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This work examines in detail the English doctrine of anticipatory breach, a hugely important subject in terms of both contract theory and commercial practice. It fills a significant gap in the existing literature with a comprehensive, systematic and in-depth treatment of the subject. The book not only restates the doctrine of anticipatory breach but also rejuvenates it, developing the proposition that the doctrine is essentially a mechanism for sanctioning present contractual remedies for future breaches. This proposition is developed in four Parts consisting of nine Chapters, which cover between them various aspects of the doctrine of anticipatory breach: historical genesis, theoretical characterisations, terminology, the constitution of an anticipatory breach, the defence of anticipated breach, the principle of election, the peculiarities of a right to claim damages, the assessment of damages, the victim's ability to continue with its performance and to claim the contract price when it is due, etc. Above all the book presents a carefully engineered critical review of the doctrine of anticipatory breach as it stands, challenging the misconceptions with which it was historically associated, the obscurity and precariousness of its theoretical foundation and the resulting inconsistency and inflexibility in its application. Instead, the author argues for a reformulation which follows a more rational, coherent and refined theoretical framework. This book is written in clear, straightforward language, and will appeal to academics, practitioners and law students alike.

To my parents, Helene and Charlie

FOREWORD BY THE HON JUSTICE WILLIAM GUMMOW AC JUSTICE OF THE HIGH COURT OF AUSTRALIA

The author challenges the confident statement by no less an authority than Lord Wilberforce[1] that anticipatory breach 'is one of the more perspicuous braches of the law of contract and the modern position is clear'. The author is right to do so.

The doctrine is usually associated with *Hochster v De la Tour*.[2] On a motion before the Court of Queen's Bench in arrest of judgment recovered by the plaintiff, the question identified by Lord Campbell CJ was:

> Whether, if there be an agreement between A and B, whereby B engages to employ A on and from a future day for a given period of time, to travel with him into a foreign country as a courier, and to start with him in that capacity on that day, A being to receive a monthly salary during the continuance of such service, B may, before the day, refuse to perform the agreement and break and renounce it, so as to entitle A before the day to commence an action against B to recover damages for breach of the agreement; A having been ready and willing to perform it, till it was broken and renounced by B.[3]

The plaintiff's declaration was that the defendant had 'wrongfully wholly broke, put an end to and determined his said promise and engagement', to the damage of the plaintiff.[4]

One reason why the courts, particularly the English courts, appear to have given up the inquiry as to the doctrinal basis for anticipatory breach, leaving it as but a manifestation of commercial convenience, may lie in a failing appreciation of the pleading system from which sprang the issues in the mid-19th century cases such as *Hochster*.

A starting point is the proposition that absent proof of readiness and willingness, the plaintiff had no cause of action for breach of contract. The analysis by Mason CJ (who had the advantage of practising at a Bar in a jurisdiction which retained a strict pleading system) is worth repeating here. In *Foran v Wight*[5] he said:

> The prevailing rules and forms of common law pleading in the eighteenth and nineteenth centuries, which necessarily reflected the principles of substantive law as applied by the courts, demonstrated that the courts treated readiness and willingness as being

[1] *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc* [1979] AC 757 at 778.
[2] (1853) 2 El & Bl 678 [118 ER 922].
[3] (1853) 2 El & Bl 678 at 687–688 [118 ER 922 at 925].
[4] (1853) 2 El & Bl 678 at 680 [118 ER 922 at 923].
[5] (1989) 168 CLR 385 at 402; [1989] HCA 51.

> material to the existence of the plaintiff's cause of action. The plaintiff was required to aver in his declaration the material elements in his cause of action. These elements included satisfaction or performance of all conditions precedent. Thus the plaintiff was required to aver performance of any condition precedent to, or concurrent with, performance of the defendant's promise. Just as the plaintiff was required to plead and prove readiness and willingness in a suit for specific performance, so at common law he had to plead and prove that he was ready and willing in an action for damages for breach of contract. It followed that proof that the plaintiff was ready and willing to perform his obligation on which performance of the defendant's promise was expressed to be conditioned was regarded as being essential to the plaintiff's cause of action.

The state of the law preceding the decision in *Hochster* was further explained as follows by Dixon CJ in *Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd*:[6]

> Now long before the doctrine of anticipatory breach of contract was developed it was always the law that, if a contracting party prevented the fulfilment by the opposite party to the contract of a condition precedent therein expressed or implied, it was equal to performance thereof: *Hotham v East India Co*.[7] But a plaintiff may be dispensed from performing a condition by the defendant expressly or impliedly intimating that it is useless for him to perform it and requesting him not to do so. If the plaintiff acts upon the intimation it is just as effectual as actual prevention.

Counsel in *Hochster* no doubt understood this, but Lord Campbell had been hostile to the submission that to preserve his remedy the plaintiff 'was bound to remain idle'.[8] The point the defendant unsuccessfully urged was that the conduct of the defendant had been no more than evidence of a dispensation of the necessity for the plaintiff to show readiness and willingness to perform, which dispensation the defendant might retract at any time before the time for performance arrived, so that an action instituted in the meantime was premature.

In Chancery, were the contract one susceptible of specific performance, a decree might be made in such circumstances before the arrival of the performance date.[9] But *Hochster* was a contract of personal service on a three month tour of Europe, and the case was an action at law for damages.

There would be no conceptual difficulty in the anticipatory breach cases if, as a matter of implication by law, the parties had a 'right to the maintenance of the contractual relations up to the time for performance, as well as to a performance of the contract when due'. That statement by the Supreme Court in *Roehm v Horst*[10] has been taken up in the United States, with the result that the anticipatory

[6] (1954) 90 CLR 235 at 246–247; [1954] HCA 25. See also at 253 per Kitto J and see further *Foran v Wight* (1989) 168 CLR 385 at 402–403 per Mason CJ.

[7] (1787) 1 TR 638 [99 ER 1295].

[8] (1853) 2 El & Bl 678 at 686 [118 ER 922 at 925].

[9] *Hasham v Zenab* [1960] AC 316 at 329–330.

[10] 178 US 1 at 19 (1900).

breach is repudiation of an implied term.[11] But this approach has not been adopted in other common law jurisdictions.

What does appear settled is that it is sufficient that, viewed objectively, the conduct of the relevant party is such as to convey to a reasonable person in the situation of the other party, the repudiation or disavowal either of the contract as a whole or of a fundamental obligation under it.[12] The author rightly is exercised by the apparent qualification associated with the House of Lords decision in *Woodar Investment Development Ltd v Wimpey Construction UK Ltd.*[13] In that case the bona fide belief by a party that it had an express power to terminate answered an allegation against it of absence of readiness and willingness to perform.

The conceptual difficulty which continues to lie at the root of the anticipatory breach doctrine was identified by McArthur J in *Y P Barley Producers Ltd v E C Robertson Pty Ltd.*[14] After referring to statements in judgments by such significant figures as Lord Esher MR, Bowen LJ and Lord Wrenbury, his Honour asked how an act not itself a breach of contract could be converted into a breach of contract by the election of the other party to the contract.[15] He answered that the action was 'an artificial cause of action' whereby '[t]he repudiation accepted and acted upon by the other party gives such party the right to at once bring an action for damages as for a breach of contract'.[16]

In like vein, the author of this work takes as his theme the proposition that the doctrine of anticipatory breach is a device to recognise as a contractual wrong words or conduct that relate essentially to an obligation the time for performance of which has yet to arrive and which effects an acceleration of legal remedies for the anticipated actual breach of that obligation; this acceleration of remedies is justifiable only where the anticipated breach is fundamental and, if it is so, where to hold the innocent party to the contract would encourage a waste of resources and an augmentation of losses. Further, the notion of 'election' is said to have no part to play here; the issue is whether the innocent party has effectively terminated the contract by acceptance and whether that termination is justifiable by the anticipatory breach relied upon to support the termination.

The author has considered decisions from England, Australia, Canada and the United States. The vexing decision of the House of Lords in *White and Carter (Councils) Ltd v McGregor*,[17] in which Lord Reid gave the leading speech, is assigned to Scotland.

[11] *Restatement, Second, Contracts §253; Farnsworth on Contracts*, 3rd ed (2004), vol II at §8.20; *Equitable Trust Co of New York v Western Pacific Railway Co* 244 F 485 (1917) per Judge Learned Hand.

[12] *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623 at 657–658; [1989] HCA 23.

[13] [1980] 1 WLR 277.

[14] [1927] VLR 194.

[15] [1927] VLR 194 at 207.

[16] [1927] VLR 194 at 208.

[17] [1962] AC 413.

Contract law is a field replete with terms in common usage but having distinct meanings which are insufficiently appreciated. The author picks his way carefully between the senses in which the courts have used the terms 'rescind', 'repudiate', 'elect', 'fundamental' and the like.

It is a truism insufficiently remarked that the search for the answers to what present as difficult issues of law must begin with an appreciation of the fundamental principles involved. When they have slipped from sight, more often than not, there ensues a line of unsatisfactory and self-contradictory authority. The course of authority over a century and a half in which the doctrine of anticipatory breach has been developed reveals a related but distinct failure. This lies in the absence in the foundation 19th century cases to expound a clear doctrinal basis whereby the common law developed this aspect of contract law.

This is the state of affairs to which the author responds. He is to be congratulated on the result.

Canberra
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Qiao Liu
Xi'an, China
07 Oct 2010

LIST OF ABBREVIATIONS

ACTSC:	Australian Central Territory Supreme Court
ACWS:	All Canada Weekly Summaries
All ER (D):	All England Direct Law Reports (Digests)
All ER Rep Ext:	All England Law Reports Reprints Extension
ALJ:	Australian Law Journal
ALJR:	Australian Law Journal Reports
ALR:	Australian Law Reports
ANZ ConvR:	Australian and New Zealand Conveyancing Reports
ANZ Ins Cas:	Australian and New Zealand Insurance Cases
BCLC:	Butterworths Company Law Cases
BCLR:	British Columbia Law Reports
BCSC:	British Columbia Supreme Court
BLR:	Building Law Reports
CE:	Court of Exchequer
CISG:	United Nations Convention on Contracts for the International Sale of Goods 1980
Com Cas:	Reports of Commercial Cases
Con LR:	Construction Law Reports
CSIH:	Court of Session Inner House
CSOH:	Court of Session Outer House
D:	Dunlop, Bell & Murray's Reports, Session Cases (2nd Series)
DLR:	Dominion Law Reports
EAT:	Employment Appeals Tribunal
EC:	Court of Exchequer Chamber
EG:	Estates Gazette
EGLR:	Estates Gazette Law Reports
FAMCA:	Family Court of Australia
FCA:	Federal Court of Australia
FCC:	Federal Court of Canada
FCR:	Federal Court Reports (Australia)
FSR:	Fleet Street Reports
GWD:	Greens Weekly Digest
HCA:	High Court of Australia
LGLR:	Local Government Reports
LJC:	Lord Justice-Clerk
LJ Ch:	Law Journal Reports, Chancery New Series
LJKB:	Law Journal Reports, King's Bench New Series
LJR:	Law Journal Reports
LKSC:	Supreme Court of Sri Lanka (Decisions from the Sri Lanka Law Reports)

Lloyd's Rep Med:	Lloyd's Law Reports Medical
Lloyd's Rep PN:	Lloyd's Law Reports Professional Negligence
LT:	Law Times Reports
Mass:	Massachusetts Reports
MULR:	Melbourne University Law Review
NCLJ:	North Carolina Law Journal
NE:	North Eastern Reporter (USA)
NI:	Northern Ireland Law Reports
NLR:	New Law Reports (Sri Lanka)
NSWCA:	New South Wales Court of Appeal
NSWLR:	New South Wales Law Reports
NY:	New York Reports
NZCLC:	New Zealand Company Law Cases
NZLR:	New Zealand Law Reports
OR:	Ontario Reports
PECL:	The Principles of European Contract Law 2002
PICC:	UNIDROIT Principles of International Commercial Contracts 2004
PRNZ:	Procedure Reports of New Zealand
R (HL):	Rettie, Crawford & Melville, Session Cases (4th Series)
SCC:	Supreme Court of Canada
SCLR:	Scottish Civil Law Reports
SCR:	Supreme Court Reports (Canada)
SCV:	Supreme Court of Victoria
SGHC:	Singapore High Court
SLR:	Singapore Law Reports
Sol Jo LB:	Solicitors Journal, Lawyers Brief
SR (NSW):	New South Wales State Reports
TCC:	Technology & Construction Court (of Queen's Bench Division)
TCLR:	Technology and Construction Law Reports
TLR:	Times Law Reports
UCC:	Uniform Commercial Code (USA)
UCLA LR:	University of California at Los Angeles Law Review
VLR:	Victorian Law Reports
VSCA:	Victoria Court of Appeal
WASC:	Western Australia Supreme Court
WN (NSW):	Weekly Notes New South Wales
WWR:	Western Weekly Reports (Canada)

TABLE OF CASES

England