the goods' discusses certain special remedies which the seller has against the goods where the buyer is insolvent. In practice, the seller's most effective remedy is to have retained ownership. That we have already discussed in Chapter 6.

WITHHOLDING PERFORMANCE, TERMINATION AND THE BUYER'S RIGHT TO REJECT

10–04 Withholding performance and termination are analytically separate but in practice there is a major degree of overlap. This is because the factual situations which lead one party to wish to withhold performance or to terminate are very similar. In practice, the threat by one party to withhold performance will either lead the other party to attend to his or her performance, in which case the contract will go on, or not, in which the case the innocent party would usually have to decide a little later whether to terminate or not. So, litigation is much more commonly about termination but no doubt withholding performance takes place very often in practice and has the desired result.

A critical question in deciding whether one party is entitled to withhold performance is to consider what the contract says or implies about the order of performance. So, for example, s 28 of the 1979 Act says:

> Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

So, in this standard case, neither the seller nor the buyer can withhold performance; each must be ready and willing to perform his or her side if he or she is to call on the other side to perform. In practice, however, other arrangements about payment and delivery are often made. The buyer may agree, and commonly does in an international sale, to open a banker's letter of credit and it has commonly been held that in such a situation the seller's obligation to ship the goods is conditional upon the buyer having opened the letter of credit for the right amount and the right currency with the right payment periods and so on. So, if the buyer fails to do this, the seller can withhold performance.[1] Conversely, the seller may have agreed to give the buyer credit. Suppose an oil company agrees to supply a filling station with all its requirements of oil for three years, payment to be made seven days after delivery. It is

1 *WJ & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189; [1972] 2 All ER 127.

not open to the oil company unilaterally to change the terms and insist on payment in cash, even if the buyer has broken the contract by not always paying within the seven day limit (*Total Oil (Great Britain) Ltd v Thompson Garages (Biggin Hill) Ltd* (1972)).[2]

These results can be expressed by saying that the buyer's obligation to pay is conditional on the seller having delivered the goods or that the seller's obligation to ship the goods is conditional on the buyer having opened a letter of credit. The parties need not necessarily have explicitly said what the order of performance is to be; in these cases, the courts have effectively inferred the order of performance from the commercial setting. So, in the case of the banker's letter of credit, it is unreasonable to expect the seller to expose itself to the risks of shipping the goods if the letter of credit has not been opened.

10–05 If we turn to consider the circumstances in which one party may terminate the contract, general contract law uses two principal approaches. One, which has been heavily used in relation to the sale of goods, is to proceed in terms of classifying the term of the contract which has been broken. This approach postulates that there are certain terms of the contract, commonly called conditions, which are so important that any breach of them should entitle the other party to terminate the contract. It is for this reason that a buyer can reject goods for breach of description, even though the breach appears in commercial terms to be quite trivial, as in *Arcos v Ronaasen* and *Re Moore and Landauer,* discussed above in Chapter 8. Many of the obligations which we have discussed in the preceding chapters are expressed as being conditions and so attract the operation of this rule. In addition, there seems to be no reason why the parties may not agree that other express terms of the contract are to be treated as conditions. Unfortunately, the word 'condition' is used by lawyers in so many different senses that it is not absolutely certain that a court will construe a statement that a particular obligation is a condition as producing this result, as is shown by the decision of the House of Lords in *Schuler v Wickman* (1973),[3] where it was said to be a condition of the agreement that Wickman should visit each of the six largest United Kingdom motor manufacturers at least once every week for the purposes of soliciting orders on behalf of Schuler. The House of Lords held by a majority, Lord Wilberforce dissenting, that this was not intended to produce the result that Schuler could terminate the contract because of Wickman's failure to make one visit in one week to one of the manufacturers. One suspects that, in fact, that was exactly what it was intended to do but that the majority of the House of Lords regarded this as such a draconian remedy that it chose to read the contract differently.

2 [1972] 1 QB 318.
3 [1973] 2 All ER 39; [1974] AC 235.

Nevertheless, in a document clearly drafted by a lawyer, it must usually be the case that, if it says that a particular obligation is a condition, breach of it will be treated as giving rise to a right to terminate.

A second way of approaching the problem of termination is to ask how serious a breach of contract committed by the defendant is. Basically, there are two principal possibilities. One is that one party has behaved in such a way as to make it clear that it is repudiating its obligations under the contract. A party can do this either by explicitly repudiating or by doing something which is inconsistent with any continuing intention to perform the contract. A classic example, given the context, is the old case of *Frost v Knight* (1872)[4] where the defendant, having agreed to marry the plaintiff upon the death of his father, broke off the engagement during the father's lifetime. It was held that the lady could sue for damages at once, even though the date for performance of the contract might be many years off because it was clear to a reasonable man that the defendant would not perform (actions for breach of promise of marriage were abolished in 1970, but the principle of the case is still of general application).

10–06 Of course, deciding whether a particular course of conduct amounts to an implicit repudiation of a party's obligations may raise difficult questions of judgment. This is particularly the case where a party does something which turns out to be a breach of the contract but which it claims it was contractually entitled to do. The difficulties can be seen by contrasting two decisions of the House of Lords. In *Federal Commerce and Navigation v Molena Alpha* (1979),[5] there were disputes between ship owner and time charterer. The owner, acting on legal advice, instructed the master not to issue freight pre-paid bills of lading and to require the bills of lading to be endorsed with charter party terms. They told the charterer that they had given these instructions. It was eventually decided that although the owner believed it was entitled to take these steps, it was in fact not entitled to do so. The House of Lords held that the owner's statement that it was going to take these steps was, in the circumstances, a repudiation. On the other hand, in *Woodar Investment Development v Wimpey Construction* (1980),[6] Woodar agreed to sell 14 acres of land to Wimpey, completion to be two months after the granting of outline planning permission or on 21 February 1980, whichever was earlier. Because of developments in the land market, Wimpey was anxious to escape from the contract if it could. It claimed to be entitled to do so on the basis of a right to rescind which was in the contract but which was eventually held not to cover the circumstances

4 (1872) 7 Exch 111.
5 [1979] AC 757.
6 [1980] 1 All ER 571; [1980] 1 WLR 277.

which in fact existed. In this case, the House of Lords held, though only by a majority of three to two, that this conduct was not repudiatory. It will be seen that in both cases one party claimed to be entitled to do something under the contract which in fact it was subsequently held not to be entitled to do. In the first case, this conduct was treated as repudiatory and in the second, it was not. The fact that two Lords of Appeal dissented in the second case shows, as will be apparent to the reader, that the cases are not easy to distinguish. The principal difference probably lies in the fact that in the *Federal Commerce* case the behaviour of the ship owner was immediately coercive of the charterer whereas in the *Woodar* case, Wimpey had perhaps said no more than it would not perform when the time came and there was plenty of time to resolve the question of whether Wimpey was in fact correct in its view of the contract without bringing the contract to an end.

10–07 A second class of case in which one party is entitled to terminate is where the other party has performed in such a defective way as effectively not to have performed at all. Of course, some defective performances may be treated as evidence of an intention to repudiate. The thrust of this argument, however, is that one party, although he or she is doing his or her best, is doing it so badly that the other party is entitled to treat the contract as at an end. Such a breach is often called a fundamental breach though, in fact, many other metaphors have been used to describe the quality of defective performance which produces this effect. What is quite clear is that, if one is talking of defective performance, a serious defect is involved so that the other party is deprived of an essential part of what he or she entered the contract to obtain.

Whether one is talking in terms of breach of condition or in terms of repudiatory or fundamental breach, it is clear that the contract does not come to an end simply because one of these events takes place. In each case, the innocent party has a choice. It can treat the breach of condition, the repudiatory breach or the fundamental breach, as bringing the contract to an end or it can continue to call for performance of the contract. Of course, in practice, it will often become clear that the contract breaker cannot or will not perform and persistence in this course will inevitably lead the innocent party, in the end, to bring the contract to an end but, as a matter of legal theory, the contract comes to an end as a result of the innocent party's decision to terminate, not as a result of the guilty party's breach. The most obvious practical importance of this is that the innocent party's decision not to terminate will often give the other party a second chance to perform his or her side of the contract properly. Where the innocent party does elect to terminate the contract, the contract is not treated as never having existed but as terminated from that moment so that existing contractual

rights and duties are not expunged. It follows that the innocent party can terminate and also claim damages for breach of contract if damage has been suffered.

There are special rules about late performance. Although the rules are similar to those in relation to other forms of breach in that they distinguish between important late performance and cases where late performance, although in breach of contract, is relatively unimportant, they have developed in a slightly different way because this was an area where equity intervened so as, in certain circumstances, to grant specific performance of the contract to one party even though he or she was late in performing.

10–08 The modern position may be stated as follows. A late performance is always a breach of contract and will give rise to an action for damages for any loss which actually follows from the late performance (in practice, it is often very difficult to show any loss resulting from late performance). However, whether the contract can be terminated for late performance depends on whether 'time is of the essence of the contract'. Time may be of the essence of the contract either because the contract expressly says so (and many contracts do expressly say that time is or is not of the essence of the contract) or because the contract is of a kind in which the courts treat timely performance as being essential. In general, courts have treated timely performance of the obligation to deliver the goods by the seller as of the essence of the contract, at least in a commercial context, unless the contract expressly says that time is not of the essence. On the other hand, the buyer's obligation to pay the price is not treated as an obligation where time is of the essence unless the contract expressly says so.

Where time is not of the essence but one party is late in performing, the other party is said to be able to 'make time of the essence'. What this means is that the innocent party may say to the late performer that, if performance is not completed within a reasonable time, he or she will bring the contract to an end. It is of the essence of this possibility that the further time given for the performance is reasonable in all the circumstances and a party choosing to do this would be well advised to err on the side of generosity.

10–09 We saw above that the parties may agree in the contract that a particular obligation is to be treated as a condition. Alternatively, the parties may provide in the contract that one party is to be entitled to terminate. Such provisions are, in fact, very common. Sometimes, the event which gives rise to the right to terminate may be a breach of contract which would not have entitled the party to terminate were it not for this provision. So, in many contracts which depend on one party paying periodically, it is common to provide that failure to pay promptly entitles the other party to terminate, although a court would not usually

hold that a single failure to pay promptly was either a repudiatory breach or a fundamental breach. In some cases, a party may contract for the right to terminate without there being any breach of contract by the other side. So, if the government places an order for a new fighter aeroplane, it may provide in the contract that the whole project can be cancelled if at a later stage defence policy changes. This would be a perfectly rational contractual arrangement to make. One would expect such a contract to contain provisions that the supplier was to be paid for the work which he or she had actually done up to the time of cancellation but the contract might well exclude the profit which the supplier would have made if the contract had been carried forward to completion. Obviously, clauses of this kind require careful negotiation and drafting.

Where the contract contains provisions for termination for events which are not in fact breaches of contract justifying termination on general principles, it may be important whether the contract makes the obligation essential or simply gives rise to a right to terminate. This is illustrated by the important case of *Lombard North Central v Butterworth* (1987).[7]

10–10 In this case, the plaintiff had leased a computer to the defendant for a period of five years and the defendant had agreed to pay an initial sum of £584.05 and 19 subsequent quarterly payments of the same sum. As is usual in such agreements, there was a clause giving the plaintiff the right to terminate the agreement if the instalments were not punctually paid. The defendant made two punctual payments and four late payments and the plaintiff then terminated the agreement, recovered possession of the computer and sold it for £172.88. It was clear that the plaintiff was entitled to do this. The question was to what further damages it was entitled. In a number of earlier decisions, of which the most important was *Financings v Baldock* (1963),[8] it had been held that, in such circumstances, the plaintiff could not recover damages for loss of the interest payments which would have been earned if the contract had run to its end because the termination of the contract arose out of the plaintiff's decision to exercise his contractual right to terminate and not out of the defendant's breach of contract. However, in the present case, the contract, although very similar to earlier contracts, contained an extra provision which stated that 'punctual payment of each instalment was of the essence of the agreement'. The Court of Appeal held that this made a fundamental difference, since its effect was that each failure to pay promptly was not only an event entitling the plaintiff to terminate but was also a breach of condition. It was said to follow that the termination of the contract

7 [1987] 1 All ER 267; [1987] QB 527.
8 [1963] 1 All ER 443; [1963] 2 QB 104.

flowed not from the plaintiff's decision to exercise its rights but from the defendant having committed a fundamental breach of contract so that all the plaintiff's loss flowed from this. This case shows that large results can flow from small variations in the wording of the contract.

10–11

The buyer's right to reject the goods is, in a sense, simply an example of the right to withhold performance or to terminate. It may be only the withholding of performance because in a few cases the seller will be able to make a second tender of the goods. This would usually only be where he or she can make a second tender within the contractually permitted time for delivery. Suppose the contract calls for delivery in January and the seller makes a defective tender on 1 January; he or she may well be able to make an effective tender later in the month. Where, as will often be the case, the contract calls for delivery on a particular day and time is of the essence, this possibility will, in practice, not exist and then rejection of the goods will effectively terminate the contract. Since many of the seller's obligations are expressed to be conditions, the buyer will have the right to reject the goods for breach of condition in a wide variety of circumstances. These include:

(a) a delivery of less or more than the contract quantity or of other goods mixed with the contract goods, as discussed in Chapter 5;
(b) failure by the seller to perform his or her obligations as to title as discussed in Chapter 6; or
(c) failure by the seller to carry out his or her obligations as to the quality of the goods as discussed in Chapter 8.

The buyer will also often be able to reject the goods because delivery is late, as discussed above. There is a major difference, however, between the rules governing the buyer's right to reject goods for breach of condition and the general law about termination. Usually, an innocent party cannot lose the right to terminate the contract until it has discovered that it has got it. However, it is clear that in some circumstances the buyer may lose the right to reject for breach of condition through acceptance even though it does not know that it has the right to reject because it has not yet discovered the defect which gives rise to this right. This is because the buyer loses the right to reject the goods by acceptance and it is possible for acceptance to take place before the buyer discovers the defect in the goods. This is because, under s 35(1), one of the ways in which the buyer can accept the goods is to retain them after the lapse of a reasonable time and a reasonable time is held to run from delivery and not from discovering that the goods are defective. This is discussed more fully above, under 'Acceptance' (Chapter 5). The right of rejection is modified by two provisions which are incorporated by virtue of s 4 of the Sale and Supply of Goods Act 1994. The first of these is a new s 15A which provides:

(1) Where in the case of a contract of sale:

(a) the buyer would, apart from this sub-section, have the right to reject goods by reason of a breach on the part of the seller of a term implied by s 13, 14 or 15 above; but
(b) the breach is so slight that it would be unreasonable for him to reject them,

then, if the buyer does not deal as consumer, the breach is not to be treated as a breach of condition but may be treated as a breach of warranty.

(2) This section applies unless a contrary intention appears in, or is to be implied from, the contract.
(3) It is for the seller to show that a breach fell within sub-s (1)(b) above.
(4) This section does not apply to Scotland.

It is assumed that, for a consumer buyer, the right of rejection is of particular importance. The great attraction of rejection, from the consumer point of view, is that it avoids any need to resort to litigation and forces the seller to decide whether it is worthwhile litigating. It can be assumed that, in respect of all goods except cars, consumers will be extremely reluctant to litigate, whatever the defects. The right of rejection is therefore particularly important. It is assumed, on the other hand, that, in the case of commercial sales, a reduction in price will, more often than not, satisfy the buyer's legitimate demands, unless the defect is a serious one. It is open to a commercial buyer to bargain for s 15A to be excluded. It must be noted that it will require some cases to be sure what exactly will count as a slight breach and when it will be unreasonable to reject the goods because of such a breach. There is a twofold test here. The seller must show both that the breach is slight and that it is unreasonable, to reject. It is not to be assumed that, simply because the breach is slight, it will be unreasonable to reject.

Finally, the buyer is given slightly greater rights of rejection by a new s 35A which provides:

(1) If the buyer:

(a) has the right to reject the goods by reason of a breach on the part of the seller that affects some or all of them; but
(b) accepts some of the goods, including, where there are any goods unaffected by the breach, all such goods,

he does not by accepting them lose his right to reject the rest.

(2) In the case of a buyer having the right to reject an instalment of goods, sub-s (1) above applies as if references to the goods were references to the goods comprised in the instalment.

(3) For the purposes of sub-s (1) above, goods are affected by a breach if by reason of the breach they are not in conformity with the contract.
(4) This section applies unless a contrary intention appears in, or is to be implied from the contract.

By virtue of this new section, the buyer does not lose the right to reject some goods as part of a parcel of goods which are defective because he has accepted other goods in the parcel which are not defective. Under the previous law, the buyer who had 1,000 tonnes of wheat delivered to him, of which 400 tonnes were defective and 600 tonnes alright, had the choices of either rejecting the whole 1,000 tonnes or accepting the whole 1,000 tonnes (in either case, he might claim damages). Under s 35A, he will now have the option, if he wishes, to reject 400 tonnes and keep the 600 tonnes which are of good quality. This seems an entirely sensible change.

SPECIFIC ENFORCEMENT

Section 52 of the Sale of Goods Act provides: **10–12**

(1) In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the plaintiff's application, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages.
(2) The plaintiff's application may be made at any time before judgment or decree.
(3) The judgment or decree may be unconditional, or on such terms and conditions as to damages, payment of the price and otherwise as seem just to the court.

It will be seen that this section talks only of specific or ascertained goods and the question of whether specific performance can be given for unascertained goods is considered below. As far as specific or ascertained goods are concerned, the section is in very broad terms. However, in practice, the courts have been very slow to exercise the broad powers given by the section. The reason for this is they have usually taken the view that in a contract for sale of goods damages will be an adequate remedy, since usually the buyer can go out and buy substitute goods and be adequately compensated by a money payment. So, in *Cohen v Roche* (1927),[9] the court refused spespecific performance of a contract for what was described as 'ordinary Hepplewhite

9 [1927] 1 KB 169.

furniture'. In 1990, there is perhaps not such a market for 'ordinary Hepplewhite furniture' that one can easily go out and buy substitutes and such a case would perhaps be close to the line. It was perhaps an important factor in the case that the buyer was buying the goods for resale. This greatly strengthened the argument that damages were an adequate remedy. A leading case in which specific performance was granted was *Behnke v Bede Shipping* (1927),[10] in which the subject matter of the contract was a ship. It cannot be assumed, however, that specific performance would routinely be given even of contracts for the sale of a ship. So, in *CN Marine v Stena Line* (1982),[11] specific performance was refused of such a contract. A court would want to inquire, in any decision whether to grant specific performance, into all the circumstances, in particular, on any hardship which would be caused to one party or the other by giving or refusing specific performance or the conduct of the parties leading up to the contract. This reflects a combination of two policies: the general feeling that specific performance is usually not necessary in the case of goods and the general equitable principle that specific performance is not to be granted mechanically and that all the circumstances are to be considered. Another recent case which illustrates the reluctance of the court to grant specific performance is the *Bronx Engineering* case (1975),[12] where the subject matter of the contract was a machine weighing over 220 tons, costing £270,000 and only buyable with a nine month delivery date.

10–13 As we said above, s 52 only talks in terms of 'specific or ascertained goods'. This leaves in the air the question whether specific performance can ever be granted of unascertained goods. One view, which was discussed in Chapter 1, is that the Sale of Goods Act contains an exhaustive code of the remedies available. This view was expressed in relation to specific performance in *Re Wait* (1972).[13] However, in the leading modern case where the question arose, the judge did, in fact, grant specific performance of a contract for unascertained goods though he did not refer to s 52 or consider the theoretical question of whether he had jurisdiction. This was in *Sky Petroleum v VIP Petroleum* (1974).[14] In this case, there was a contract for the supply of petrol to a filling station and the seller refused to deliver. Normally, no question of specific performance would arise on such facts because the filling station could go and buy petrol on the market and be compensated adequately by damages. However, at the time of the case, the Yom Kippur war had recently disrupted supplies of petrol so that alternative

10 [1927] 1 KB 649.
11 [1982] 2 Lloyd's Rep 336.
12 [1975] 1 Lloyd's Rep 465.
13 [1972] 1 Ch 606.
14 [1974] 1 All ER 954.

supplies were not available to the buyer. In the circumstances, specific performance was a uniquely desirable and effective remedy. The decision of the judge that he should give specific performance seems entirely sensible though it is perhaps unfortunate that he did not consider the theoretical question of whether he had power to do so.

Section 52 talks of plaintiffs and defendants and not of buyers and sellers. So it may be that, in theory, a seller can sue for specific performance. However, this is not likely to be a practical question except in the most extraordinary circumstances, since a seller will nearly always be able to sell the goods elsewhere and recover compensation by way of damages for any loss that he or she suffers. There will be cases, however, where the seller would wish, if possible, to sue for the price rather than to sue for damages. This is principally because, in the English system, actions for defined sums of money are much easier, quicker and, therefore, cheaper than actions for damages. Section 49 of the 1979 Act provides:

> (1) Where, under a contract of sale, the property in the goods has passed to the buyer and he wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.
> (2) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed and the goods have not been appropriated to the contract.

10–14 Although the action for the price is in a sense the seller's equivalent of the buyer's action for specific performance, the two remedies should be kept clearly distinct. This is for historical reasons. The action for specific performance arises historically from the jurisdiction of the Court of Chancery to grant specific performance which was always said to be discretionary and to turn on taking into account all the relevant circumstances. The action for the price was not an equitable action but basically a common law action for debt. This means that, where sellers are entitled to sue for the price, they do not have to show that they have suffered any loss; they do not have to take steps to mitigate the loss as they do in a damages action and the action is not subject to any general discretion in the court. On the other hand, the seller does not have an action for the price simply because the buyer's obligation to pay the price has crystallised and the buyer has failed to pay. The seller has to bring the case within one or other of the two limbs of s 49.

It will be seen that s 49(1) links the right to sue for the price to the passing of property. This is another example of the point discussed in Chapter 6 that the passing of property in the English system is largely