the sense that it was enforcing its right to liquidated damages payable following termination. Whether such provisions should be regarded as conferring a single right of termination with two different sets of consequences or two concurrent rights of termination is hardly likely to matter. The question is whether the vendor’s rights against the purchaser following default have been satisfied. In claiming liquidated damages the vendor is therefore electing between inconsistent remedies, not inconsistent rights.\footnote{See also \textit{Taylor v Raglan Developments Pty Ltd} \cite{TaylorRaglan Developments} and \textit{Zografakis v McCarthy} \cite{Zografakis v McCarthy}.}
  \item In \textit{R V Ward Ltd v Bignall},\footnote{\textit{R V Ward Ltd v Bignall} \cite{RVWardvBignall}.} Diplock LJ applied much the same analysis to an express right to resell goods. Referring to s 48(4) of the Sale of Goods Act 1893 (UK),\footnote{Sale of Goods Act 1893 (UK), s 48(4). See also eg Sale of Goods Act 1923 (NSW), s 50(4); Sale of Goods Act (1993 rev ed) (c 393) (Sing), s 48(4).} relating to an \textit{express} right of resale, Diplock LJ said:\footnote{\textit{R V Ward Ltd v Bignall} \cite{RVWardvBignall} at 550–1.} \footnote{Where the seller expressly reserves the right of re-sale in case the buyer should make default, and on the buyer making default re-sells the goods, the original contract of sale is rescinded but without prejudice to any claim the seller may have for damages.} \footnote{Sale of Goods Act 1979 (UK), s 48(4). See also eg Sale of Goods Act 1923 (NSW), s 50(4); Sale of Goods Act (1993 rev ed) (c 393) (Sing), s 48(4).}
\end{itemize}
Subsection (4) deals with the consequences of a resale by a seller, not necessarily an ‘unpaid seller’ as defined in section 38, made in the exercise of an express right of resale reserved in the contract on the buyer making default. If such an express right were exercisable after the property in the goods had passed to the buyer, its exercise might, on one view, be regarded as an alternative mode of performance of the seller’s primary obligations under the contract, and the resale as being made by the seller as agent for the buyer. It was, therefore, necessary to provide expressly that the exercise of an express power of resale should rescind the original contract of sale. That is, in my view, the explanation of the express reference to rescission in subsection (4).

It is, of course, always open to the parties to a contract for the sale of land or goods to agree to a different result, that is, that the vendor or seller may resell without a prior termination. But in the usual case — where termination is required — although the rights are concurrent, the remedies are not.

### Alternative Rights Cases

What we termed the ‘attribution’ principle has frequently been applied in the alternative rights cases. The key feature of those cases, however, is that on analysis it is found that the promisee has only one right to terminate. For example, in *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH (The Mihalis Angelos)* a charterparty was agreed for a voyage from Haiphong to Hamburg with a cargo of apatite. There was no apatite available at Haiphong, and the charterers thought this was due to the war in Vietnam. The charterers terminated the contract on the basis of force majeure. However, there was no force majeure, and the charterers’ termination was, so far as that ground was concerned, a repudiation of the contract. However, the English Court of Appeal held that the shipowners had breached a condition. Applying the attribution principle it was held that the charterers’ ‘repudiation’ was — as a matter of law — a valid termination.

Given that in the alternative rights cases there is typically only one valid basis for the promisee’s termination, it is easy to understand why this line of authority has not figured in the discussion in the illustrative cases considered above. However, in our view they raise precisely the same issues. For example, if a promisee enjoys an express right to terminate and a common law right, but a notice given under the former is invalid, the cases illustrate that it is sufficient that the promisee enjoys an independent or concurrent common law right. Unless there is a basis for not applying the attribution principle, the notice of termination under the express clause, although invalid, can be attributed to the common law basis for termination. Where the courts have struggled is in trying to explain — from a doctrinal perspective — the situations in which the attribution principle has not been applied. Although in our view the decision in *Gearbulk* sounds the death knell on the reasoning in *Ennis* to the effect that termination of a contract may amount to an

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122 *Howe v Smith* (1884) 27 Ch D 89 at 105. In each case, the action is for damages, not the contract price: *R V Ward Ltd v Bignall* [1967] 1 QB 534 at 550.


124 That was in our view the proper characterisation of the invalid notices in *Latco*. See above, text at n 80.
affirmation,\(^{125}\) that reasoning seems to underlie at least some of the cases in which promisees have been denied the benefit of the attribution principle.

There are three lines of authority. The first is typified by *Panchaud Frères SA v Etablissements General Grain Co.*\(^{126}\) Very briefly, in that case sellers agreed to sell 5500 tons of maize on CIF terms. Payment was to be made in cash against documents. When the documents were presented to the buyers they were accepted and the agreed price was paid. These documents included a falsely dated bill of lading. Had the buyers examined the documents closely, they would have seen a discrepancy between the bill of lading and the quality certificate, suggesting a false shipment date. When the goods arrived at Antwerp they were rejected by the buyers who relied on the quality and description of the goods. However, those matters did not in fact justify rejection. During arbitration proceedings the buyers discovered the true date of shipment. They therefore sought to justify their election to terminate the contract by reference to late shipment. The English Court of Appeal held\(^{127}\) that the buyers had not elected to affirm the contract. But it was nevertheless held that the buyers were not entitled to put forward an alternative basis for their election to terminate.

The case must be considered against the elementary law that under a CIF contract a buyer enjoys two rights of termination.\(^{128}\) The contract may be terminated if the documents are not in order. The goods may be rejected if the seller breaches a condition. Accordingly, the buyers in *Panchaud Frères* had two independent rights of termination. Putting issues of knowledge to one side, since they accepted the documents they lost their first right of termination. However, because they rejected the goods, the attribution principle suggests that they had validly elected to terminate the contract. The court’s decision to the contrary has been a source of considerable debate. However, in *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce*\(^{129}\) the English Court of Appeal explained the decision as based on estoppel.\(^{130}\) Whether the facts in *Panchaud Frères* justified a conclusion of estoppel is another matter. However, for the purposes of this article it is sufficient to say that the first line of authority illustrates no more than that a promisee may be estopped from relying on the attribution principle by words or conduct preceding the accrual of a second right to terminate.\(^{131}\)


\(^{128}\) *Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 QB 459 at 480.


\(^{130}\) Adopting *V Berg & Son Ltd v Vandem Avenue-Iegem PVRA* [1977] 1 Lloyd’s Rep 499 at 504.

\(^{131}\) See *Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 QB 459 at 481 per Devlin J, buyer loses the ‘right to reject the goods . . . because he [has] waived in advance reliance on the date of shipment’. Although Devlin J may have been using ‘waiver’ in the sense of election, the true doctrinal basis must be estoppel.
The second line of authority takes us into the ‘somewhat marshy ground’ of *Braithwaite v Foreign Hardwood Co*. Much of the water was drained by the House of Lords in *Fercometal SARL v Mediterranean Shipping Co SA (The Simona)*, and there is no need to go into the intricacies of the facts. Suffice to say that a seller claimed damages for non-acceptance in circumstances where the buyers had purported to terminate the contract for breach of a collateral agreement by the seller. There was, however, no such agreement. According to the trial judge (Kennedy J), had the buyers not wrongfully repudiated the contract, but instead called for its performance, they would have been entitled to reject the goods. Nevertheless, the English Court of Appeal affirmed his decision that the buyers could not justify their termination of the contract on the basis of the seller’s inability to perform. As in the later case of *Taylor v Oakes Roncoroni & Co*, it was said that any inability was irrelevant. Just why that was the position was not explained, although it does seem clear that at the time of these decisions the ability to rely on an alternative ground for termination was not fully established. Thus, when *British and Beningtons Ltd v North Western Cachar Tea Co Ltd* was before the Court of Appeal, Scrutton LJ, relying on *Braithwaite*, had restricted the right to rely on alternative grounds to the wrongful dismissal of employees. In the House of Lords, Lord Sumner would have none of that. He said:

> [A]s reported, that decision is not quite easy to understand. It was presented to your Lordships by the respondents, fortified by the opinion of Scrutton LJ, as a decision that, when there has been a repudiation by one party on a given ground, and an acceptance of that repudiation by the other party, the former can no longer rely on any other ground for refusing to perform his obligations, and particularly cannot require the latter to prove his readiness and willingness to perform any of his obligations under the contract, thus repudiated . . . [In] my opinion, the case as reported either does not lay down this proposition or, if it does so, is wrong . . . The case was dealt with [by the majority in the Court of Appeal] as one in which the buyers had explicitly waived all conditions precedent, while retaining a right to rely on them as terms, the breach of which would sound in damages that could be given in evidence in reduction of the claim, and the judgment of Kennedy J, who had thus reduced the plaintiff’s damages, was consequently affirmed.

This idea, namely, that the statement of one ground for termination may amount to the ‘waiver’ of any alternative ground, has been invoked in several other cases. So far as *Braithwaite* is concerned, it must now be accepted that there was, in fact, no alternative ground on which the buyers could have relied. However, had there been the breach of one or more ‘conditions

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132 *Esmail v J Rosenthal & Sons Ltd* [1964] 2 Lloyd’s Rep 447 at 463 per Davies LJ (affirmed sub nom *Rosenthal & Sons Ltd v Esmail* [1965] 1 WLR 1117 without reference to the point).
133 [1905] 2 KB 543.
135 See (1905) 92 LT 637 at 639.
136 (1922) 27 Com Cas 261.
138 Sub nom *North-Western Cachar Tea Co Ltd v British & Beningtons Ltd* (1921) 10 LI L Rep 381 at 387.
140 Sharp v Thomson (1914) 20 CLR 137 at 143; *Cooper Ewing & Co Ltd v Hamel Horley Ltd* (1922) 13 LI L Rep 590 at 592, 593; *Bowes v Chaleyer* (1923) 32 CLR 159 at 184, 191, 197.
precedent’ as he termed them, Lord Sumner’s statement that the buyers were ‘retaining a right to rely on them as terms, the breach of which would sound in damages’ is very clearly a statement to the effect that the buyers had affirmed the contract. But if there was an alternative ground in Braithwaite — whether concurrent with or independent of the ground which was alleged to exist — it seems quite impossible to say that the buyers both repudiated and affirmed the contract. Since the conduct which was held to be a repudiation was a wrongful termination, under the attribution principle it would have amounted to a valid termination.

Of course, the word ‘waiver’ is a malleable one. On the facts in Braithwaite it is possible that the seller could have procured conforming goods. Thus, Lord Sumner added:

Furthermore it does not anywhere appear that, even if the first cargo might rightly have been rejected, the seller could not have found another exactly conforming with the contract, which he might have duly tendered and so have put himself right.

As in relation to the first line of authority, that also suggests an estoppel argument.

The third line of cases is based on the decision in Heisler v Anglo-Dal Ltd. A contract for the sale of aluminium ingots required the plaintiff to furnish a guarantee. The ‘guarantee’ was in fact an undertaking by the plaintiff to pay. The objection made was that Treasury permission was necessary for payment in United States dollars but never obtained. However, assuming Treasury permission was required, the English Court of Appeal held that it was too late for the defendants to take the point. On the facts, the plaintiff was entitled to an opportunity to cure the defect. Although the decision has been regarded as stating an exception to the ability to invoke an alternative ground for termination, it is extremely doubtful whether that was the intention of the court. The time for providing the guarantee had not arrived. There was, therefore, no breach of condition. Moreover, on the basis of decisions such Sweet & Maxwell Ltd v Universal News Services Ltd statements made by the plaintiff in relation to the guarantee could not have amounted to a repudiation. It follows that, in fact, the alternative ground for termination never existed as such. On that basis, the defendants had no right to terminate the contract at the time they purported to do so and the attribution principle was of no assistance to them.

141 In addition, if the English Court of Appeal was correct in deciding in Peyman v Lanjani [1985] Ch 457 that affirmation requires knowledge of the right to terminate, the buyers could not be said to have made any election against termination on the ground of inability.


144 See also Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd [2009] 4 SLR(R) 602 at 623; [2009] SGCA 24 at [67] which interpreted the case to stand for the proposition that: ‘In other words, the innocent party will not be entitled to rely on a ground not raised at the time of termination if the party in breach could have rectified the situation had it been afforded the opportunity to do so’.

Conclusions

In this article we have argued for a two-stage approach in dealing with situations in which a promisee has alternative rights of termination. Given the complexities of the area, we have focused on the position of a promisee who has the benefit of an express right and a common law right.

In the first stage, it is determined whether the rights are concurrent or independent. The former relates to rights which arise in respect of the same event — usually at the same time — whereas independent rights arise in respect of the different events, usually at different points in time. Although that distinction is useful in determining the impact of an alleged affirmation of the contract, it does not provide a solution to the problems which typically arise where a promisee enjoys a common law right of termination and an express right of termination. It is therefore necessary to proceed to the second stage of our analysis.

In the second stage, the content of the rights is considered. Although termination inevitably involves a discharge of the parties, different consequences may ensue depending on whether the promisee invokes the express right or the common law right. Our approach requires a consideration of whether the rights are coordinate, and if they are not in what respects they are discordant. However, even if the consequences are dramatically different, that does not prevent the promisee exercising both rights simultaneously. Given the principles regulating election between rights and remedies, what matters is whether the promisee’s cause of action against the promisor has been satisfied. In our shipbuilding example, P2’s cause of action against the builder is satisfied only by payment under the express provision or by the recovery of common law damages. Therefore, notwithstanding the comments in Dalkia, provided exercise of the express right brings about an immediate termination, the promisee remains entitled to invoke its common law right until satisfaction unless the promisee is estopped from relying on that right.

It follows that the mere exercise of an express right does not of itself prevent reliance on the common law right. Indeed, given the inconsistent act principle, exercise of the express right will in most cases also amount to exercise of the common law right. It necessarily follows from this that the conduct of the promisee cannot amount to affirmation of the contract. To the extent that Ennis purported to decide to the contrary, it was wrongly decided and cannot be supported as a matter of principle. Following the decision in Gearbulk, it cannot be supported as a matter of authority either.

The thesis which we have presented is consistent with the power of sale cases, and also explains some of the problems of the alternative rights cases. In our view it also exposes certain difficulties in the reasoning in the other illustrative cases, particularly in Latco. That decision shares with Gearbulk and Dalkia features which are somewhat disquieting from two related perspectives. The first perspective is contract doctrine. In each case, a great deal of use is made of the presumption in favour of common law rights.

146 Above, text at n 89.
147 Above, text at n 58.
148 Above, text at n 96.
149 Above, text at n 69.
Particularly in *Latco* it is difficult to escape the conclusion that the promisee was effectively held to be entitled to pick and choose between express and common law incidents of termination.\(^{150}\) It is trite that a contract can be terminated only once. But it follows that the use of common law principles to ‘supplement’ the consequences of termination must be done with precision. As we have pointed out,\(^{151}\) in relation to our P2 example, it is simply not possible for P2 to enjoy the benefit of the express provision and also claim damages for loss of the bargain simply on the basis that the clause does not expressly deny to P2 the right to recover such damages or on the basis that the express right is activated by circumstances amounting to a repudiation. That is not to say that the concern is that a promisee should not recover the same loss twice. The fact that P2’s entitlements under the express clause might turn out to be less advantageous than the alternative claim for loss of bargain damages does not entitle P2 to supplement the former by reliance on the latter. By taking the benefits under the express clause the cause of action is satisfied and there is no ability to claim any additional loss damages.\(^{152}\)

The second perspective is commercial. Particularly in *Dalkia* and *Latco*, the parties had gone to some lengths in agreeing on the regime which would apply if the contracts were terminated. Parties to commercial contracts do not agree on such regimes to supplement common law rights. The commercial intention is to replace those rights. If an event within the express clause occurs, and the clause is exercised, there is no commercial justification for permitting parties to second-guess their agreed regime. In other words, putting to one side the obvious point that the parties are unlikely to intend the express regime to apply if the promisor simply abandons the contract, or purports to terminate it when there is no right to do so, the starting and finishing point in relation to such clauses ought to be that the parties have spoken. To the extent that the reasoning in the illustrative cases relies on the presumption in favour of common law rights, and analyses express rights of termination as if they were exclusion clauses,\(^{153}\) the cases seem on the verge of adopting a new form of the fundamental breach doctrine.

Equally, to conceive (as in *Gearbulk*) of a right to terminate for repudiation as being the same right as that conferred expressly by the contract or to conceive (as in *Latco*) that the effect of express conferral of a right is the same as an agreement that a term is a condition, invites confusion. Neither is doctrinally accurate nor a sufficient explanation of why the promisees in those cases were entitled to recover loss of bargain damages. Like Alice, whether Gearbulk exercised its common law right or its express right, it arrived at the same destination — the parties were discharged. And just as the contents of Tweedledum’s House are the same as at Tweedledee’s, the ‘contents’ of Gearbulk’s express right were the same as its common law right. Similarly, just as Bill cannot garden at the White Rabbit’s House and at the same time enjoy the delights of the Croquet Lawn, the builders in *Latco* could not

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\(^{150}\) See also *Celtech* [2006] 1 Lloyd’s Rep 599 at 632; [2006] EWHC 63 (Comm) at [144] per Christopher Clarke J (‘if the claim made under the notice of termination is inconsistent with, and not simply less than, that which arises on acceptance of a repudiation’).

\(^{151}\) Above, text at n 54.

\(^{152}\) But see *Gearbulk* [2010] QB 27 at 46; [2009] EWCA Civ 75 at [44].

\(^{153}\) See, eg *Gearbulk* [2010] QB 27 at 40; [2009] EWCA Civ 75 at [25].
augment their rights following resale of the vessels by reference to loss of
bargain damages. Therefore, having reached the Croquet Lawn, although Bill
might — regretting his ‘election’ — retrace his steps and journey to the White
Rabbit’s House,\textsuperscript{154} no such facility was available to the builders in \textit{Latco}.

\textsuperscript{154} If Bill were to be told what Alice has in store for him at the White Rabbit’s House he might be content to suffer the dangers which lurk on the Croquet Lawn.