"Are there any circumstances (and if so, what are they) in which the Court may refuse to give effect to contractual provisions on the ground of repugnancy? Should the Court have such a power?"

Introduction

> 'One may safely say that the parties cannot, in a contract, have contemplated that [an exclusion] clause should have so wide an ambit as in effect to deprive one party's stipulations of all contractual force: to do so would be to reduce the contract to a mere declaration of intent.'

1. This sentence, from Lord Wilberforce's speech in *Suisse Atlantique v Rotterdamsche*,[1] is the modern plank upon which the repugnancy doctrine has been built. That doctrine emphasises in the well-hallowed phrase 'freedom of contract' the latter rather than the former element: that parties are free to contract, but what they have created must consist of reciprocal and enforceable rights and obligations.

2. The doctrine bites when a clause – generally an exclusion clause – is so widely drawn that it effectively renders one party's obligations wholly illusory. This point is clear enough, but it is almost the only point that is certain: it is not clear whether the doctrine is a rule of law or simply a principle of construction; nor is it certain as to what the effect of a successful plea to the doctrine should be.

3. The doctrine has never been built on the firmest of foundations. It grew out of the idea – now heretical – of the 'fundamental breach' of contract: a breach which, it was said, should be treated differently to other types of breach. This two-stranded breach categorisation was rejected in *Suisse Atlantique* and was finally put to rest in *Photo Production v Securicor*.[2]

4. However, what arose out of the ashes of fundamental breach was the repugnancy doctrine: a residual, protective principle, and one which would entitle a court to disregard an exclusion clause where that clause had the effect of reducing the entirety of one party's contractual obligations to mere declarations of intent.

5. It might be thought peculiar that such a doctrine exists at all. After all, contractual interpretation, as we now know it, is all about determining the meaning a document

[1] *Suisse Atlantique Societe d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] AC 361 at 432.
[2] [1980] AC 827.

would convey to a reasonable person having all the background knowledge reasonably available to the parties: and, if that reasonable person concludes that what was intended was a very widely-drawn exclusion clause, then that is what the conclusion should be. The law should strive to uphold rather than destroy that contractual bargain, however one-sided it might appear.

6. This essay argue that the repugnancy doctrine should be rejected: it is *unprincipled and uncertain*; it *sits uneasily with modern authorities*; it is *used as an argument of last resort in difficult cases*; and, perhaps most importantly, it is simply *unnecessary*.

7. The conclusion reached is that, much like the doctrine of fundamental breach, the repugnancy doctrine can be safely discarded from English law.

The current law

8. As already noted, the repugnancy doctrine has its modern roots in the *Suisse Atlantique* case. The charterers chartered a vessel from the owners for the carriage of coal. If charterers delayed in loading or unloading her, they had to pay demurrage limited to $1,000 a day. The owners terminated the charterparty in reliance on the charterers' repudiatory breach, and argued that, since their breach of contract had been 'fundamental', the charterers could not rely on the demurrage clause to limit their liability.

9. This was rejected by the House of Lords. The court held that whether a 'fundamental breach' was covered by an exclusion or limitation clause was a question of construction: there was no rule of law that liability for such a breach could not be excluded.

10. It was in this context that members of the court made a number of observations on the repugnancy doctrine. Perhaps the clearest statement is that of Lord Wilberforce, set out above as the opening to this essay. Lord Reid also touched on the doctrine, speaking of an exclusion clause whose terms:[3]

> 'are so wide that they cannot be applied literally: that may be because this would lead to an absurdity or perhaps it would defeat the main object of the contract or perhaps for other reasons.'

11. The difficulty with these tests are twofold. The first is that it is unclear whether they represent simply a principle of construction, or whether they go further and are a rule of

[3] At 398F-G.

law. While the extract from Lord Wilberforce's speech set out above refers to what the parties 'cannot…have contemplated' – indicating a principle of construction – his very next sentence is:[4]

> 'To this extent it may be correct to say that there is a rule of law against the application of an exceptions clause to a particular type of breach.'
>
> (Emphasis added)

12. Thus, it is not clear whether we are left with a hard-edged rule or simply a guiding principle.

13. The second problem with the tests is that they are inexact and, it is submitted, inherently contradictory. A contract is a 'mere declaration of intent' only if there are *no* enforceable obligations. Lord Wilberforce suggests that it is enough for a clause 'in effect to deprive one party's stipulations of all contractual force'. The limits of this are very uncertain. What if a clause excludes a party's liability for failing to perform his obligations save for when his decision to do is entirely arbitrary? It could be argued that such a clause does 'in effect' nullify his obligations, but the contract remains more than a more declaration of intent.

14. In short, the doctrine was off to an inauspicious start.

15. The House of Lords revisited the question in another shipping case, *Tor Line v Alltrans Ltd ('The TFL Prosperity')*.[5] The charterers sued the owners for breach of a warranty as to the height of the main deck of a ship, and claimed damages for loss of freight and for delay. The owners sought to rely on a standard form exclusion clause, which provided that they would 'only' be liable in certain cases of delay or of loss or damage, and were:

> 'not to be responsible in any other case nor for damage or delay whatsoever and howsoever caused even if caused by the neglect or default of their servants'.

16. It was argued that this clause really meant what it said: that the owners would not be liable in any case other than those specified (i.e. in certain cases of delay or loss or damage), including for breach of express warranties. Lord Roskill rejected this argument, concluding that 'the charter virtually ceases to be a contract for the letting of

[4] At 432.
[5] [1984] 1 WLR 48.

the vessel and the performance of services' by the owners.[6] Instead, Lord Roskill argued, the contract would become no more than 'a statement of intent' by the owners in exchange for the payment of hire.[7]

17. The difficulty with this reasoning is that it is, regrettably, not true. The owners *did* agree to be liable for a number of breaches: for example, for a delay in delivery of the vessel caused by their lack of due diligence in making the ship seaworthy. They had not merely declared their intent to use due diligence in such a situation: they were contractually liable for failing to do so.

18. The uncertainty surrounding the doctrine therefore persisted, and has done so ever since.

Principle

19. Having briefly summarised the repugnancy doctrine, this section goes on to argue that there are four reasons why, as a matter of principle, it should be rejected.

20. First, the repugnancy doctrine is ***unprincipled and uncertain***. Lord Roskill concluded in *The TFL Prosperity* that, while the owners did have *some* enforceable obligations, they did not have enough obligations for the contract to be recognised as a charterparty. This reasoning hints at an 'irreducible core' of obligations, without which a contract cannot be (for example) a charterparty. In this sense, it is analogous to the 'irreducible core' of trusteeship set out by Millett LJ in *Armitage v Nurse*.[8]

21. There are two difficulties with this 'irreducible core' reasoning:

    (1) First, it leads to uncertainty. While Millett LJ set out clearly what was contained in the irreducible core of trusteeship, Lord Roskill did not set out what the irreducible core of a charterparty might be. Would it be enough for owners to have been liable for delay and loss to cargo caused by lack of due diligence *and* negligence on their part; or would that too have been considered no more than a declaration of intent? The difficulties at the margins are extreme.

    (2) Secondly, the notion of an irreducible core, while workable in trusts law, is simply unfeasible in contract law. Devlin J rejected one interpretation of a contract in *Firestone Tyre and Rubber Company v Vokins*[9] on the basis that it would 'turn a

[6] At 58 (emphasis added).
[7] At 59.
[8] [1998] Ch 241.
[9] [1951] 1 KB 32.

contract of carriage into a contract of indemnity': thereby contemplating different cores for different types of contract. While there are areas in which courts do 'categorise' contracts by their type – consider, for example, implied terms at law in contracts of employment – many contracts cannot be so easily pigeonholed. Nor does the irreducible core reasoning provide a workable solution in *sui generis* contracts, or those which contain elements of different types of contracts.

22. Second, the repugnancy doctrine ***sits uneasily with modern authorities***. Contracts which give one party the right to terminate for convenience are, in one respect, similar to those which exclude liability for loss. In *Lotus v Comau*[10] Robin Knowles QC held that where A terminates a contract in which B has a right to terminate for convenience, A's losses are to be assessed on the assumption that B would have exercised its termination right. On the facts of *Lotus*, this assessment of damages would have given A only nominal damages. The effect would have been the same if B had excluded all liability for damages: an act which would have been struck down as 'repugnant' by Lord Wilberforce or Lord Roskill, but went entirely unremarked in *Lotus*.

23. Similarly, one can imagine a contract that gives one party a contractual discretion whether or not to perform its obligations. That discretion would (in general) be subject to the implied limit that it be exercised in good faith and not arbitrarily or capriciously; but, with very clear language, the discretion could be rendered entirely unfettered (per Lord Sumption in *BT v Telefonica*[11]). Such an unfettered discretion should fall within the ambit of the repugnancy doctrine, since it would make a party's obligations effectively no more than a statement of intent. But it is submitted that a court would be very reluctant to strike such a contract down: to do so would be acting entirely contrary to the parties' bargain.

24. Third, the repugnancy doctrine is liable to being used as ***an argument of last resort in difficult cases***. Three examples are given:

    (1) In *Mendelssohn v Normand*[12] M parked his car in garage and, on complaining about the garage's rule that he was not allowed to lock his car, was told by an attendant that he (the attendant) would lock it for him. M's suitcase, which had been on the back seat, was stolen, most probably by the attendant. In response to M's claim for

[10] [2014] EWHC 2122 (Comm).
[11] [2014] Bus LR 765 at [37].
[12] [1970] 1 QB 177.

damages, the garage raised an exclusion clause, which excluded liability for 'any loss or damage … however caused'. Lord Denning MR held that the term was rejected because it was 'repugnant to the express oral promise or representation' made by the attendant.[13] This constitutes a significant extension to the tests set out *Suisse Atlantique* and *Tor Lines*, which require that the contract *as a whole* be rendered a statement of intent. It is submitted that, if this case were to reach the courts today, the better approach would be to interpret the exclusion clause as not covering loss caused by the deliberate or criminal acts of the garage's employees.

(2) Another instructive decision is *Mitsubishi Corp v Eastwind*.[14] In response to the defendant's reliance on an exclusion clause, the claimant argued that the court should the clause as widely as possible *in order to* find it repugnant. This argument was roundly rejected by the judge: but it demonstrates the perverse results the repugnancy doctrine can sometimes have.

(3) Finally, in *Blackburn Rovers v Avon*[15] Moore-Bick J considered an insurance policy taken out by Blackburn Rovers against the risks of injury to its players. The policy excluded liability for injury 'directly or indirectly resulting from or consequent upon' degenerative conditions in bones. The agreed facts were that the injured footballer suffered from a degenerative condition which was very common among people of his age and profession. Moore-Bick J held (at [29]) that to exclude a claim in this situation would be a 'serious derogation from the cover', and (with the repugnancy doctrine at the forefront of his reasoning) construed the clause as not extending to 'normal' degenerative conditions.

(4) It is submitted that this analysis was flawed. If it was very common for degenerative conditions to cause injuries in footballers, it made perfect sense for the insurer to exclude its liability for them: it should not be taken to be underwriting risks that occurred with a high degree of frequency.[16] Moore-Bick J's focus on the repugnancy doctrine obscured what should have been an analysis of the purpose of the clause and commercial common sense.

[13] At 184.
[14] [2004] EWHC 2924 (Comm).
[15] [2004] EWHC 2625 (Comm).
[16] This was the reasoning that was in fact adopted by the Court of Appeal.

25. Fourth, the repugnancy doctrine is ***unnecessary***. Principles of contractual interpretation have now developed to cover almost entirely the space previously filled by the repugnancy doctrine:

(1) Where an exclusion clause can be interpreted in a number of ways, a court is entitled to accept the meaning which is more consistent with business common sense (see, for example, *Rainy Sky v Kookmin Bank*[17]). In most – if not all – cases this would lead to the rejection of an 'extreme' interpretation of a clause rendering one party's obligations illusory, in favour of an interpretation which would give those obligations some contractual force. Indeed, most of the decided cases which apply the repugnancy doctrine would now be easily explained by reference to this principle of commercial common sense.

(2) Another principle is that courts tend to insist on very clear language before interpreting clauses in such a way so as to exclude liability for what might be described as 'extreme' breaches of contract. This means that, even where a clause excludes liability for loss 'of any kind whatsoever… however caused', it may be interpreted not to cover losses caused by dishonesty (as in the *Mitsubishi* case referred to above).

(3) An overlapping principle is that neither party to a contract is presumed to abandon remedies it would have by operation of law. A court would therefore be unlikely to interpret an exclusion clause in such a way as to deprive one party of such remedies.

(4) Courts can also interpret clauses in subtler ways. Where a term states that a company 'shall have no liability whatsoever in contract, tort (including negligence) or otherwise', that may be limited to liability arising from defective *performance* of the agreement, rather than an outright *refusal* to perform the agreement at all.[18]

26. Accordingly, courts can deal with the problems previously solved by the doctrine of repugnancy by applying the modern approach to contractual interpretation.

27. Other areas of law have also developed. Lord Wilberforce's speech in *Suisse Atlantique* was given before the Unfair Contract Terms Act 1977. That Act reduced the need for courts to retain a residual discretion to reject 'repugnant' clauses, at least in cases within

[17] [2011] 1 WLR 2900.
[18] *Kudos Catering v Manchester Central Convention Complex Ltd* [2013] EWCA Civ 38.

the Act's scope. Further protections became available in the Unfair Terms in Consumer Contracts Regulations 1999 (protections which, together with UCTA 1977, have now been re-enacted in the Consumer Rights Act 2015).

28. The law is likely to continue to develop further. The repugnancy doctrine is often relied on in the insurance context, in general by assureds who argue that an exclusion clause deprives the policy of substantially all its contractual force. The introduction of the principle of 'good faith' into this area of law by the Insurance Act 2015 may, potentially, extend as far as exclusion clauses. It could be argued that reliance by the insurer on a wide exclusion clause which was not brought to the assured's attention was contrary to 'good faith'; and, if the principle of good faith became incorporated as a term into the contract, its breach by the insurer could sound in damages.

Conclusion

29. It has been argued that the repugnancy doctrine can safely be discarded without a material impact on the law of contract. The doctrine is unprincipled, out-dated and unnecessary.

30. Ultimately, an exclusion clause should not be construed by reference to some preconceived notion that the failure to perform a particular obligation was intended to give rise to a claim in damages, but should be construed in light of the contract as a whole.[19] The repugnancy doctrine cuts across the modern law, and should be rejected.

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[19] See *Nissho Iwai Australia Ltd v Malaysian International Shipping Corp* (1989) 167 CLR 219 (HCA) at [13].