period of four years and five months was reasonable so that the tie was valid but the other tie for 21 years in the solus agreement and the mortgage was invalid, so that the injunction asked for by the claimant could not be granted.

Comment The House of Lords appears to have been influenced by the report of the Monopolies Commission on the Supply of Petrol to Retailers in the United Kingdom (Cmnd 1965, No 264) which recommended the period of five years.

213 *Cleveland Petroleum Co Ltd* v *Dartstone Ltd* [1969] 1 All ER 201

The owner of a garage and filling station at Crawley in Sussex leased the property to Cleveland and it in turn granted an underlease to the County Oak Service Station Ltd. The underlease contained a covenant under which all motor fuels sold were to be those of Cleveland. There was power to assign in the underlease and a number of assignments took place so that eventually Dartstone Ltd became the lessee, having agreed to observe the covenants in the underlease, but then challenged the covenant regarding motor fuels, and Cleveland asked for an injunction to enforce it. The injunction was granted. Dealing in the Court of Appeal with *Harper*'s case Lord Denning, MR said:

> It seems plain to me that in three at least of the speeches of their Lordships a distinction is taken between a man who is already in possession of the land before he ties himself to an oil company and a man who is out of possession and is let into it by an oil company. If an owner in possession ties himself for more than five years to take all his supplies from one company, that is an unreasonable restraint of trade and is invalid. But if a man, who is out of possession, is let into possession by the oil company on the terms that he is to tie himself to that company, such a tie is good.

Comment (i) The essential distinction is, as we have seen, that where the restraint on the use of the land is contained in a conveyance or lease the common-law rules of restraint of trade do not apply. The person who takes over the property under a conveyance or lease has given nothing up. In fact, he has acquired rights which he never had before even though subject to some limitations.

(ii) In *Alec Lobb (Garages) Ltd* v *Total Oil GB Ltd* [1985] 1 All ER 303 the claimant company borrowed from the defendant to develop a site. As part of the loan arrangements, the claimant agreed to buy the defendant's petrol for 21 years. Since the company was already in occupation of the garage and filling station when the agreement was made, it was subject to the doctrine of restraint of trade, being a *contract* and not a *lease*. The High Court said that 21 years was too long and that the restraint was unenforceable. The Court of Appeal rejected that view and with it the opinion of the Monopolies Commission that it was not in the public interest that a petrol company should tie a petrol filling station for more than five years in the circumstances of this case.

Therefore, the *Lobb* case seems to show that the courts may not be prepared to help the so-called weaker party, i.e. the garage owner, as they were in the past. In the *Lobb* case the Court of Appeal said that each case must depend on its own facts. In fact, the longer restriction in this case seems to have been justified. The loan by Total was a rescue operation greatly benefiting Lobb and enabling it to continue in business. There were also break clauses in the arrangement at the end of seven and 14 years if Lobb wished to use them. In view of the ample consideration offered by Total, the restraint of 21 years was not, according to the Court of Appeal, unreasonable and was, therefore, valid and enforceable.

(iii) These agreements would in any case appear to be contrary to the prohibition contained in the Competition Act 1998. Section 2(2)(e) of the Act prohibits agreements which require the acceptance of supplementary trading conditions which have no connection with the subject matter of the contract. This would cover cases in which a manufacturer or a supplier insisted that a retailer did not stock the products of a rival manufacturer. This is at the root of solus agreements and yet has nothing essentially to do with the supply and sale of petrol and other products such as oil normally sold by a garage.

Involuntary restraints on members of trade associations and the professions

214 *Pharmaceutical Society of Great Britain* v *Dickson* [1968] 2 All ER 686

The Society passed a resolution to the effect that the opening of new pharmacies should be restricted and be limited to certain specified services, and that the range of services in existing pharmacies should not be extended except as approved by the Society's council. The purpose of the resolution was clearly to stop the development of new fields of trading in conjunction with pharmacy. Mr Dickson, who was a member of the Society and retail director of Boots Pure Drug Company Ltd, brought this action on the ground that the proposed new rule was *ultra vires* as an unreasonable restraint of trade. A declaration that the resolution was *ultra vires* was made and the Society appealed to the House of Lords where the appeal was dismissed, the following points emerging from the judgment.

(*a*) Where a professional association passes a resolution regarding the conduct of its members the validity of the resolution is a matter for the courts even if binding in honour only, since failure to observe it is likely to be construed as misconduct and thus become a ground for disciplinary action.

(*b*) A resolution by a professional association regulating the conduct of its members is *ultra vires* if not sufficiently related to the main objects of the association. The objects of the society in this case did not cover the resolution, being 'to maintain the honour and safeguard and promote the interests of the members in the exercise of the profession of pharmacy'.

(*c*) A resolution by a professional association regulating the conduct of its members will be void if it is an unreasonable restraint of trade.

Comment (i) Once again, the court is concerned with business efficiency and an arrangement under which retail chemists are prevented from selling general merchandise is not likely to lead to greater efficiency and competition. It was, therefore, struck down as too restrictive.

(ii) Agreements which involve the rules relating to the regulation of professional bodies are excluded from the operation of the Competition Act 1998 (see s 3 and Sch 4) but their activities are subject to common-law principles of restraint of trade.

(iii) Without the benefit of exclusion, the exclusive right of barristers and solicitors to practise law could be found to be illegal. Nevertheless, the exclusion depends for its continuance upon the Secretary of State for Trade and Industry 'designating' the profession concerned. In this connection the Director-General of Fair Trading may carry out an investigation to see whether a particular profession should continue to be designated. An early investigation was of the legal and accountancy professions, which could lead to multi-disciplinary practices.

DISCHARGE OF CONTRACT

Discharge by performance: entire contracts

215 ***Bolton* v *Mahadeva*** [1972] 2 All ER 1322

Bolton installed a central heating system in the defendant's house. The price agreed was a lump sum of £560. The work was not done properly and it was estimated that it would cost £179 to put the system right. The Court of Appeal decided that the lump-sum payment suggested that the contract was entire, and since Bolton had not performed his part of it properly and in full, he could not recover anything for what he had done.

Comment The case of *Cutter* v *Powell* (1795) 6 Term Rep 320 is sometimes used to illustrate the point about entire contracts. The facts of the case were that a seaman agreed to serve on a ship from Jamaica to Liverpool for the sum of 30 guineas (£31.50 today) to be paid on completion of the voyage. He died when the ship was 19 days short of Liverpool. The court *held* that the contract was entire and his widow was not entitled to anything on behalf of his estate. While the case is valid as an illustration, it has been overtaken on its own facts by more recent law. The Merchant Shipping Act 1995 now provides for the payment of wages for partial performance in such cases and the Law Reform (Frustrated Contracts) Act 1943 would also have assisted the widow to recover because the seaman had conferred a benefit on the master of the ship prior to his death (which would now frustrate the contract) giving the widow the right to sue the master of the ship for the benefit of the seaman's work up to the time of his death.

Discharge by performance: effect of substantial performance

216 ***Hoenig* v *Isaacs*** [1952] 2 All ER 176

The defendant employed the claimant, an interior decorator and furniture designer, to decorate a one-room flat owned by the defendant. The claimant was also to provide furniture, including a fitted bookcase, a wardrobe and a bedstead, for the total sum of £750. The terms of the contract regarding payment were as follows: 'Net cash as the work proceeds and the balance on completion'. The defendant made two payments to the claimant of £150 each, one payment on 12 April and the other on 19 April. The claimant alleged that he had completed the work on 28 August, and asked for the balance, i.e. £450. The defendant asserted that the work done was bad and faulty, but sent the claimant a sum of £100 and moved into the flat and used the furniture. The claimant now sued for the balance of £350, the defence being that the claimant had not performed his contract, or in the alternative that he had done so negligently, unskilfully and in an unworkmanlike manner.

The court assessed the work that had been done, and found that generally it was properly done except that the wardrobe required replacing and that a bookshelf was too short and this meant that the bookcase would have to be remade. The defendant claimed that the contract was entire and that it must be completely performed before the claimant could recover. The court was of the opinion that there had been substantial performance, and that the defendant was liable for £750 less the cost of putting right the abovementioned defects, the cost of this being assessed at £55 18s 2d. The court accordingly gave the claimant judgment for the sum of £294 1s 10d.

Comment The case illustrates that while full performance is essential to the right to be paid in *full*, perfect performance is not required in order to obtain a

part-payment. This contract had been performed but badly. Nevertheless, a claim could be made for the price of the work less a deduction, like damages, for the defendant's breach of contract by bad work.

Discharge by performance: partial performance

217 *Sumpter* v *Hedges* [1898] 1 QB 673

The claimant entered into a contract with the defendant under the terms of which the claimant was to erect some buildings for the defendant on the defendant's land for a price of £565. The claimant did partially erect the buildings up to the value of £333, and the defendant paid him that figure. The claimant then told the defendant that he could not finish the job because he had run out of funds. The defendant then completed the work by using materials belonging to the claimant which had been left on the site. The claimant now sued for work done and materials supplied, and the court gave him judgment for materials supplied, but would not grant him a sum of money by way of a *quantum meruit* (an action for reasonable payment for work done), for the value of the work done prior to his abandonment of the job. The reason given was that, before the claimant could sue successfully on a *quantum meruit*, he would have to show that the defendant had voluntarily accepted the work done, and this implied that the defendant must be in a position to refuse the benefit of the work as where a buyer of goods refuses to take delivery. This was not the case here; the defendant had no option but to accept the work done, so his acceptance could not be presumed from conduct. There being no other evidence of the defendant's acceptance of the work, the claimant's legal action for the work failed.

Comment In practice, this form of injustice to the builder is avoided because a building contract normally provides for progress payments as various stages of construction are completed, thus making it a divisible agreement.

Discharge by performance: performance prevented

218 *De Barnardy* v *Harding* (1853) 8 Exch 822

The claimant agreed to act as the defendant's agent for the purpose of preparing and issuing certain advertisements and notices designed to encourage the sale of tickets to see the funeral procession of the Duke of Wellington. The claimant was to be paid a commission of 10 per cent upon the proceeds of the tickets actually sold. The claimant duly issued the advertisements and notices, but before he began to sell the tickets the defendant withdrew the claimant's authority to sell them and in consequence the claimant did not sell any tickets and was prevented from earning his commission. The claimant now sued upon a *quantum meruit* and his action succeeded.

Discharge by performance: time of performance; waiver

219 *Bowes* v *Shand* (1877) 2 App Cas 455

The action was brought for damages for non-acceptance of 600 tons (or 8,200 bags) of Madras rice. The sold note stated that the rice was to be shipped during 'the months of March and/or April 1874'. In fact, 8,150 bags were put on board ship on or before 28 February 1874, and the remaining 50 bags on 2 March 1874. The defendants refused to take delivery because the rice was not shipped in accordance with the terms of the contract.

Held – the bulk of the cargo was shipped in February and therefore the rice did not answer the description in the contract and the defendants were not bound to accept it.

Comment (i) A buyer can reject in these circumstances even though there is nothing wrong with the goods and he merely wants to reject because the market price has fallen.

(ii) It is of interest to note that the rules about delivery apply to early delivery as well as late delivery. Incidentally, the defendants refused to take delivery early because they were not ready with their finance at that time.

220 *Chas Rickards Ltd* v *Oppenhaim* [1950] 1 KB 616

The defendant ordered a Rolls-Royce chassis from the claimants, the chassis being delivered in July 1947. The claimants found a coachbuilder prepared to make a body within six or at the most seven months. The specification for the body was agreed in August 1947, so that the work should have been completed in March 1948. The work was not completed by then but the defendant still pressed for delivery. On 29 June 1948, the defendant wrote to the coachbuilder saying that he would not accept delivery after 25 July 1948. The body was not ready by then and the defendant bought another car. The body was completed in October 1948, but the defendant refused to accept delivery and counterclaimed for the value of the chassis which he had purchased.

Held – time was of the essence of the original contract, but the defendant had waived the question of time by

continuing to press for delivery after the due date. However, by his letter of 29 June he had again made time of the essence, and had given reasonable notice in the matter. Judgment was given for the defendant on the claim and counterclaim.

Comment (i) That a waiver of a date of delivery without consideration is binding can be based on promissory estoppel (as in *High Trees* – see Chapter 10) said Denning, LJ in *Rickards*, or on s 11(2) of the Sale of Goods Act 1979 which states: 'Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive that condition.' This section was used to justify a waiver without consideration by McCardie, J in *Hartley* v *Hymans* [1920] 3 KB 475.

(ii) This is an example of the doctrine of promissory estoppel being used by a claimant, i.e. as a sword not a shield, because a seller may tender delivery after the originally agreed date relying on the buyer's promise to accept such delivery by reason of his waiver. If the buyer then refuses to accept the delivery the seller can claim damages and is in essence suing upon the waiver which is unsupported by consideration.

(iii) Those in business often find it unsatisfactory to rely on the willingness of the courts to imply that time is of the essence of the contract, in terms of delivery dates and other matters. An express provision in the contract is the solution of which the following is an example:

> Time shall be of the essence of this agreement as regards times, dates or periods specified in this agreement and as to times, dates or periods that may by agreement between the parties be substituted for them.

Discharge by performance: appropriation of payments

221 *Deeley* v *Lloyds Bank Ltd* [1912] AC 756

A customer of the bank had mortgaged his property to the bank to secure an overdraft limited to £2,500. He then mortgaged the same property to the appellant for £3,500, subject to the bank's mortgage. It is the normal practice of bankers, on receiving notice of a second mortgage, to rule off the customer's account, and not to allow any further withdrawals since these will rank after the second mortgage. In this case the bank did not open a new account but continued the old current account. The customer thereafter paid in sums of money which at a particular date, if they had been appropriated in accordance with the rule in *Clayton*'s Case, would have extinguished the bank's mortgage. Even so the customer still owed the bank money, and they sold the property for a price which was enough to satisfy the bank's debt but not that of the appellant.

Held – the evidence did not exclude the rule in *Clayton*'s Case, which applied, so that the bank's mortgage had been paid off and the appellant, as second mortgagee, was entitled to the proceeds of the sale.

Comment The operation of *Clayton*'s Case is normally prevented by the bank stating in the mortgage that it is a continuing security given on a running account varying from day to day and excluding the repayment of the borrower's liability, which would otherwise take place as credits are paid in.

Discharge by frustration: contracts of personal service

222 *Storey* v *Fulham Steel Works* (1907) 24 TLR 89

The claimant was employed by the defendant as manager for a period of five years. After he had been working for two years he became ill, and had to have special treatment and a period of convalescence. Six months later he was recovered, but in the meantime the defendant had terminated his employment. The claimant now sued for breach of contract, and the defendant pleaded that the claimant's period of ill-health operated to discharge the contract.

Held – the claimant's illness and absence from duty did not go to the root of the contract, and was not so serious as to allow the termination of the agreement.

223 *Norris* v *Southampton City Council* [1982] IRCR 141

Mr Norris was employed as a cleaner. He was convicted of assault and reckless driving and was sentenced to a term of imprisonment. His employer wrote dismissing him and Mr Norris complained to an employment tribunal that his dismissal was unfair. The tribunal held that the contract of employment was frustrated and that the employee was not dismissed and, therefore, not entitled to compensation. The Employment Appeal Tribunal to which Mr Norris appealed laid down that frustration could only arise where there was no fault by either party. Where there was a fault, such as deliberate conduct leading to an inability to perform the contract, there was not frustration but a repudiatory breach of contract. The employer had the option of whether or not to treat the contract as repudiated and if he chose to dismiss the employee, he could do so, regarding the breach as repudiatory. The question then to be decided was whether the dismissal was fair. The case was remitted to the employment tribunal for further consideration of whether there was unfair dismissal on the facts of the case.

Discharge by frustration: government intervention

224 ***Re Shipton, Anderson & Co and Harrison Bros' Arbitration*** [1915] 3 KB 676

A contract was made for the sale of wheat lying in a warehouse in Liverpool. Before the seller could deliver the wheat, and before the property in it had passed to the buyer, the government requisitioned the wheat under certain emergency powers available in time of war.

Held – delivery being impossible by reason of lawful requisition by the government, the seller was excused from performance of the contract.

Discharge by frustration: destruction of subject matter

225 ***Taylor* v *Caldwell*** (1863) 3 B & S 826

The defendant agreed to let the claimant have the use of a music hall for the purpose of holding four concerts. Before the first concert was due to be held the hall was destroyed by fire without negligence by any party, and the claimant now sued for damages for wasted advertising expenses.

Held – the contract was impossible of performance and the defendant was not liable.

Comment A more modern example of the rule is to be found in *Vitol SA* v *Esso Australia, The Times*, 1 February 1988, where the buyers of petroleum were discharged from the contract by frustration when the vessel and cargo were destroyed by a missile attack during the Gulf War.

Discharge by frustration: non-occurrence of an event

226 ***Krell* v *Henry*** [1903] 2 KB 740

The claimant owned a room overlooking the proposed route of the Coronation procession of Edward VII, and had let it to the defendant for the purpose of viewing the procession. The procession did not take place because of the King's illness and the claimant now sued for the agreed fee.

Held – the fact that the procession had been cancelled discharged the parties from their obligations, since it was no longer possible to achieve the real purpose of the agreement.

Comment This type of decision is rare since the court will in general assume that the parties to a contract are not concerned with the motive for which it was made (see *Herne Bay Steamboat Co* v *Hutton* (1903) below). However, this seems to be an exceptional situation where the motive and contract were fused and could not be separated: '. . . it is the coronation procession and the relative position of the rooms which is the basis for the contract as much for the lessor as the hirer . . .', said Vaughan-Williams, LJ.

Also a contract will remain binding even if it turns out to be more expensive or difficult to perform than was thought. Thus a contract to ship ground nuts from the Mediterranean to India was not frustrated by the closure of the Suez Canal so that the goods would have to go around the Cape of Good Hope, which was twice as far. (See *Tsakiroglou* v *Noblee Thorl GmbH* [1961] 2 All ER 179.)

227 ***Herne Bay Steamboat Co* v *Hutton*** [1903] 2 KB 683

The claimant company agreed to hire a steamboat to the defendant for two days, in order that the defendant might take paying passengers to see the naval review at Spithead on the occasion of Edward VII's Coronation. An official announcement was made cancelling the review, but the fleet was assembled and the boat might have been used for the intended cruise. The defendant did not use the boat, and the claimant employed her on ordinary business. The action was brought to recover the fee of £200 which the defendant had promised to pay for the hire of the boat.

Held – the contract was not discharged, as the review of the fleet by the Sovereign was not the foundation of the contract. The claimant was awarded the difference between £200 and the profits derived from the use of the boat for ordinary business on the two days in question.

Comment (i) It may be thought that it is difficult to reconcile this case with *Krell* (see above). However, whatever the legal niceties may or may not be, there is clearly a difference in fact. To cruise round the fleet assembled at Spithead, even though the figure of the Sovereign (minuscule to the viewer, anyway) would not be present, is clearly more satisfying as the subject matter of a contract than looking through the window at ordinary London traffic.

(ii) In addition, Vaughan-Williams, LJ and the Court of Appeal thought that motive was less relevant here. The judge said, 'I see nothing that makes this case differ from a case where, for instance, a person has engaged a brake (the judge refers to a form of carriage) to take himself and a party to Epsom to see the races there, but for some reason or other, such as the spread of an infectious disease, the races are postponed. In such a case it could not be said that he could be relieved of his bargain.' Romer, LJ added, 'The ship (as a ship) had nothing particular to do with the review of the fleet except as a convenient carrier of passengers to see it; and other

ships suitable for carrying passengers would have done equally as well.'

Discharge by frustration: commercial purpose defeated

228 ***Jackson* v *Union Marine Insurance Co*** (1874) LR 10 CP 125

The claimant was the owner of a ship called *Spirit of the Dawn* which had been chartered to go with all possible dispatch from Liverpool to Newport, and there load a cargo of iron rails for San Francisco. The claimant had entered into a contract of insurance with the defendant insurance company, in order that he might protect himself against the failure of the ship to carry out the charter. The vessel was stranded in Caernarfon Bay whilst on its way to Newport. It was not refloated for over a month, and could not be fully repaired for some time. The charterer hired another ship and the claimant now claimed on the policy of insurance. The insurance company suggested that since the claimant might claim against the charterer for breach of contract, there was no loss, and the court had to decide whether such a claim was possible.

Held – the delay consequent upon the stranding of the vessel put an end, in the commercial sense, to the venture, so that the charterer was released from his obligations and was free to hire another ship. Therefore, the claimant had no claim against the charterer and could claim the loss of the charter from the defendants.

Discharge by frustration: where frustration is self-induced

229 ***Maritime National Fish Ltd* v *Ocean Trawlers Ltd*** [1935] AC 524

The respondents were the owners and the appellants the charterers of a steam trawler, the *St Cuthbert*. The *St Cuthbert* was fitted with, and could only operate with an otter trawl. When the charterparty was renewed on 25 October 1932, both parties knew it was illegal to operate with an otter trawl without a licence from the Minister. The appellants operated five trawlers and applied for five licences. The Minister granted only three and said that the appellants could choose the names of three trawlers for the licences. The appellants chose three but deliberately excluded the *St Cuthbert* though they could have included it. They were now sued by the owners for the charter fee, and their defence was that the charterparty was frustrated because it would have been illegal to fish with the *St Cuthbert*. It was *held* that the contract was not frustrated, in the sense that the frustrating event was self-induced by the appellants and that therefore they were liable for the hire.

Comment An otter trawl is a type of net which can, because of its narrow mesh, pick up small immature fish. Its use is restricted for environmental reasons.

Discharge by frustration: contracts concerning land

230 ***Cricklewood Property and Investment Trust Ltd* v *Leighton's Investment Trust Ltd*** [1945] AC 221

In May 1936, a building lease was granted between the parties for 99 years, but before any building had been erected war broke out in 1939 and government restrictions on building materials and labour meant that the lessees could not erect the buildings as they intended, these buildings being in fact shops. Leighton's sued originally for rent due under the lease and Cricklewood, the builders, said the lease was frustrated. The House of Lords *held* that the doctrine of frustration did not apply because the interruption from 1939 to 1945 was not sufficient in duration to frustrate the lease, and so they did not deal specifically with the general position regarding frustration of leases, basing their judgment on the question of the degree of interruption. In so far as they did deal with the general position, this was *obiter*, but Lord Simon thought that there could be cases in which a lease would be frustrated, and the example that he quoted was a building lease where the land was declared a permanent open space before building took place; here he thought that the fundamental purpose of the transaction would be defeated. Lord Wright took much the same view on the same example. Lord Russell thought frustration could not apply to a lease of real property, and Lord Goddard, CJ took the same view. Lord Porter expressed no opinion with regard to leases generally and so this case does not finally solve the problem.

Comment (i) Even if the courts were prepared to apply the doctrine of frustration, it would not often apply to leases, particularly long leases. In a lease for 99 years a tenant temporarily deprived of possession as by requisition of the property would hardly ever be put out of possession long enough to satisfy the test of frustration (see below).

(ii) In *National Carriers* v *Panalpina (Northern)* [1981] 1 All ER 161 the House of Lords was of the opinion that a lease could be frustrated. The claimants leased a warehouse to the defendants for 10 years. The Hull City Council closed the only access road to it because a listed building nearby was in a dangerous condition. The access road was closed for 20 months. The defendants refused to pay the rent for this period. The House of Lords said

that they must. A lease could be frustrated, they said, but 20 months out of 10 years was not enough to frustrate it in the particular circumstances of this case. Once again, therefore, the decision of the House of Lords on the matter of frustration of leases was *obiter*.

(iii) In *Amalgamated Investment and Property Co Ltd* v *John Walker & Sons Ltd* [1976] 3 All ER 509 Buckley, LJ was prepared to presume that the doctrine of frustration could be applied to contracts for the sale of land, though once again this decision was *obiter* because he did not have to apply the doctrine in this case. Walker sold a warehouse to Amalgamated, both parties believing that the property was suitable and capable of being redeveloped. After the contract was made the Department of the Environment included it in a list of buildings of architectural and historic interest so that the development became more difficult. The Court of Appeal *held* that the contract was not frustrated. The listing merely affected the value of the property and the purchaser always took the risk of this in terms of a listing order or, indeed, compulsory purchase. The contract could be completed according to its terms and specific performance was granted to Walkers. Nor was the contract voidable under *Solle* v *Butcher* (1950) (but see now Chapter 12) because the mistake did not exist at the date of the contract.

Discharge by frustration: effect at common law

231 *Chandler* v *Webster* [1904] 1 KB 493

The defendant agreed to let the claimant have a room for the purpose of viewing the Coronation procession on 26 June 1902 for £141 15s. The contract provided that the money be payable immediately. The procession did not take place because of the illness of the King and the claimant, who had paid £100 on account, left the balance unpaid. The claimant sued to recover the £100 and the defendant counterclaimed for £41 15s. It was *held* by the Court of Appeal that the claimant's action failed and the defendant's counterclaim succeeded because the obligation to pay rent had fallen due before the frustrating event.

Comment This case is included only to show how important the Law Reform (Frustrated Contracts) Act 1943 really is!

Discharge by breach: anticipatory breach

232 *Hochster* v *De la Tour* (1853) 2 E & B 678

The defendant agreed in April 1852 to engage the claimant as a courier for European travel, his duties to commence on 1 June 1852. On 11 May 1852, the defendant wrote to the claimant saying that he no longer required his services. The claimant commenced an action for breach of contract on 22 May 1852, and the defence was that there was no cause of action until the date due for performance, i.e. 1 June 1852.

Held – the defendant's express repudiation constituted an actionable breach of contract.

Comment (i) This decision should not be accepted as entirely logical. It is odd in a way to say that a person who has stated that he will not perform a contract when the time comes to perform it is for that reason *in breach of contract now* and can be sued. This is particularly so where, as in this case, the defendant might still at the commencement of the proceedings have performed the contract when the time came. Of course, by the time the case came to court it was obvious that the defendant had not performed his part of the contract and the device of anticipatory breach at least prevented the claimant's action from being defeated on the technicality that when he served his writ (now claim form) there was in fact no breach of contract as such. A case in which A was obliged to commence performance of a contract in December and said in the previous January that he would not do so, and which came before the court in September, might be decided differently because A would still have time to change his mind.

(ii) A more modern example of the application of the rule in *Hochster* is to be found in *Sarker* v *South Tees Acute Hospitals NHS Trust* [1997] ICR 673. The Trust sent a letter of appointment to a post within the Trust to S. It stated that her employment was to begin on 1 October, but on 6 September the offer was withdrawn. The Employment Appeal Tribunal ruled that S was an employee and could bring a claim for wrongful dismissal based on breach of contract. A claim for unfair dismissal could be brought in similar circumstances, but it would have to be a case not requiring one year's service as where dismissal was connected with pregnancy as where the offer was withdrawn because the employer found out that the employee was pregnant (see further Chapter 19).

233 *Omnium D'Enterprises and Others* v *Sutherland* [1919] 1 KB 618

The defendant was the owner of a steamship and agreed to let her under a charter to the claimant for a period of time and to pay the second claimants a commission on the hire payable under the agreement. The defendant later sold the ship to a purchaser, free of all liability under his agreement with the claimants.

Held – the sale by the defendant was a repudiation of the agreement and the claimants were entitled to damages for breach of the contract.

Comment (i) The charterer would have no claim against the purchaser of the vessel because restrictive covenants do not pass with chattels (which a ship is) but only with land. Compare *Dunlop* v *Selfridge* (1915) (see Case **87**) and *Tulk* v *Moxhay* (1848) (Case **91**) (see Chapter 10).

(ii) This decision is more logical because by selling the ship the defendant had clearly put it beyond his power to perform the charter.

234 *White and Carter (Councils) Ltd* v *McGregor* [1961] 3 All ER 1178

The respondent was a garage proprietor on Clydebank and on 26 June 1957, his sales manager, without specific authority, entered into a contract with the appellants whereby the appellants agreed to advertise the respondent's business on litter bins which they supplied to local authorities. The contract was to last for three years from the date of the first advertisement display. Payment was to be by instalments annually in advance, the first instalment being due seven days after the first display. The contract contained a clause that, on failure to pay an instalment or other breach of contract, the whole sum of £196 4s became due. The respondent was quick to repudiate the contract for on 26 June 1957, he wrote to the appellants asking them to cancel the agreement, and at this stage the appellants had not taken any steps towards carrying it out. The appellants refused to cancel the agreement and prepared the advertisement plates which they exhibited on litter bins in November 1957, and continued to display them during the following three years. Eventually the appellants demanded payment, the respondent refused to pay, and the appellants brought an action against him for the sum due under the contract.

Held – the appellants were entitled to recover the contract price since, although the respondents had repudiated the contract, the appellants were not obliged to accept the repudiation. The contract survived and the appellants had not completed it. The House of Lords said that there was no duty to mitigate loss until there was a breach which the appellants had accepted and they had not accepted this one.

Comment (i) Although the respondent's agent had no actual authority, he had made a similar contract with the appellants in 1954, and it was not disputed that he had apparent authority to bind his principal.

(ii) It is worth pointing out that there was in this case no evidence that the appellants could have mitigated their loss. No evidence was produced to show that the demand for advertising space exceeded the supply so it may be that the appellants could not have obtained a new customer for the space on the litter bins intended for the respondent. Thus, White and Carter may have had a 'legitimate interest' in continuing with the contract. Perhaps if evidence that mitigation was possible had been produced, the House of Lords would have applied the principles of mitigation to the case, or held that White and Carter had no 'legitimate interest' in continuing the agreement. This view is supported by a decision of the Court of Appeal in *Attica Sea Carriers Corporation* v *Ferrostaal Poseidon Bulk Reederei GmbH* [1976] 1 Lloyd's Rep 250 where the charterer of a ship agreed to execute certain repairs before he redelivered it to the owner and to pay the agreed hire until that time. He did not carry out the repairs but the owner would not take redelivery of the ship until they had been done and later sued for the agreed hire. It was *held* that the owner was not entitled to refuse to accept redelivery and to sue for the agreed hire. The cost of the repairs far exceeded the value which the ship would have if they were done and the owner had therefore no legal interest in insisting on their execution and the payment of the hire. The court held that he should have mitigated his loss by accepting redelivery of the unrepaired ship so that his only remedy was damages and not for the agreed hire.

(iii) This line was followed also in the case of *Clea Shipping Corporation* v *Bulk Oil International, The Alaskan Trader* [1984] 1 All ER 129. A vessel had been chartered by the claimant owners to the defendants, the hire charge having been paid in advance. However, the ship broke down and required expensive repairs. The charterers thereupon gave notice that they intended to end the contract. However, the claimants decided to keep the agreement open and undertook the repairs and then informed the defendants that the vessel was at their disposal. The claimants said they were exercising their right of election conferred upon the innocent party in such circumstances to keep the contract open, thus entitling them to keep the hire money instead of suing for damages. Lloyd, J denied the existence of an unfettered right of election for an innocent party to keep the contract running in such circumstances. He found that, in the absence of a 'legitimate interest' in the contract's perpetuation by the party faced with repudiation, the party concerned could, though innocent, be forced to accept damages in lieu of sums falling due under the contract subsequent to the actionable event. This restraint is founded on general equitable principles, to be based on what is reasonable on the facts of each case.

235 *Avery* v *Bowden* (1855) 5 E & B 714

The defendants chartered the claimant's ship *Lebanon* and agreed to load her with a cargo at Odessa within 45 days. The ship went to Odessa and remained there for most of the 45-day period. The defendant told the captain of the ship that he did not propose to load a cargo and that he would do well to leave, but the

captain stayed on at Odessa, hoping that the defendant would change his mind. Before the end of the 45-day period the Crimean War broke out so that performance of the contract would have been illegal as a trading with the enemy.

Held – the claimant might have treated the defendant's refusal to load a cargo as an anticipatory breach of contract but his agent, the captain, had waived that right by staying on at Odessa, and now the contract had been discharged by something which was beyond the control of either party.

Comment A more modern application of the above rule can be seen in *Fercometal Sarl* v *Mediterranean Shipping Co Ltd* [1988] 2 All ER 742. The claimants chartered a ship to the defendants. The charterparty (i.e. the contract) provided that if the ship was not ready to load during the period 3–9 July the defendants could cancel the contract. On 2 July the defendants said that they were not going on with the contract anyway but the claimants did not accept that breach and provided the ship, but this was not ready to load until 12 July and the defendants said again that they would not go on with the contract. The claimants sued for damages and failed. They could have based an action on the first breach but had not done so. Their action on the second 'breach' failed because the ship was not ready to load.

REMEDIES AND LIMITATION OF ACTIONS

Damages: must be a genuine pre-estimate of loss

236 ***Ford Motor Co (England) Ltd* v *Armstrong*** (1915) 31 TLR 267

The defendant was a retailer who received supplies from the claimant company. As part of his agreement with the claimant the defendant had undertaken:

(*a*) not to sell any of the claimant's cars or spares below list price;
(*b*) not to sell Ford cars to other dealers in the motor trade;
(*c*) not to exhibit any car supplied by the company without its permission.

The defendant also agreed to pay £250 for every breach of the agreement as being the agreed damage which the manufacturer will 'sustain'. The defendant was in breach of the agreement and the claimant sued. It was *held* by the Court of Appeal that the sum of £250 was in the nature of a penalty and not liquidated damages. The same sum was payable for different kinds of breach which were not likely to produce the same loss. Furthermore, its size suggested that it was not a genuine pre-estimate of loss.

Comment (i) A contrast is provided by *Dunlop* v *New Garage & Motor Co Ltd* [1915] AC 79 where the contract provided that the defendants would have to pay £5 for every tyre sold below the list price. The House of Lords *held* that this was an honest attempt to provide for a breach and was recoverable as liquidated damages. Privity problems did not arise here (even though the Contracts (Rights of Third Parties) Act 1999 was not in force, obviously) because the wholesalers were Dunlop's agents. (See further Chapter 10.)

(ii) In *Jeancharm Ltd (t/a Beaver International)* v *Barnet Football Club Ltd* [2003] All ER (D) (Jan) the Court of Appeal ruled that a clause providing for a rate of interest of 260 per cent a year on late payments was unenforceable as a penalty. Jeancharm contracted to supply football kit to Barnet. The contract provided that any late payments by Barnet would be subject to interest of 5 per cent per week (or some 260 per cent a year). Both of the parties had accepted this as a late payment penalty. Disputes arose regarding delivery and payment. The High Court applied the penalty rate set out in the contract on the late payments. Barnet appealed to the Court of Appeal. The Court of Appeal allowed Barnet's appeal ruling that while equality of bargaining power, as in this case, was always a relevant factor it did not in every case mean that a penalty clause could not be regarded as unenforceable. The rate of interest here was an 'extraordinarily large amount' and far exceeded a genuine pre-estimate of loss. The interest clause had only a deterrent function and was unenforceable. This meant that there was no enforceable rate of interest based on the contract.

237 ***Cellulose Acetate Silk Co Ltd* v *Widnes Foundry Ltd*** [1933] AC 20

The Widnes Foundry entered into a contract to erect a plant for the Silk Co by a certain date. It was also agreed that the Widnes Foundry would pay the Silk Co £20 per week for every week it took in erecting the plant beyond the agreed date. In the event, the plant was completed 30 weeks late, and the Silk Co claimed for its actual loss, which was £5,850.

Held – the Widnes Foundry was only liable to pay £20 per week as agreed.

Damages: the object is to put the claimant in the same position financially as if the contract had been properly performed

238 ***Beach* v *Reed Corrugated Cases Ltd*** [1956] 2 All ER 652

This was an action brought by the claimant for wrongful dismissal by the defendant. The claimant was the managing director of the company and he had a 15-year contract from 21 December 1950 at a

salary of £5,000 per annum. His contract was terminated in August 1954 when he was 54 years old and the sum of money that he might have earned would have been £55,000, but the general damages awarded to him were £18,000 after the court had taken into account income tax, including tax on his private investments.

Comment (i) In a later case and on similar reasoning it was *held* that what the claimant would have paid by way of national insurance contributions must also be deducted (see *Cooper* v *Firth Brown Ltd* [1963] 2 All ER 31).

(ii) It must be said that some of the 'tax must be deducted' cases are far from clear in terms of how the court reaches its final conclusion. The clearest of all is *Shove* v *Downs Surgical plc* [1984] 1 All ER 7, where the claimant had been wrongfully dismissed 30 months before the end of a fixed-term contract of employment as managing director. The figures involved as set out in the judgment are as follows:

	£
Gross pay for the 30 months	90,000
Court's estimate of net pay	53,000*
Initial award	53,000
Of this £30,000 is tax free (see Income Tax (Earnings and Pensions) Act 2003)	30,000
	23,000
This sum is taxable in Mr Shove's hands (see IT(E and P)A 2003). The tax is estimated to be £6,000 on the £23,000 *Mr Shove's highest tax rate used.	
Therefore, the court's *final award* to Mr Shove is	59,000
to give	£53,000 net

(iii) In *C & P Haulage* v *Middleton* [1983] 3 All ER 94, C & P let Mr Middleton have a licence for six months renewable of premises from which he conducted a business as a self-employed engineer. He lived in a council house and would have used his own garage there, but the Council objected. There was a quarrel between the parties and M was evicted from the premises before the licence term expired. This was a breach of contract by C & P. M stopped a cheque which was payable to C & P because of his grievance. They sued him on it. He counterclaimed for damages because of his eviction. In fact the Council had let him use his own garage for the remainder of the six months' term.

Held – by the Court of Appeal – since he had paid no rent for the premises in which he had worked following his eviction, he was no worse off than if the contract had been properly carried out. It was not the function of the court to put a claimant in a better position than he would have been if the contract had not been broken. Only nominal damages were awarded.

(iv) Damages have been awarded for the loss of a chance. This is not prevented by the rule that the claimant must not be better off. Thus in *Chaplin* v *Hicks* [1911] 2 KB 786 the claimant who had won earlier stages of a beauty contest was, by error of the defendant organiser, not invited to the final. Although it was by no means certain that she would have won, the claimant was awarded £100 damages. In a similar case, though in tort, the Court of Appeal affirmed an award of a sum of money for the loss of a chance where, because of personal injury suffered in a road accident caused by the negligence of the defendant, the claimant was unable to qualify and obtain employment as a drama teacher. Once again, a percentage of the damages was awarded for loss of a chance (see *Doyle* v *Wallace* [1998] Current Law para 1447).

Damages: for mental distress

239 *Jarvis* v *Swans Tours Ltd* [1973] 1 All ER 71

Swans promised the claimant a 'Houseparty' holiday in Switzerland. Some of the more important things promised were a welcome party on arrival, afternoon tea and cake, Swiss dinner by candlelight, fondue party, yodeller evening and farewell party. Also the hotel owner was said to speak English.

Among the matters which the claimant complained about were that the hotel owner could not speak English. This meant he had no one to talk to since, although there were 13 people present during the first week, he was on his own for the second week. The cake for tea was potato crisps and dry nutcake. The yodeller evening consisted of a local man who came in his overalls and sang a few songs very quickly. The Court of Appeal *held* that the claimant was entitled to an award of £125 damages. (Incidentally, the holiday had cost £63.)

Comment (i) Damages for disappointment, inconvenience or loss of enjoyment are not awarded except in contracts such as the above which are for the provision of pleasure. Such damage may be foreseeable in other contracts but is not awarded as a matter of public policy. Thus, in *Alexander* v *Rolls-Royce Motor Cars, The Times*, 4 May 1996 the Court of Appeal held that the owner of a Rolls-Royce car could not claim damages for disappointment, loss of enjoyment or distress as part of an award of damages for breach of a contract to repair. It was accepted by the court that the car had been bought for pleasure, prestige and enjoyment but that was not enough to bring the case outside the general rule that damages for disappointment are not awarded for breach of a commercial contract.

(ii) Another case where the matter of damages for non-pecuniary loss was raised is *Farley* v *Skinner* [2001] 3 WLR 899. The claimant bought a house that was surveyed

by the defendant. It was 15 miles from Gatwick airport. The claimant asked the defendant surveyor to deal with the possibility of aircraft noise. The defendant reported that the property was unlikely to suffer to any great extent from aircraft noise. After moving in, the claimant found that there was substantial interference from aircraft noise. A claim for breach of contract was made. Damages for disappointment at the loss of a pleasurable amenity and disappointment at the loss of pleasure, relaxation and peace of mind were asked for. The Court of Appeal refused the claim because the contract was not for the supply of a pleasurable amenity but for a property survey.

On appeal the House of Lords ruled that a sum of £10,000 was recoverable in the circumstances of the case even though the contract did not have the provision of pleasure as its object.

Damages: remoteness; loss must be proximate and not too remote

240 *Hadley* v *Baxendale* (1845) 9 Exch 341

The claimant was a miller at Gloucester. The driving shaft of the mill being broken, the claimant engaged the defendant, a carrier, to take it to the makers at Greenwich so that they might use it in making a new one. The defendant delayed delivery of the shaft beyond a reasonable time, so that the mill was idle for much longer than should have been necessary. The claimant now sued in respect of loss of profits during the period of additional delay. The court decided that there were only two possible grounds on which the claimant could succeed.

(*a*) That in the usual course of things the work of the mill would cease altogether for the want of the shaft. This the court rejected because, to take only one reasonable possibility, the claimant might have had a spare.

(*b*) That the special circumstances were fully explained, so that the defendant was made aware of the possible loss. The evidence showed that there had been no such explanation. In fact, the only information given to the defendant was that the article to be carried was the broken shaft of a mill, and that the claimant was the miller of that mill.

Held – the claimant's case failed, the damage being too remote.

Comment (i) The loss here did not arise *naturally* from the breach because there might have been a spare. The fact that there was no spare was not within the contemplation of the defendant and he had not even been told about it, much less accepted the risk. The defendant did not know that there was no spare nor as a reasonable man ought he to have known there was not.

(ii) Damage caused by a supervening event may also be too remote. In *Beoco* v *Alfa Laval Co, The Times*, 12 January 1994, Alfa installed a heat exchanger at Beoco's works. It developed a crack and a third party, S, was brought in to repair it. The work was done negligently and shortly afterwards the exchanger exploded, causing damage to property and economic loss of profit until it was put right. It was held that Alfa was liable in damages for the costs of replacing the heat exchanger and for loss of profit up to the time of the repair but not subsequently. Although the matter is not raised in the report, presumably S would be liable for the subsequent loss. The position in regard to supervening events is, therefore, the same in contract as in tort. For the latter see *Jobling* v *Associated Dairies* (1980) in Chapter 20.

241 *The Heron II (Koufos* v *Czarnikow)* [1967] 3 All ER 686

Shipowners carrying sugar from Constanza to Basra delayed delivery at Basra for nine days during which time the market in sugar there fell and the charterers lost more than £4,000. It was *held* that they could recover that sum from the shipowners because the very existence of a 'market' for goods implied that prices might fluctuate and a fall in sugar prices was likely or in contemplation.

Comment (i) The existence of a major sugar market at Basra made it within the *contemplation* of the defendants that the claimant might sell the sugar and not merely use it in a business.

(ii) As Lord Hodson said in his judgment: 'Goods may be intended for the purpose of stocking or consumption at the port of destination and the contemplation of the parties that the goods may be resold is not necessarily to be inferred.' He went on to decide, however, that resale must be inferred as in contemplation because Basra was a well-known sugar market. Damages of £4,183 were awarded, this being the fall in price of sugar between the date when the ship did arrive and the date when it should have arrived.

(iii) The contemplation test was, of course, set out in *Hadley* as the comment at (i) to the summary of the case shows. So what is new about the ruling of the House of Lords in *The Heron II*? *The Heron II* deals with a problem that had arisen following the interpretation by subsequent courts in subsequent cases that the test in *Hadley* was foreseeability of damage. *The Heron II* merely restores in an authoritative way the *Hadley* rule of contemplation. This is a tighter test for loss. A person may *foresee* all sorts of things in terms of damage but not actually *contemplate* them. This makes the ruling in, say, negligent personal injury, where the claim is in tort and the foreseeability test applies, different from contract,