DEMYSTIFYING THE RIGHT OF ELECTION IN CONTRACT LAW

This article is about commercial choices between two inconsistent rights, or courses of action, which are available to a party under his contract after a breach by the other contractual partner. In legal terminology the choice is known as "election" but it is often labelled as "waiver". Invariably, it has been confused with "estoppel". The nature and extent of knowledge required for the election to be operative, and whether there are any limits of the right to elect, are examined in Part II of the article. The different strands of opinion that are said to arise from judgments are reconciled. Problems that emerge from the use of an all embracing term "waiver" in substitution of either "election" or "estoppel" are dealt with under Part III. The author explains the misconceptions of using "waiver", demystifies the concept of "election", and provides guidance for commercial people to realise consciously when their election will result in intended legal consequences.

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I. Introduction

1 In a looking glass world, if commercial people had a chance to look at the mirror and reflect, they would ask the questions of Alice in Wonderland: "Which way do I go, this or that? Do I mean what I mean to say?" A voice would tell them: "You have a right to elect; to find out about the method and limits of exercising your right, we send you to the law of election. But waiver may step in, saying that when you choose one situation you intentionally relinquish your right to the other." And commercial people would ask: "What do these words mean?"

2 So we have a duty to explain. Election, in a contractual context, is about commercial choices and poses a dilemma to choose between two inconsistent rights, or courses of action, that have arisen after a breach of contract by the other contractual partner. A party exercises a choice; it does not waive nor relinquish anything. However, the meaning and inter-relationship of election with similar principles tend to be confused by

lawyers and the courts. Substituting "waiver" for election or estoppel results in muddled judgments.[1]

3 Election is an entitlement, not an obligation,[2] under the contract and it has its roots in ancient times, as early as the reign of Queen Elizabeth I, but was originally derived from the civil law.[3] Lord Redesdale LC in *Birmingham v Kirwan*[4] explained it very succinctly:

> The general rule is that a person cannot accept and reject the same instrument, and this is the foundation of the law of election.

4 The principle of election was later developed in the 19th century and a clear example of its correct application, both in terms of law and semantics, is shown in *Jones v Carter*[5] (a case concerning breach of covenants), in which Parke B stated:[6]

> [T]he lease would be rendered invalid by some unequivocal act, indicating the intention of the lessor to avail himself of the option given to him, and notified to the lessee, after which he could no longer consider himself bound to perform the other covenants in the lease.

5 The operation of the principle arises in a variety of contractual situations.[7] In the commonest incident of repudiation of contract, the

1 If the analysis of the classic book of John S Ewart, *Waiver Distributed* (Harvard University Press, 1917) had been followed by draftsmen, the courts and writers, there would not have been such a confusion.

2 "In all cases, [the one party to a contract] has in the end to make his election, not as a matter of obligation, but in the sense that, if he does not do so, the time may come when the law takes the decision out of his hands, either by holding him to have elected not to exercise the right which has become available to him, or sometimes by holding him to have elected to exercise it" *per* Lord Goff of Chieveley in *The Kanchenjunga* [1990] 1 Lloyd's Rep 391 at 398.

3 *Lissenden v C A V Bosch, Limited* [1940] AC 412 at 418, *per* Viscount Maugham. This doctrine was confined to cases arising under wills and deeds or other instruments *inter vivos* (derived from old Chancery Court cases). He distinguished it from the common law principle because this applied, he said, to cases relating to alternative remedies in court. But the court overlooked that the principle has been treated as one and the same in both courts, particularly since common law and equity have been administered together.

4 (1805) 2 Sch & Lef 444 at 449: it was stated that the principle cannot be said to be peculiar to a court of equity. He treated the right of election, as derived from English jurisprudence, in the same way as the Scottish doctrine of "approbate and reprobate" (*quod approbo non reprobo*).

5 (1846) 15 M & W 718; 153 ER 1040.

6 *Ibid*, at 725; 1043.

7 Unless a statute restricts a party's choice between alternative courses of action. It should be noted that the right of election does not belong only to the area of contract law but it arises in almost every area of law, including criminal, constitutional and procedural law, and in connection with almost every type of legal rights.

inconsistent rights are: the right to continue the contract, or to accept the conduct of the other party as terminating the contract.[8] The right to terminate often arises out of an express term of the contract or is provided by law or statute. A choice made in favour of one right or course of action against the other results in irrevocable consequences which may have not been intended. Therefore the choice must be an informed one; there must, at least, be knowledge of the full facts giving rise to the breach. Whether or not there should also be knowledge of the existence of two inconsistent rights from which to choose and of their respective legal consequences is debatable. The case law is not uniform on this issue.[9]

6 It is, therefore, necessary to explore the possibility of reconciling decisions that appear to be conflicting, for the law must be clear to help commercial men to make their decisions with knowledge of how the law will treat their words or conduct which may amount to an irrevocable choice.

7 Furthermore, in the labyrinth of case law on election, another issue which is not clear is the use of terminology.[10] The purpose of this article is three-fold:

(a) First, to ascertain the necessary conditions of election, the kind of knowledge required and cases in which there may be a fetter on the right.

(b) Second, to illustrate the terminology used by the courts in the application of the doctrine and identify the cause of the problem, which has led to confusion.

(c) Third, to conclude and recommend how the law could be clarified.

8 *The Santa Clara* [1996] 2 Lloyd's Rep 225.

9 See also "Exploring Election" by Justice Ken Handley, lecture given to the Chancery Bar Association and the Anglo-Australasian Lawyers Society on 15 November 2004, now published in (2006) 122 LQR 82.

10 This has been observed by other writers also: *Chitty on Contracts* (Sweet & Maxwell, 29th Ed, 2004), vol 1, ch 24; Sir Guenter Treitel, *The Law of Contract* (Sweet & Maxwell. 11th Ed, 2003), pp 811–816, 1015–1019; also by Australian judges, see Bronwyn Lincoln & Katherine Aistrope "Current Issues in the Termination of Construction Contracts" (2002) 19 ICLR 488–509.

II. The necessary conditions and elements for the operation of election

8 A clear description encapsulating election, while also highlighting the problems that arise in the application of the principle, was given by the High Court of Australia in *Sargent v ASL Developments Ltd*,[11] in which Stephen J stated:

> The doctrine of election as between two inconsistent legal rights is well established but certain of its features are not without their obscurities. The doctrine only applies if the rights are inconsistent … and it is this concurrent existence of inconsistent sets of rights which explains the doctrine; because they are inconsistent neither … may be enjoyed without the extinction of the other and that extinction confers upon the elector the benefit of enjoying the other, a benefit denied to him so long as both remained in existence …
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> …
>
> For the doctrine to operate there must be both an element of knowledge on the part of the elector and words or conduct sufficient to amount to the making of an election …
>
> The nature of the knowledge which an elector must possess is a matter upon which the authorities are somewhat at variance. An elector must at least know of the facts which give rise to those legal rights, as between which an election must be made; without that knowledge the doctrine of election will not be available to make irrevocable his choice of one particular right, although in appropriate circumstances an estoppel may still arise which produces that very consequence.

9 He further observed that in many instances what may pass for an application of the doctrine is, in truth, the inevitable consequence of the party's conduct, a consequence that would follow even if no such doctrine existed. But if he chooses instead to keep the contract alive and later seeks to rely on the breach to avoid the contract, the other party may have recourse to election or, if the facts will support it, to an estoppel.

10 Such a pragmatic observation unclothes the right of election from the myth that has been created around the concept and election can be understood as providing the mechanism (by the process of a choice made) in altering either the primary obligations (*eg* further performance) or secondary obligations (*eg* damages) of the parties after a breach, provided certain preconditions are fulfilled.

11 (1974) 131 CLR 634 ("*Sargent*") at 641–642.

A. Preconditions of election

11 The first precondition of election is that the conduct of one party to the contract is held, as a matter of law, to entitle the other to a choice between two inconsistent courses of action. Having made a choice, the next precondition is that the elector must communicate his choice to the other party, whereupon the election becomes irrevocable.

12 The elector of course cannot be held to an irrevocable choice unless he had, at least, actual knowledge of the relevant facts that constituted the breach, or the uncontractual performance, by the other party. This is well settled amongst the authorities, which will be seen next.

13 What is not uniformly settled is whether the putative elector should further know that:

(a) he has the right to elect between two inconsistent rights or courses of action; and

(b) the legal effect of his choosing for the one against the other right, or course of action.

14 A subsidiary question is whether or not an intention to elect can be presumed from the conduct of the putative elector, who does not in fact know of his right to elect.

15 A clear answer to these questions is very important because it will determine whether the test of proving election is subjective (at least partially), or objective (*eg*, election will be imputed on objective grounds).

B. The extent of knowledge

16 Some examples of the choices commercial people have been faced with in different situations are given to focus the mind to the level of knowledge that might be required and illustrate the aforesaid questions before they can be answered.

(a) Assuming there is a defect in the title of the vendor, would knowledge of the fact which constitutes the defect be

enough, or should the putative elector also know that he has a right to rescind in consequence of the defect?[12]

(b) Would an elector need to know, in addition to his knowledge of the facts giving rise to compensation under statute, that the exercise of his option to accept compensation would bar his claim for damages which he would have independently of the statute?[13]

(c) Should an elector know that his choice to make an application for a stay of execution of judgment would bar him from applying to set the judgment aside? His action to apply for a stay would be unequivocal, judged objectively; but without knowledge of the other right, would it amount to a conscious election?[14]

(d) When a putative elector knows that a breach has been committed by the other party, should he also know:

(i) whether or not the breach is going to the root of the contract?

(ii) his alternative rights of either termination or affirmation of contract?

(iii) the consequences of his election?[15]

(e) Should the owners of a ship, when faced with a charterer's order to proceed to a port which might be unsafe, know that by choosing to proceed to port, such choice will have the effect of rejecting their alternative right to refuse to comply? Should they also know what the effect of choosing one or the

12 *The Earl of Darnley v The Proprietors, etc of the London, Chatham, and Dover Railway* (1867) LR 2 HL 43 at 57: "A waiver must be an *intentional act with knowledge* of the circumstances" [emphasis added].

13 *Young v Bristol Aeroplane Company Limited* [1946] AC 163 which concerned compensation under the Workmen's Compensation Act 1925: "to make a choice the workman must be aware of his right to choose, and of the alternatives open to his choice" (*per* Lord Russell of Killowen at 176).

14 *Evans v Bartlam* [1937] AC 473 at 479 (*per* Lord Atkin): "full knowledge of the various rights amongst which he elects" is required.

15 *Bentsen v Taylor, Sons & Co* [1893] 2 QB 274, the Court of Appeal had to determine the question whether the statement "now sailed or about to sail" in the charterparty was a condition or a warranty.

other option would be, either upon their right to claim damages, or upon the contract?[16]

(f) Should a party to a contract know the effect of:

(i) accepting defective shipping documents in a sale of goods transaction,[17] or

(ii) accepting an invalid notice of delivery of the purchased goods, or

(iii) commencing to load cargo when the notice of readiness of the ship is invalid?[18]

17 A further understanding of these scenarios will be gleaned from the analysis of the relevant decisions mentioned in the following pages.

C. Two schools of thought about the level of knowledge[19]

(1) The first school

18 One school of thought about the level of knowledge maintains that election requires not only knowledge of the facts giving rise to a breach, but also of the right to elect between two inconsistent rights.

19 The authorities included in this category are *The Earl of Darnley v The Proprietors, etc of London, Chatham, and Dover Railway*:[20] "a waiver must be an intentional act with knowledge of the circumstances";[21] *Kendall v Hamilton*,[22] in which Lord Blackburn said, "there cannot be election until there is knowledge of the right to elect"; *Young v Bristol Aeroplane Company Limited*,[23] in which the House of Lords again

16 *The Kanchenjunga, supra* n 2.
17 *Shipton, Anderson & Co v John Weston & Co* (1922) 10 Ll LR 762 (buyer could not reject goods unless the defect was in the goods).
18 *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109 ("*Bremer v Vanden*"); *Bremer Handelsgesellschaft mbH v C Mackprang Jr* [1979] 1 Lloyd's Rep 221 ("*Bremer v Mackprang*"); *The Happy Day* [2002] 2 Lloyd's Rep 487: unequivocal conduct with knowledge of the underlying facts relevant to the choice can infer election to waive reliance on the invalidity of notices.
19 See also "Exploring Election", *supra* n 9.
20 *Supra* n 12 ("*Earl of Darnley*"), at 57.
21 What was meant by "circumstances" was interpreted in *Peyman v Lanjani* [1985] Ch 457 as knowledge of the rights.
22 (1879) 4 App Cas 504 ("*Kendall*") at 542.
23 *Supra* n 13 ("*Young*"), at 176.

repeated: "to make a choice the [elector] must be aware of his right to choose, and of the alternatives open to his choice". This line of authority was followed by Lord Atkin in *Evans v Bartlam*:[24] "to infer election it must be shown that the person concerned had full knowledge of the various rights amongst which he elects"; and culminated in the decision of *Peyman v Lanjani*,[25] in which the Court of Appeal reviewed all the authorities and held:

> [W]here a party to a contract was faced with the choice whether to affirm or rescind the contract, in order to render his election irrevocable he had to have knowledge not only of the facts which gave rise to the election but also of the right of election itself; that a person could not be treated as having elected to affirm a contract unless he had unequivocally demonstrated to the other party that he intended to proceed with it …

20 Stephenson LJ specifically stated:[26]

> [K]nowledge of the facts which give rise to the right to rescind is not enough to prevent the plaintiff from exercising that right, but he must also know that the law gives him that right yet chooses with that knowledge not to exercise it.

21 May LJ summarised the ingredients of election as derived from previous leading House of Lords decisions and said:[27]

> … I do not think that a party to a contract can realistically or sensibly be held to have made this irrevocable choice between rescission and affirmation unless he has actual knowledge not only of the facts of the serious breach of the contract by the other party which is the pre-condition of his right to choose, but also of the fact that in the circumstances which exist he does have that right to make that choice which the law gives him. To hold otherwise, … would in my opinion not only be unjust, it would be contrary to the principles of law which one can extract from the decided cases.[28]

22 Slade LJ, having considered the authorities that seem to conflict on the issue of knowledge, concurred:[29]

24 *Supra* n 14 ("*Evans*"), at 476.
25 *Supra* n 21 ("*Peyman*").
26 *Ibid*, at 487.
27 *Id*, at 494.
28 These cases referred to were *Kendall*, *supra* n 22; *Evans*, *supra* n 14; *Young*, *supra* n 13, and the judgments of the Supreme Court of Victoria in *Coastal Estates Pty Ltd v Melevende* [1965] VR 433.
29 *Peyman*, *supra* n 21, at 500.

> I do not think that a person … can be held to have made the irrevocable choice between rescission and affirmation which election involves unless he had knowledge of his legal right to choose and actually chose with that knowledge.

23 These authorities answer the first question (posed in para 13(a) above) in the affirmative. But although the elector should know he has a right to elect between two inconsistent rights, he is not required to know the legal effect of his choice. It will be seen later that the second question posed in para 13(b) above is a question of mixed fact and law.[30]

24 As to the third question in para 14 above, whether or not an intention to elect will be imputed even if an elector does not know his legal rights, the answer ought to be in the negative, but equitable estoppel may assist the other party in appropriate circumstances.[31] A comparison between estoppel and election is made in Part III of this paper.

(2) The second school

25 The second school of thought is said to support the view that full knowledge by the elector of the facts giving rise to the breach would be sufficient and election will be imputed on objective grounds judging from his conduct regardless of the elector's actual intention.

26 It is also argued[32] that this line of authority includes Lord Blackburn's judgment in *Clough v The London and North Western Railway Company*[33] and in *Scarf v Jardine*[34], as well as *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd*.[35]

27 The Australian courts in some cases[36] have interpreted these decisions as meaning that it is sufficient for an election to be proved if it

30 *Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd* [2000] Ch 12; *The Democritos* [1975] 1 Lloyd's Rep 386 at 397; see later under intention at paras 38–46 of the main text below.

31 *Peyman*, *supra* n 21.

32 See Justice Ken Handley, *supra* n 21.

33 (1871) LR 7 Exch 26 ("*Clough*") at 34; Lord Blackburn wrote the decision although it was delivered by Mellor J.

34 (1882) 7 App Cas 345 ("*Scarf*").

35 [1971] AC 850 ("*Kammins*").

36 *Craine v The Colonial Mutual Fire Insurance Company Limited* (1920) 28 CLR 305; Jordan CJ in *O'Connor v S P Bray, Limited* (1936) 36 SR (NSW) 248; *Elder's Trustee and Executor Company Limited v Commonwealth Homes and Investment Co Ltd* (1941) 65 CLR 603 ("*Elder's Trustee*").

is shown that the elector had knowledge of the facts and did an unequivocal act regardless of his actual intention.

28 In *Clough*, the court posed this question:[37]

> [H]as the person on whom the fraud was practised, having notice of the fraud, elected not to avoid the contract? or has he elected to avoid it? or has he made no election?

29 In *Scarf*, Lord Blackburn gave the answer:[38]

> [W]here a party … has thought that he would choose one of two remedies, … so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election ... [He] can go no further … *whether he intended it or not, if he has done an unequivocal act* … the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election. [emphasis added]

30 In *Kammins*, Lord Diplock said:[39]

> [Election] arises in a situation where a person is entitled to alternative rights inconsistent with one another. If he has knowledge of the facts which give rise in law to these alternative rights and acts in a manner which is consistent only with his having chosen to rely on one of them, the law holds him to his choice even though he was unaware that this would be the legal consequence of what he did.

31 Given the irrevocable consequences of an election, the above authorities need clarification.

D. Can the decisions be reconciled?

(1) Choice and knowledge

32 A chronological reference to the authorities of both schools of thought and subsequent ones will assist in determining whether or not they really conflict.

37 *Supra* n 33, at 35.

38 *Supra* n 34, at 360–361. The elector had trading dealings with a firm before and after a change of partners. He was owed money and sought recovery from the new partners, who went into liquidation. Subsequently he sued the previous partner and failed because when he made his election to sue one set of partners, he had notice of the change of partners who owed the debt to him.

39 *Supra* n 35, at 883. Lords Pearson and Reid, minority, thought that the only knowledge required was knowledge of the relevant facts.

33 In *Earl of Darnley* (1867), the House of Lords did not examine the question of knowledge in depth. In *Clough* (1871), in which the contract of sale of pianos had been induced by fraud, the issue was whether the company had already chosen to affirm the contract and it was held that the company had not, without full knowledge of the fraud, chosen to do so. Lord Blackburn laid down the minimum of knowledge required on the facts of this case. In *Kendall* (1879), he expanded further on the particular knowledge required (*eg*, also knowledge of the right to elect) before an election is made, although this case was concerned with *res judicata*.[40] In *Scarf* (1882), concerning a choice to sue one set of people instead of another, Lord Blackburn referred to *Jones v Carter* (1846),[41] in which the principle stated implies knowledge of the options or rights:[42]

> [T]he lease would be rendered invalid by some unequivocal act, indicating the intention of the lessor to avail himself of the option given to him …

34 In *Evans* (1937), the relevant rights to choose were an application to stay execution of judgment or to set it aside and concerned procedural matters in court to which court rules applied. Thereafter, in *United Australia, Limited v Barclays Bank, Limited* (1941)[43] (concerning a choice between two remedies, claiming in debt or in tort), the elector was not barred to sue in tort before judgment was entered in the debt action which had been discontinued. In *Young* (1946), the House of Lords distinguished a statutory option from the common law election. In *Kammins* (1971) (concerning estoppel), Lord Diplock acknowledged (*obiter*) the need for showing the elector's knowledge of his rights.

35 The issue of knowledge was for the first time examined in *Peyman* (1985) (fraudulent defect in title not known; whether possession of the leasehold prior to knowledge of that fact and hence of rights which arose due to fraud amounted to affirmation of contract). The Court of Appeal reconciled the strands of authorities and confirmed that election requires also knowledge of the right to elect. It further stated that when a party has legal advice, he will be more easily presumed to know the law and evidence of special circumstances may be required to rebut the presumption.

40 Lord Porter in *Young*, *supra* n 23, at 186, regarded *Kendall*, *supra* n 22, as establishing a general principle

41 *Supra* n 5.

42 *Ibid*, at 725; 1043.

43 [1941] AC 1 ("*United Australia*").

36 Subsequently, the Court of Appeal in *Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd*[44] concurred that knowledge is a necessary ingredient of election; the elector must make an informed choice, although the consequences of that choice are a question of law. In *The Kanchenjunga*,[45] this question did not have to be answered because the House of Lords found on the facts that the shipowners, knowing the facts and their rights under the contract, accepted unequivocally the charterers' order to load at the port of Kharg Island in Iran which was proved to be unsafe.

37 More recently, the Court of Appeal in *HB Property Developments Ltd v Secretary of State for the Environment*[46] held that the elector must know he had the right to choose on the law and on the facts and it must be shown he made a conscious election.

(2) Intention and unequivocal conduct (reconciling the decisions)

38 Can a man make a conscious election unintentionally? Lord Blackburn's words in *Scarf*:[47] "whether he intended it or not, if he has done an unequivocal act" caused the problem. But his phrase: "[the elector] determined to follow one of his remedies", indicates that the elector knew (before he made his election) his two alternative remedies[48] or rights and consciously elected one.

39 From a close reading of the judgment, it is apparent from the facts that the elector knew of his rights. It was stated that the elector must have thought of his legal right to sue the new partnership after he received the notice of dissolution of the previous partnership and made a conscious decision to follow that course of action.[49]

40 Similarly, in *Clough*, it was not necessary to ask the question whether or not the elector knew of his alternative right because it was obvious from the discussion in court that once he knew of the fraud he knew of his legal right to avoid the contract.

44 *Supra* n 30 ("*Oliver Ashworth*"), at 27.
45 *Supra* n 2.
46 (1999) 78 P & CR 108.
47 See para 29 of the main text above.
48 "Remedies" in this context means "rights": *United Australia*, *supra* n 43, at 30. [1941] AC 1, 30; *Johnson v Agnew* [1980] AC 367 at 396; *Oliver Ashworth*, *supra* n 30, at 28.
49 *Supra* n 34, at 355, 358, 359, 360.

41 In the writer's view, there is no real conflict in the decisions of the English courts,[50] although, at first sight, they may seem to give conflicting answers to the question of knowledge.[51] It seems more likely that different words were used in different contractual situations and importance was placed on "unequivocal act".

42 "Unequivocal act" is an essential element of election and this has been made clear also in Australian decisions.[52] A conduct is unequivocal when it is capable of one construction only.[53] It is consistent with the exercise of one of two sets of rights and inconsistent with the exercise of the other.[54] This implies that the act was not done inadvertently but at least some thought had been given to the existence of the rights.

43 For example, where the right to elect is conferred by an express term of the contract, there is no question whether a party had knowledge of his rights; he is deemed to know the terms of his own contract and the rights it confers. By contrast, when the right to elect is not conferred by an express term of the contract, knowledge of the inconsistent rights is essential. Stephen J in *Sargent* examined this by referring to the distinction made in *Elder's Trustee*[55] between cases in which there is only some evidence of election but not an unequivocal conduct and cases in which there is unequivocal conduct by the elector.

44 Where there is *no unequivocal* conduct, it will be necessary to prove knowledge of both the relevant facts and the inconsistent legal rights from which a choice was to be made for an election to be operative. In the absence of knowledge of the alternative legal right, only estoppel (which does not require knowledge) would prevent its exercise, if there was proof of detrimental reliance by the other party.[56] The court would look at the effect of the unequivocal conduct upon the position of the other party.[57]

50 It is said in *Sargent*, *supra* n 11, at 644 that there is no unanimity of opinion amongst the courts in the US although the clear weight of opinion appears to require knowledge only of the relevant facts and not of the legal rights.

51 *Peyman*, *supra* n 21, *per* Slade LJ, at 498–500.

52 *Sargent*, *supra* n 11, at 644, 657; *Khoury v Government Insurance Office of New South Wales* (1984) 165 CLR 622 at 633–634.

53 Sean Wilken & Theresa Villiers, *The Law of Waiver, Variation and Estoppel* (Oxford University Press, 2nd Ed, 2002) at p 49.

54 *Per* Stephen J in *Sargent*, *supra* n 11, at 646.

55 *Supra* n 36.

56 *Sargent*, *supra* n 11, at 644, 657–658; *Elder's Trustee*, *supra* n 36, at 618; *Coastal Estates Pty Ltd v Melevende*, *supra* n 28, at 443; *Peyman*, *supra* n 21, at 488, 495.

57 *Stevens & Cutting Ltd v Anderson* [1990] 1 EGLR 95; *Peyman*, *supra* n 21, at 488.

45 Where on the other hand there is *unequivocal* conduct, the need for more than knowledge of the facts giving rise to the legal right may not be necessary if the elector exercised a right under the contract, in which case he is presumed to know of his rights.[58] A suitable example of this is *Matthews v Smallwood*[59] (an unequivocal act is done recognising the continuance of the lease in the knowledge of the right under the contract to re-enter). Intention is presumed from the unequivocal act and since it is a presumption, it can be rebutted. The test is whether there can be an objective manifestation of choice by an unequivocal act.[60] As indeed the House of Lords said in *The Mihalios Xilas*:[61] "there must be an unequivocal act … showing that he intends to pursue one of [the remedies]".

46 Such an interpretation would seem to reconcile what Lord Blackburn said in *Scarf*: "whether he intended it or not, if he has done an unequivocal act".[62]

E. Essential elements of election

47 It can be derived from the decisions, as reconciled, that the elements for the operation of election are:

(a) knowledge of the facts giving rise to a breach of contract which warrants election;

(b) knowledge of the right to elect between two inconsistent rights that have arisen; and

(c) communication of the choice to the other party either by words or unequivocal conduct, whereupon the election is complete and irrevocable.

58 *Elder's Trustee*, *supra* n 36.
59 [1910] 1 Ch 777.
60 *Insurance Corporation of the Channel Islands Royal Insurance (UK) Ltd v The Royal Hotel Ltd* [1998] Lloyd's Rep IR 151(there was no unequivocal representation by the insurers to infer election to affirm the policy after fraud committed by the assured in manipulating the figures during negotiations for settlement).
61 *China National Foreign Trade Transportation Corporation v Evlogia Shipping Co SA of Panama (The Mihalios Xilas)* [1979] 1 WLR 1018 at 1024.
62 See *supra* n 38 and para 29 of the main text above.

The elector makes a conscious election, even if he is ignorant of the legal consequences of what he did, which at the end are imposed by law.[63]

48 How communication can be conveyed was put in a nutshell by the House of Lords in *The Santa Clara*:[64]

> It is sufficient that the communication or conduct clearly and unequivocally conveys to the repudiating party that [the] aggrieved party is treating the contract as at an end. … [T]he aggrieved party need not personally, or by an agent, notify the repudiating party of his election to treat the contract as at an end. It is sufficient that the fact of the election comes to the repudiating party's attention …

F. Test and burden of proof

49 The burden of proof is upon the party who alleges that an election has been made to prove so.[65] Under the first and prevailing line of authority, the Court of Appeal in *Leathley v John Fowler & Company Limited*[66] confirmed there should be proof of both knowledge of the facts, which gave rise to the right to elect, and of knowledge of the existence of such right in law, before a choice can be made.

50 A will have to provide further and better particulars of the allegation in order to show that B made a conscious decision to elect (a partially subjective test). In many cases, as *per* Slade LJ in *Peyman*,[67] the best particulars A can provide will be to invite the court to infer such knowledge from the circumstances. However, it will still be open to the court, after hearing evidence as to B's true state of mind, to hold on the balance of probabilities that he did not in fact have the requisite knowledge and A's plea will fail. Slade LJ added:

> Yet it should not be thought that injustice to A will necessarily follow. For if A has acted to his detriment in reliance on an *apparent* election by B, he will in most cases be able to plead and rely on an estoppel by conduct, in the alternative. If, on the other hand, A has *not* acted to his

63 This was also observed by both Stephenson LJ and May LJ in *Peyman*, *supra* n 21, at 486–487, 494 and in *Oliver Ashworth*, *supra* n 30, at 48.

64 *The Santa Clara*, *supra* n 7, at 229–230 (*per* Lord Steyn): the sellers' conduct in not tendering a bill of lading to the buyers constituted sufficient acceptance of the buyers' wrongful repudiation. (That was an unequivocal conduct through which their election was communicated).

65 *Matthews v Smallwood*, *supra* n 59.

66 [1946] KB 579.

67 *Supra* n 21, at 501.

> detriment … justice would not seem to preclude B from sheltering behind his ignorance of his legal rights. [emphasis in original]

G. Effect of delay in electing

51 Mere inactivity after the state of affairs has arisen does not of itself amount to an election one way or another. A reasonable time is needed for a decision to be made and what is a reasonable time is a question of fact in each case.[68]

52 There is no general rule that the innocent party to a broken contract loses the right to rescind if he does not elect to do so within a reasonable time after knowledge of the breach.[69] A party is not bound to elect at once. He may wait and think which way he will exercise his election, so long as he can do so without injuring other persons.[70] Only if the lapse of time is such as to lead the defaulting party to act on the belief that the contract will not be rescinded, or if an innocent third party has acquired an interest in property, will the innocent party lose his right to rescind[71] upon the application of the principle of estoppel.

53 In the absence of prejudice to other parties, silence, delay or failure to act quickly cannot form an unequivocal representation such as to hold that A has made an election. Recent authorities confirm this. Rix LJ in *Stocznia Gdanska SA v Latvian Shipping Co*[72] saw a "middle ground" between acceptance of the repudiation and affirmation of the contract, where the innocent party has a period of time to make up his

68 See references in *Chitty on Contracts*, *supra* n 10, vol 1, para 24-003.

69 *Allen v Robles* [1969] 1 WLR 1193: according to the headnote, "lapse of time did not operate against a party who was entitled to elect to repudiate liability under a contract unless there was prejudice to the defendant or rights of third parties had intervened or the delay was of such a length as to be evidence that [he] had in truth decided to accept liability"; the insurers here took five months to repudiate liability after the breach of the assured to notify his claim within the contractual time limit.

70 Lord Blackburn in *Scarf*, *supra* n 34, at 360–361.

71 *Clough*, *supra* n 33, at 35; *Wahbe Tamari & Sons, Ltd v "Colprogeca"-Sociedade Geral de Fibras, Cafés e Produtos Coloniais, Lda* [1969] 2 Lloyd's Rep 18 at 22–23; also *The Scaptrade* [1981] 2 Lloyd's Rep 425 at 430: "The lapse of time must be of such a length as to indicate unequivocally to the defaulting party that the innocent party has elected to affirm." The answer will depend on the facts of each case: *More OG Romsdal Fylkesbatar AS v The Demise Charterers of the Ship Jotunheim* [2005] 1 Lloyd's Rep 181 ("*The Jotunheim*") at [45]: "the constant pressing for hire, coupled with the threat of withdrawal, cannot mean that a reasonable time has passed" and *The Northern Pioneer* [2003] 1 Lloyd's Rep 212.

72 [2002] 2 Lloyd's Rep 436. In *The Happy Day*, *supra* n 18, at 507, silence could amount to waiver of the invalidity of a notice if it was combined with another step taken or assented to under the contract; *cf The Mass Glory* [2002] 2 Lloyd's Rep 244.

mind as to which course of action to take. Cresswell J in *Fleming & Wendeln GmbH & Co v Sanofi SA/AG* said:[73]

> If the contractual date for performance comes and goes, the innocent party may not immediately treat the other party as in default. He has an election whether to do so or not; he may, for a variety of reasons, decide to wait for a time, and while he waits the contract remains open to performance.

54 Thus, the courts should avoid an unduly technical approach to deciding whether the injured party has affirmed the contract without very clear evidence.[74]

H. Effect of mistake upon election

55 In many cases the right to elect arises well before legal advice can be obtained. If an innocent party to a contract does not appreciate the legal consequences of his choice, which are imposed by contract or the law, an unequivocal conduct may result in non-intended legal consequences upon the contract.

56 The effect of mistake in making a wrong choice has not yet been fully explored in case law. What would the effect of mistake of facts be upon election? Ewart[75] questioned whether or not an election would be reversible if it was based upon mistake; his lucid answer and reasoning are worth quoting:

> Upon principle, we should answer in the negative. For ... the right to elect comes from contract, and its effect is prescribed by contract. If in pursuance of the contract between the parties, one of them by his election, terminates it, how can it be re-established without the consent of both parties? The elector may regret that he made a mistake; but how can he restore ruptured relations? He pleads that he ought not to be bound by what he did; but meanwhile he has bound the other party; and what he is claiming is not that his mistake has nullified his election, but that, because of his mistake, he is to have a right to nullify his action – that he is to have a second option. The contract gave him only one.

73 [2003] 2 Lloyd's Rep 473 at 483.
74 Moore-Bick J in *Yukong Line Ltd of Korea v Rendsburg Investments Corporation of Liberia* [1996] 2 Lloyd's Rep 604 at 608.
75 *Supra* n 1, at 83–84.

57 This touches upon knowledge as discussed. In absence of requisite knowledge, there could be no election in the first place.[76] It is not uncommon, however, that people make wrong predictions[77] of what the outcome of their choices might be or, once they realise that the result is unfavourable, they may later allege mistaken belief of facts[78] or law. Would equitable relief from the unintended position arrived at after an election was made be allowed for a mistake of law about legal rights? On general principles, a mistake will not be operative to relieve a mistaken party, if he conducted himself in such a way as to lead the other party reasonably to believe that he had chosen, for example, to terminate the contract. The courts will expect commercial people to be aware of the consequences of their actions, or they ought to be, to protect their interests.

I. Fetter on the right of election

58 The question here is this: Can the innocent party choose to hold the contract-breaker to the contract and proceed unilaterally when co-operation of the other party is a necessary part of performance? The House of Lords set a general rule in *White & Carter (Councils) Ltd v McGregor*[79] but subsequent decisions have clarified the rule. On the facts of this case, an advertisement contractor was entitled to carry out the contract after wrongful repudiation by the other party and claim the full contract price. Lord Reid stated a general principle:[80]

> [I]f it can be shown that a person has no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages, he ought not to be allowed to saddle the other party with an additional burden with no benefit to himself.

59 Legitimate interest was defined fairly recently in a shipbuilding case, *Stocznia Gdanska SA v Latvian Shipping Co* in which Staughton LJ said:[81]

76 See also *HB Property Developments Ltd v Secretary of State for the Environment*, *supra* n 46.

77 See Keith Spencer, "Restitution of Monies Paid Pursuant to a Mistake of Law" (2004) 12 ISLR 153 available online at <http://www.islr.ie/Reviews/2004/pdf/Mistake.pdf> (accessed 17 April 2006).

78 The issue of discretionary equitable relief from contract allegedly formed upon a mistaken belief of facts was rejected by the Court of Appeal in *The Great Peace* [2002] 2 Lloyd's Rep 653.

79 [1962] AC 413 ("*White & Carter*").

80 *Ibid*, at 431(Lords Morton of Henryton and Keith of Avonholm dissenting).

81 [1996] 2 Lloyd's Rep 132 at 139.

> To be a legitimate interest, the innocent party must have reasonable grounds for keeping the contract open bearing in mind also the interests of the wrongdoer.

60 The burden of proving lack of legitimate interest rests with the contract-breaker.[82] The burden is not discharged by merely showing that the benefit to the innocent party is small in comparison with the loss to the contract-breaker.

61 The decision in *White & Carter* was criticised by Lord Denning MR as giving a "grotesque" result and it should have no application in cases where the injured party ought to elect to accept the repudiation and sue for damages provided damages was an adequate remedy. By suing for the contract price, the injured party is seeking specific performance.[83] Even in employment cases, the Court of Appeal held in *Decro-Wall International SA v Practitioners in Marketing Ltd*[84] that it would be for the interest of a wrongfully dismissed employee to choose to accept his employer's conduct as repudiation, mitigate his loss by finding alternative employment and sue for damages; otherwise, he would be prejudicing that claim by doing nothing while the contract ran its course.

J. How the White & Carter *rule is applied*

62 In *The Puerto Buitrago*,[85] the Court of Appeal held that the ship owners did not have legitimate interest in electing to preserve the charterparty rather than claim damages when the ship was redelivered in an unrepaired state. Lord Denning emphasised the futility of insisting upon the continuation of an already dead contract when damages would be an adequate remedy. Subsequently, Kerr J in *The Odenfeld*,[86] examining the law of the almost unfettered right of election, stated his understanding that the fetter would apply only in exceptional cases,

82 *The Dynamic* [2003] 2 Lloyd's Rep 693.

83 *Attica Sea Carriers Corporation v Ferrostaal Poseidon Bulk Reederei GmbH* (*The Puerto Buitrago*) [1976] 1 Lloyd's Rep 250 at 255.

84 [1971] 1 WLR 361 at 370; *cf Hill v C A Parsons & Co Ltd* [1972] Ch 305 . A question arose recently in *Cerberus Software Ltd v Rowley* [2001] IRLR 160, as to whether a wrongfully dismissed employee, in the absence of gross misconduct on his/her part, could seek an injunction from the court to prevent the employer from terminating the contract otherwise than in accordance with its terms. This would effectively force the employer to make payment in lieu. The point was not decided; see a commentary on the case by David Pearce, "Election Latest" [2001] CLJ 261–264.

85 *Supra* n 83.

86 [1978] 2 Lloyd's Rep 357.

where damages would be an adequate remedy and where an election to keep the contract alive would be *wholly*[87] unreasonable. In this case, the owners had a legitimate interest to keep the contract alive because it was difficult to find another comparable employment and damages were not an adequate remedy because of the collapse in the freight market.

63 A further clarification of the rule was made in *The Alaskan Trader (No 2)*[88] in which Lloyd J tried to reconcile the *dicta* in *White & Carter* with the language used in subsequent cases and commented that, in effect, while the fetter might apply in extreme cases, it was the range of remedies that was limited by the court and not the right to elect.

64 Thus, there is no real fetter on the right to elect. The innocent party may choose to hold the contract-breaker to the contract. However, should he do so unilaterally where the necessary co-operation of the other party is not forthcoming, the court may hold, in an appropriate case, that his conduct was unreasonable and will not, on equitable grounds, allow him to enforce his full contractual rights or remedies which he would have had otherwise. What would be unreasonable conduct would depend on the facts; the yardstick is whether or not the innocent party, considering the position of the other party as well, had a legitimate interest in doing so. If damages can be an adequate remedy, thoughtful consideration must be given to prevent the risk of losing the remedy of damages by insisting on keeping the contract alive.

III. The terminology used by the courts in the application of election

65 Reading the authorities reveals considerable terminological inconsistency which mainly revolves around the indiscriminate use of the word "waiver" in clear cases which involved either election or estoppel. "Waiver" has been defined in many cases and texts as "an intentional relinquishment or abandonment of a known right". The courts frequently say that when a party chooses one alternative, it "waives" (gives away), or relinquishes, the other. This is inaccurate because an elector does not possess both rights in order to give one away. The rights are available and

87 Simon J commented in *The Dynamic*, *supra* n 82, at [22], that the addition of the word "wholly" before "unreasonable" adds nothing to the test of the general rule that the *White & Carter* exception applies only in extreme cases.

88 [1983] 2 Lloyd's Rep 645 at 651.

he has a choice between them.[89] Ewart pointed out 90 years ago that there has been no case in which a right has effectively been relinquished, save by contract, estoppel, or release. There is no category for "waiver" as such. Further he stated:[90]

> "[W]aiver" appears to be effective only because, being sufficiently loosely defined, it sometimes assumes the garb of one of these and sometimes that of another. "Waiver" is said to have close relations with election also, because when you choose one thing, you are said to "waive" your right to the other – a right that you never had.

66 In this part the following issues are examined: (a) Why does precise terminology matter? (b) What is the use of "waiver"? (c) How have the courts and writers applied it, and how is it contrasted with other concepts? (d) Where does the problem of confusion lie?

A. Why precise terminology matters

67 The courts in most cases substitute "waiver" for election or estoppel. For example, in both *Bremer v Vanden*[91] and *Bremer v Mackprang*,[92] an unequivocal representation by the buyers of goods to the sellers to treat an invalid notice as valid was discussed by both the House of Lords and the Court of Appeal[93] in the respective judgments as a "waiver" of the right to challenge the defect in the notice. In the view of Shaw LJ in *Bremer v Mackprang*,[94] it did not matter whether it was regarded as waiver or estoppel.

89 The writer agrees with the analysis of Ewart, *supra* n 1, *eg* at pp 25–26.
90 *Supra* n 1, at pp 6–7.
91 *Supra* n 18.
92 *Supra* n 18.
93 In *Bremer v Mackprang*, *ibid*, Lord Denning MR said that the House of Lords decision in *Bremer v Vanden* was the most important one on waiver. But from what he stated at 226, he must have meant "estoppel". In *Peyman*, *supra* n 21, Stephenson LJ, at 486–487, recognised that confusion exists in the various judgments and distinguished between election on the one hand and estoppel on the other.
94 *Supra* n 18, at 230. It was recently commented by Potter LJ in *The Happy Day*, *supra* n 18, at [65], that the *Bremer* cases were concerned with a "waiver by election". However, it seems more likely from the discussion in the *Bremer* cases regarding detrimental reliance by the sellers that the issue was about estoppel, the doctrine of equitable forbearance, which does not require knowledge. Similarly, in *Avimex SA v Dewulf & Cie* [1979] 2 Lloyd's Rep 57, where the buyers were not aware of any defect in the *force majeure* notices, the gist of the *dicta* by Robert Goff J at 67 was about equitable estoppel although the word "waiver" was used.

68 The problem created by terminology has been observed by several law lords and lord justices, in fact, since 1940, when Lord Wright in *Ross T Smyth and Co, Ltd v T D Bailey and Son and Co*[95] pointed out:

> The word "waiver" is a vague term, used in many senses. It is always necessary to ascertain in what sense and with what restrictions it is used in any particular case. … The use of so vague a term without further precision is to be deprecated.

69 Lord Diplock in *Kammins* also observed the loose use of "waiver" by judges:[96]

> "Waiver" is a word which is sometimes used loosely to describe a number of different legal grounds on which a person may be debarred from asserting a substantive right … or from raising a particular defence to a claim against him which would otherwise be available to him. … He is sometimes said to have "waived" the alternative right, as for instance a right to forfeit a lease or to rescind a contract of sale for wrongful repudiation or breach of condition; but this is better categorised as "election" rather than as "waiver."

70 A much better description of the problem was given by the Court of Appeal recently in *Oliver Ashworth* by Robert Walker LJ:[97]

> Waiver is not at all a precise term of art … It can be used to describe the effect of an election (especially in the old expression "waiver of forfeiture" …). However the expression "waiver" is often used in a wider sense of any deliberate decision by a party not to stand on his strict rights, for instance, as in *Kammins*'s case, not to take a technical point as to the validity of a notice. In that case Lord Diplock … regarded this second type of waiver as being a form of estoppel and said that ordinary principles of estoppel apply to it.

71 Australian judges have also observed the problem. An astute comment was made by Mason CJ in *The Commonwealth of Australia v Verwayen*.[98] He almost declared the non-existence of "waiver" as a concept by stating:[99]

> It has been doubted that waiver exists as a defence or answer in any case except where it is used as an alternative designation for some other defence or answer, for example, election, estoppel or new agreement ...

95 (1940) 164 LT 102 at 106.
96 [1971] AC 850 at 882–883.
97 *Supra* n 30, at 28–29.
98 (1990) 170 CLR 394.
99 *Ibid*, at 406.

> Generally speaking, … an existing legal right is not destroyed by mere waiver ...

72 It seems from these *dicta* that there has, at last, been a realisation of a problem; but what has been done to eliminate the word "waiver" and not to substitute it for either election or estoppel? One could argue that the words of the House of Lords in *The Kanchenjunga*[100] implicitly, but not expressly, would have provided a guide to lawyers, writers and judges since 1990 to use precise words when they mean election or estoppel. Nevertheless, lack of consistency in the words used is still persisting, even today.[101]

73 So what really causes the continuing confusion in the use of the terms? Is it due to a conceptual problem, in the sense of difficulty in distinguishing the features of these concepts, or is it due only to terminological laziness, in the sense of knowing the differences between the concepts but using the word "waiver" for convenience or because of habit? Or is the confusion due to not having noticed the problem created by the indiscriminate use of "waiver"? Let us see what the use of "waiver" is, and how the courts and writers have applied it.

B. Use of "waiver"

74 One aspect about which there is consensus in the jurisprudence and amongst writers is the origin of the all-embracing term "waiver". It became a necessary invention when the parties to a contract wished to vary its terms orally. The courts recognised the need of developing the concept of waiver in order to bypass the formalities rule, as Goddard J put it in *Besseler Waechter Glover and Company v South Derwent Coal Company, Limited*:[102]

> One must … try to find the underlying principle which will explain the different results in cases which at first sight appear to be so alike in point of fact. … I think it is possible to extract a principle, and it seems to me to be this: If the parties agree to rescind their original contract and to substitute for it a new one, the latter must be evidenced by writing; so, too, if as a matter of contract the parties agree that the terms of the original agreement shall be varied, the variation must be in writing. But if what happens is a mere voluntary forbearance to insist

100 See quote from Lord Goff's judgment in *supra* n 2.

101 *Eg*, *The Jotunheim*, *supra* n 71, where "waiver" is used for both election and estoppel; *Fortisbank SA v Trenwick International Ltd* [2005] Lloyd's Rep IR 464: waiver and estoppel could be treated together.

102 [1938] 1 KB 408 at 416–417.

on delivery or acceptance according to the strict terms of the written contract, the original contract remains unaffected, and the obligation to deliver and to accept the full contract quantity still continues.

75 Judges and advocates tend to refer to "waiver" when they mean either variation, or equitable forbearance (estoppel), or election. Furthermore, writers classify waiver as a category and some have sliced it up into fine distinctions, such as unilateral, or pure, or total waiver, waiver by equitable forbearance or estoppel, or waiver by election.[103]

(1) Unilateral and pure waiver

76 It is said that neither is related to a breach of contract. Unilateral waiver is the voluntary abandonment by A of a particular clause in the contract which is only for his benefit and the performance of B is not affected.[104] Pure waiver is said by Wilken and Villiers to occur when A suggests to B by words or conduct that B need no longer perform its future obligations under the contract. In either case, if A later asserts the abandoned right, B can plead abandonment by way of confession or avoidance. What do these words mean? Such definitions will not satisfy our commercial men. Slicing further an already obscure term is bound to confuse them. They will be lost among vague words and their mirror may crack. If there is a concept by which the future contractual obligations of B can be altered, would it be without consideration for value? And if it requires consideration, why not just call it "variation"? If it is just a concession, the original agreement remains unaltered, unless A is estopped from going back on his promise to release B. An attempt is made to answer these questions later (at paras 81 to 84).

(2) Total waiver

77 What is "total waiver" and does it really exist as a category? It is said that it means a total abandonment of rights under the contract after a breach.[105] For this reason, it is characterised by some authors as

103 See Wilken & Villiers, *supra* n 53, ch 4.

104 An example of it would be when a term gives power to A under the contract to be exercised at A's sole and unfettered discretion: Wilken & Villiers, *supra* n 53, at p 64; *Hawksley v Outram* [1892] 3 Ch 359 at 376; *cf Lloyd v Nowell* [1895] 2 Ch 744; *Heron Garage Properties Ltd v Moss* [1974] 1 WLR 148.

105 *Banning v Wright* [1972] 1 WLR 972 at 988–990; Treitel, *supra* n 10, at p 812.

"total waiver".[106]

78 Now a crucial question is this: What person, in his right mind, would give up all his rights after a breach, unless he was negligent in prosecuting his claim within the prescribed time limit such that it has become substantively time-barred by statute?[107] Such result would come about by statutory provisions. Alternatively, the "waivor" may have wished to abandon his rights gratuitously (and this does not happen in real commercial life without something to be gained). Otherwise, if the intention was to abandon accrued rights after a breach was committed, there should be mutual consent supported by consideration[108] (this is expressed as accord and satisfaction). There is no such thing as a unilateral abandonment of rights after breach.[109] Once a right has accrued, it must be released or discharged either by deed or upon consideration.[110] Judges have not accepted the concept of total waiver without having proof of a separate binding agreement by which the "waivor" agrees to surrender the right to damages for valid consideration.[111] Alternatively, for a finding of an effectual total abandonment of rights one should look at whether or not the elements of equitable or promissory estoppel exist. This can be extracted from the numerous judgments which deal with waiver in this sense[112] and from Treitel who discusses total waiver under equitable forbearance.[113]

106 Treitel, *id*, at pp 99–117, 188–190, 812–816; by giving it the name of "total waiver", while discussing its elements under equitable estoppel, the author complicates the matter. Wilken & Villiers, *supra* n 53, at pp 61–63, also maintain that total waiver is a separate category, although they cannot give examples other than those befitting equitable estoppel.

107 Some statutory time bars extinguish not only the procedural remedy but also the substantive right.

108 This is also supported by the House of Lords in *Banning v Wright*, *supra* n 105, which has been misunderstood as being a case on total abandonment.

109 *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* (*The Hannah Blumenthal*) [1983] 1 AC 854; *Collin v Duke of Westminster* [1985] QB 581 at 595.

110 *Atlantic Shipping and Trading Company, Limited v Louis Dreyfus and Company* [1922] 2 AC 250 at 261–262.

111 Whether A waived both the right to reject defective documents and the right to claim damages was held untenable: *Ets Soules & Cie v International Trade Development Co Ltd* [1980] 1 Lloyd's Rep 129; *Kwei Tek Chao v British Traders and Shippers Ld* [1954] 2 QB 459 at 477: for there to be a total waiver there would have to be a separate agreement by which A agreed to surrender the right to damages vested in him at the time of the breach; *The Democritos*, *supra* n 30, at 398.

112 *Finagrain SA Geneva v P Kruse Hamburg* [1976] 2 Lloyd's Rep 508 ("*Finagrain v Kruse*"): the Court of Appeal did not accept that the buyers had waived all rights to claim damages for the sellers' non-contractual performance of subsequent monthly shipments by having accepted a previous late shipment.

113 Treitel, *supra* n 10, at pp 105–118, 812–816.

C. How have the courts applied "waiver"?

79 Cases in the international trade of goods illuminate the issues. Frequently, difficulties arise in supplying the cargo through the chain of a CIF contract, or due to delays in confirming the letter of credit,[114] or due to other events such as floods in rivers or embargo on exports by governments.[115] Such events cause a temporary difficulty to deliver or accept delivery on the agreed monthly dates of a sale contract. Commercial men will have to adjust their position and reserve their rights. Should they wish the contract to continue, they should take care not to find themselves in wrongful repudiation of contract.[116]

80 Similarly, when defective documents under a CIF contract are delivered to the buyer, what right is rejected if the buyer accepts non-conforming documents? Can he later reject the goods?[117] These questions will be best illustrated if "waiver", as used by the courts, is divided into "waiver before breach" and "waiver after breach".

(1) Waiver before breach

81 There are instances where either the seller or the buyer asks for delivery at a later date than the date provided by the contract and there is nothing written down nor is new consideration provided.[118] The party who requested a later delivery cannot later bring an action for non-delivery,[119] or refuse to perform his part on the later date; and the party who gave the concession is said to have waived strict compliance with the contractual date.[120] In such cases there will be no damages for late

114 *W J Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189 ("*Alan v El Nasr*"); *Panoutsos v Raymond Hadley Corporation of New York* [1917] 2 KB 473 ("*Panoutsos v Raymond Hadley*"); *Enrico Furst & Co v W E Fischer, Ltd* [1960] 2 Lloyd's Rep 340 ("*Furst v Fischer*").

115 *Eg*, *Finagrain v Kruse*, *supra* n 112.

116 *Furst v Fischer*, *supra* n 114.

117 *Shipton, Anderson & Co v John Weston & Co*, *supra* n 17, at 763 (a case of election to accept the documents with a wide liberty clause in the bill of lading. Knowledge by the buyer of the right to reject did not entitle him to reject the goods because the defect in the documents was not defect in the goods; but he could claim damages against the ship).

118 *Eg*, *Ogle v Earl Vane* (1868) LR 3 QB 272; *Hickman v Haynes* (1875) LR 10 CP 598; *Plevins v Downing* (1876) 1 CPD 220 (parol agreement does not rescind, vary, or in any way affect a written contract (required so to be by the Statute of Frauds 1677 (c 3) (UK)); *cf Hartley v Hymans* [1920] 3 KB 475 (waiver by equitable estoppel or implied new written agreement in a case under the Sale of Goods Act 1893 (c 71) (UK)).

119 *Tyers v The Rosedale & Ferryhill Iron Company, Limited* (1873) 8 Exch 305.

120 *Hartley v Hymans*, *supra* n 118.

performance within the extended period. But if there is no performance at all, damages will be assessed on the basis of the written contract, which remains unaffected, as if the breach took place at the end of the extended period.[121]

82 This is known as a concession or forbearance under the contract. The party making a concession recognises that the other is in a difficulty and prefers to continue the contract by not insisting on strict compliance upon a term or a condition.[122] As such, it cannot be equivalent to a contractual variation. It provides a lawful excuse for specific departure from the contractual terms. It requires mutual consent before the fixed performance has arrived but falls short of a new agreement, or variation, without consideration.[123] In the absence of consideration, it is merely forbearance, either at common law[124] or in equity,[125] to insist on strict legal rights. For example, A acquiesces in the method of payment as per contract and indicates that a new method is accepted. A cannot cancel the contract on the ground that the other party failed to comply with the original method without prior notice of his intention to revert to the original method.[126] It is just a variation as to the mode of performance, not a variation of the agreement.[127]

83 The effect of forbearance at common law is that the contractual terms will apply to enforce the parties' remedies, because their rights have not been altered irrevocably, as the forbearance can be retracted.[128]

84 Forbearance in equity (referred to as promissory estoppel) requires an unequivocal promise by A to B that he will not insist on his strict legal rights and B relies on the promise, so that retracting from the

121 *Ogle v Earl Vane*, *supra* n 118: forbearance as to time of delivery of goods affected the measure of damages when the seller could not deliver on the later date; this is called a contract to purchase forbearance by Samuel J Stoljar, "The Modification of Contracts" (1957) 35 Can Bar Rev 485 at 499.

122 Stoljar, *id*, at 490.

123 See also H K Lucke, "Non-Contractual Arrangements for the Modification of Performance: Forbearance Waiver and Equitable Estoppel" (1991) 21 UWAL Rev 149.

124 Forbearance at common law presents great difficulties, unless variation can be established, so the courts resort to the application of forbearance in equity (equitable or promissory estoppel) if its elements are proved on objective grounds.

125 Treitel, *supra* n 10, at pp 103–105, 117 (waiver in equity in a sense of forbearance has analogies with equitable estoppel and is often referred to as promissory or equitable estoppel).

126 *The Scaptrade*, *supra* n 71; *Panoutsos v Raymond Hadley*, *supra* n 114.

127 Treitel, *supra* n 10, at p 104; *Panoutsos v Raymond Hadley*, *supra* n 114.

128 Treitel, *ibid*.

promise would be inequitable.[129] It does not require knowledge of the promisor of its own rights but knowledge that the promise has been acted upon by the promisee. Since there is no breach, the question of election between two conflicting rights with knowledge of the right to elect does not arise here.

(2) Waiver after breach

85 There are two types of "waiver" after breach: waiver in the sense of election, as discussed in Part II, and waiver by which it is said there is total abandonment of rights under the contract, seen under "total waiver".

86 Since the proponent writers of "total waiver", and the courts mean, in effect, equitable estoppel,[130] it is now time to compare estoppel with election.

D. Election versus equitable estoppel[131]

87 Election has been dealt with in Part II. While election is concerned with the knowledge of the representor, A, equitable estoppel is concerned with whether or not the position of B, the representee, has been altered to his detriment by relying on the promise or representation made by A. Both equitable estoppel and election require communication of the representation either by words or conduct to the other party. But apart from that they should not be blurred, as May LJ warned in *Peyman*:[132]

> The doctrine of election is no doubt based upon foundations similar to those which in general terms support estoppels, … but in the first instance it must be considered on its own. Cases in which on the facts it

129 Stoljar, *supra* n 121, at 491, 493, argues that this type of waiver (which, in his view, is an agreement to modify) could cover everything from the most insignificant amendment to a total rescission and that it is not estoppel because the waivee's rights do not depend (as they depend in estoppel) upon a reliance or change of position and if the position is changed, it is changed for the better, not for the worse.

130 *Hughes v The Directors, etc, of the Metropolitan Railway Company* (1877) 2 App Cas 439 ("*Hughes v Metropolitan Railway*") 448 (relief against forfeiture); *Birmingham and District Land Company v London and North Western Railway Company* (1888) 40 Ch D 268 at 286; *Central London Property Trust Limited v High Trees House Limited* [1947] KB 130.

131 Estoppel by representation is finely distinguished from equitable estoppel: in the former the representation is one of present fact (A leads B to believe that a certain state of facts exist which must be proved), while in equitable estoppel the promise or representation is one of future intention not to enforce pre-existing legal rights.

132 *Supra* n 21, at 493.

> is held that there has been no true election frequently thereafter raise questions of possible estoppel ... but … for the correct sequential analysis of the legal position … the two doctrines … must not be confused.

88 Equitable estoppel significantly differs from election in the following respects:

> (a) It is not about electing between two inconsistent rights that have arisen after a breach has occurred, as it is in the case of election;[133]
>
> (b) It is about A forbearing not merely his right to rescind the contract after a serious breach by B, but also his right to damages or to performance;[134]
>
> (c) Knowledge by A of his rights is not necessary in equitable estoppel;
>
> (d) Action by B in reliance on the representation of A giving rise to estoppel is necessary as a substitute for consideration, while reliance is not required in election;[135]
>
> (e) As reliance may lead to a change of position, it is necessary to demonstrate either that B has altered his position to

133 *Benjamin's Sale of Goods* (Sweet & Maxwell, 6th Ed, 2002) paras 12-034 to 12-036 and cases referred thereto; see Part II of the main text above.

134 Treitel, *supra* n 10, at p 812; Wilken & Villiers, *supra* n 53, at pp 61–63; *Ets Soules v International Trade Developments Co Ltd*, *supra* n 111, at 137–138 (if the buyers did not reject defective documents either because they did not know of the matter which gave rise to their invalidity, or because, knowing they could reject, they decided not to do so, there is no basis on which it can be said that merely by electing not to reject the documents, they have in any way given up their right to claim damages). *Bentsen v Taylor, Sons & Co*, *supra* n 15 (by electing to affirm the contract, there was no "waiver" by the innocent party of its underlying right to claim damages for the breach. Its conduct to load the ship amounted to a waiver of its right to repudiate the contract for breach of a condition precedent). *The Kanchenjunga*, *supra* n 2 (an election to proceed to a prospectively unsafe port instead of refusing the charterers' order, would not prevent the shipowners from claiming damages for breach); *Torvald Klaveness A/S v Arni Maritime Corporation (The Gregos)* [1994] 1 WLR 1465 (an election not to reject an uncontractual last voyage order by the charterers would not prevent the shipowners from claiming damages suffered due to the overrun).

135 Stephenson LJ in *Peyman*, *supra* n 21, at 488, and Slade LJ at 500: Election does not require reliance by the other party on the choice, while reliance and detriment in the case of the promissory or equitable estoppel are essential on the basis of *Hughes v Metropolitan Railway*, *supra* n 130. The reason is that the injured party is not necessarily in a worse position if he elects, instead of rescinds, to keep the contract alive and claim damages.

his detriment, or that it would be inequitable for A to go back on his representation;[136] this is not required in election;

(f) While election is irrevocable, estoppel can be suspensory.[137]

E. Position under the Sale of Goods Act 1979

89 Section 11(2) of the Sale of Goods Act 1979[138] ("SOGA") provides that:

> Where a contract of sale is subject to a condition to be fulfilled by the seller, the buyer may waive the condition, or may elect[139] to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated.

90 Treitel[140] postulates that the word "elect" refers to waiver in the sense of election while the word "waive" is used to refer to total waiver (abandonment by the buyer of his rights to rescind and to claim damages for repudiation).[141] However, it is possible that the draftsman inserted the words "or may elect" after the phrase "waive the condition" by way of explanation, in that the buyer has a right of election to treat the condition as a warranty. Such interpretation is understood as a "waiver" after breach. Should it be intended that the section covers also "waiver of the condition" before breach, the section could mean this:

136 *Tool Metal Manufacturing Co Ld v Tungsten Electric Co Ld* [1955] 1 WLR 761 at 764; *The Uhenbels* [1986] 2 Lloyd's Rep 294 at 298; *The Happy Day*, *supra* n 18,; in *The Kanchenjunga*, *supra* n 2, at 399, Lord Goff stressed inequity as a key feature of the doctrine.

137 *Eg* when: the promisor can resile from his promise on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position; the promise only becomes final and irrevocable if the promisee cannot resume his position: *Ajayi v R T Briscoe (Nigeria) Limited* [1964] 1 WLR 1326.

138 Sale of Goods Act 1979 (c 54) (UK).

139 Except for s 35 which modifies the common law right of election by providing for deemed acceptance of repudiation, notwithstanding the buyer's lack of knowledge of the seller's breach, provided he had a reasonable opportunity of examining the goods; if he later discovers the breach, he may be deemed to have lost the right to reject; and s 35A concerning the buyer's right to accept or reject part of the goods; the buyer's behaviour in accepting or rejecting a part would not be regarded as an election to affirm or reject the whole contract.

140 Treitel, *supra* n 10, at p 812.

141 His theory of "total waiver". This argument is also advanced by Wilken & Villiers, *supra* n 53, at p 61.

(a) the buyer may forgo the condition before its performance falls due, whereupon there will be no breach without the condition; however this would need to be evidenced by agreement, if the buyer later denied the non-existence of the condition, unless the seller could claim reliance on equitable estoppel, if the facts supported it;

(b) after breach, the buyer may elect to continue the contract by treating the breach of condition as breach of warranty and maintain his right to claim damages.

91 Apparently, the use of the word "waive" causes problems, while more precise terms should be used, such as variation, or estoppel, or election, to reflect what is actually meant and avoid confusion. There are many statutes that add to this conundrum in semantics. Let us see briefly what problem is created by the Marine Insurance Act 1906[142] ("MIA 1906").

F. Warranties under the Marine Insurance Act 1906

92 The MIA 1906 contains many sections in which the words "the insurer may waive" are used when it is a question of electing either to terminate or affirm the contract.

93 The most complex example is s 33(3) which provides:

> A warranty …. is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability by him before that date.

But s 34(3) provides that "[a] breach of warranty may be waived by the insurer".

94 In *The Good Luck*,[143] Lord Goff of Chieveley interpreted s 33(3) thus:[144]

> Those words are clear. They show that discharge of the insurer from liability is automatic and is not dependent upon any decision by the

142 Marine Insurance Act 1906 (c 41) (UK).
143 *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1992] 1 AC 233.
144 *Ibid*, at 262.

> insurer to treat the contract or the insurance as at an end; though, under section 34(3), the insurer may waive the breach of warranty.

95 In other words, the agreement of both parties has, in effect, been terminated automatically as from the date of the breach ("discharged from liability" meaning discharged in the future; thus, in effect no contract remains, save for pre-breach accrued liabilities).

96 Lord Goff interpreted s 34(3) as follows:[145]

> When, as section 34(3) contemplates, the insurer waives a breach of a promissory warranty, the effect is that, to the extent of the waiver, the insurer cannot rely upon the breach as having discharged him from liability. This is a very different thing from saying that discharge of the insurer from liability is dependent upon a decision by the insurer.

97 In other words, Lord Goff implied that the insurer will be estopped[146] from relying on the breach because his discharge from liability is not dependent on his election. However, the wording of s 34(3) is ambiguous; it implies a positive act by the insurer in a way of election. It does not state that the insurer may be estopped from relying on the breach.

98 Subsequent sections on specific warranties, *eg* s 36(2), or conditions, *eg* s 42, indicate that the insurer has an election: "the insurer may avoid the contract". There are also unfortunate contradictions between these sections and s 33(3). The words "the insurer is discharged from liability" and the waiver of s 34(3) are not reconcilable with other sections of the Act (in which the right of election – using the word "waiver" – is implied). The problem stems first from bad drafting and second from the inaccurate use of the word "waive" instead of using either election or estoppel. The language is misleading and causes unnecessary convolution by which judges are handicapped in the interpretation of the statute, resulting in injustice.

145 *Id*, at 263.

146 The effect of *The Good Luck* is interpreted as meaning that from the moment of the breach, the *insurance cover* is automatically terminated; there is no scope of election by the insurer: *HIH Casualty and General Insurance Ltd v Axa Corporate Solutions* [2002] Lloyd's Rep IR 325 (HC) and [2003] Lloyd's Rep IR 1 (CA) (waiver by estoppel). In a recent Court of Appeal decision, *Bolton Metropolitan Borough Council v Municipal Mutual Insurance Ltd* [2006] EWCA Civ 50, where the contract provided that a notification of a claim provision was a condition precedent to insurer's liability, the court clarified misunderstood issues of election. It held that the insurer could elect to rely on the failure of notice by the assured in addition to its rejection of the claim for lack of cover at the relevant period.

G. Where does the problem lie then for the confusion that exists in this area?

99 As is apparent from the authorities, the use of the term "waiver" has created enormous confusion with regard to which concept applies in a particular case. Waiver, unless it is in the sense of election or estoppel or variation of contract, is not capable of definition. Why then use waiver in substitution for the others? One reason for this is that the courts look at the end result to avoid the technicalities of definitions.[147] There is a misconception that waiver is a term describing an end result. Another reason is that the authorities and writers have been using "waiver" for convenience in cases in which either election or estoppel should be spelt out.[148] Such use involves dangers which may be avoided by forgoing "waiver" when considering either election or estoppel.[149] A third reason is that waiver and equitable estoppel have been judicially described as "two ways of saying the same thing".[150] But, sometimes, the courts use "waiver"[151] to refer to either election or estoppel, perhaps because of important similarities between the two. In any event, the terminology used has not been consistent.[152]

147 Denning LJ in *Charles Rickards Ld v Oppenhaim* [1950] 1 KB 616 at 623; In *Furst v Fisher*, *supra* n 114, at 349–350, waiver was defined as a conduct by A which affects his remedies after a breach by the other party. It was equitable estoppel and should have been spelt out.

148 *Eg*, *Brikom Investments Ltd v Seaford* [1981] 1 WLR 863 (landlord and tenant case decided on estoppel by representation although it was clearly a case of election, namely the landlord had elected to accept enhanced rent fixed to include repairs of the leasehold and could not thereafter assert the inconsistent right that they were not liable to pay for the repairs under the lease). *Panchaud Frères SA v Etablissements General Grain Company* [1970] 1 Lloyd's Rep 53, also a case on election (to accept or reject shipping documents) where the buyers, having accepted the shipping documents outside the shipping period sued sellers for the purchase price on the ground that the goods did not conform with the contract. The buyer lost on the basis of equitable estoppel. Unfortunately, the court was not asked to apply its mind to the principle of election, and the court was uncertain about the application of "waiver" and in which sense it could be applied at that time (at 59–60).

149 This view is also advocated by *Spencer, Bower and Turner, The Law Relating to Estoppel by Representation* (Butterworths, 3rd Ed, 1977) at para 314 (pp 319–320).

150 *The Nerano* [1996] 1 Lloyd's Rep 1 at 6 .

151 "Waiver" was used in an obvious case of election, see *The Post Chaser* [1981] 2 Lloyd's Rep 695, a case concerning absence of protest on the part of buyers of goods when presented with defective declaration of the ship. Even more recently in *The Jotunheim*, *supra* n 71.

152 *Alan v El Nasr*, *supra* n 114, at 212; *Panoutsos v Raymond Hadley*, *supra* n 114; *Furst v Fischer*, *supra* n 114 (cases of waiver by equitable estoppel); *The Superhulls Cover Case (No 2)* [1990] 2 Lloyd's Rep 431 at 449 (case of waiver in the sense of election). See also Stoljar, *supra* n 121, at 503, 513–515, 525, 526, the decisions which he found difficult to reconcile were in fact about election, or estoppel, but the term waiver was used by the courts: *eg*, *Hartley v Hymans*, *supra* n 118; *Panoutsos v Raymond Hadley*, *supra* n 114 and the cases on leases.

100 The problem is compounded by the analysis of these concepts by some authors.

101 For example, Stoljar objected to the treatment of waiver in the same way as estoppel and proposed that the law enforces waiver or estoppel as an agreement to modify. Such proposal forces a novel category of an agreement which does not fit four-square into contract law and may be met with the fate of an attempted variation of contract without consideration. Wilken and Villiers take the position that total waiver is a different species from estoppel. They admit, however, that total waiver may be applied only in extreme cases but the example they give is actually concerned with estoppel.[153] "Waiver" is used in leading legal texts on contract law and specialist texts on charterparties when what is meant is either election or estoppel. Such confusion blurs the issue further but the courts in recent leading authorities are inclined to settle with estoppel[154] when the elements of election are not satisfied.

102 Apparently, it can be deduced from the various recent judgments that the problem is largely terminological, and it may be slightly conceptual due to a misunderstanding that when one elects to affirm the contract he waives the right to terminate; the correct expression should be "he simply elects not to exercise the right to terminate".[155] In addition, it seems, it has not yet been fully noticed that the term "waiver" ought to be written off and not be used to refer to either estoppel or election.

103 To conclude on this part, "waiver" before breach should be understood as: (a) a concession which does not affect the contractual terms, unless there is a binding variation; or (b) equitable forbearance of a term or a condition of the contract. There is no need to use the word "waiver".

104 "Waiver" after breach is either (a) election, provided its elements are proven; or (b) equitable estoppel, if it is supported by the facts. Unfortunately, it is stated in several decisions that it does not really matter which term is used.[156] It is hoped that this paper proves that it does matter. Indeed, delineation of these concepts will greatly assist in clarifying and further developing the law.

153 *Finagrain v Kruse*, *supra* n 112.
154 See also *Bremer Handelsgesellschaft mbH v Deutsche Conti-Handelsgesellschaft mbH* [1983] 2 Lloyd's Rep 45, and many others referred to in this paper.
155 This has been recognised by some authorities; see also Ewart, *supra* n 1.
156 *Eg*, *The Democritos*, *supra* n 30, at 398.

IV. Conclusion: How can the law be clarified, or demystified?

105 The perplexities created by the language used by statutes, the courts and writers in describing election, coupled with a misconception about the use of an all-embracing term, "waiver", has created an unnecessary mystery around the concept of election. Furthermore, some inconsistencies in old judgments with regard to the issue of the required knowledge for an operative election have added to the confusion surrounding the principle.

A. Choice and knowledge

106 The problem of knowledge seems to be reconcilable. In the light of modern decisions, the prevailing view must be that the contract breaker should prove that the putative elector had the requisite knowledge of both the facts and of the right to elect between two inconsistent rights.

107 Election signifies a conscious positive act on the part of the elector although there may be no express intention that a party is electing. Unlike estoppel, election is not the effect which the law attributes to conduct, although the law will confirm the meaning of the conduct as shown from the facts. Choosing one right will prevent the elector from choosing the other inconsistent right.

108 The contract in some cases will help the innocent party to choose between two inconsistent rights by expressly providing for them and knowledge of the rights in such circumstances will be presumed. But in cases in which the contract does not so provide, full knowledge of the rights is necessary.

B. Terminology

109 In most modern decisions in which the term "waiver" has been used instead of election, or estoppel, it seems that there is no real doctrinal confusion in the application of the concepts but differences in semantics. However, the inaccurate use of language, in some cases, is based on a misunderstanding that a right is waived. An elector makes a choice between two rights that have arisen after a breach; he does not waive any right he does not possess.

110 For the purpose of certainty, it is therefore suggested that the word "waiver" be abolished from the relevant statutes and, in the meantime, it should not be used in judgments. Positive guidance should

be given by higher courts. For the eradication of the imprecise term "waiver", it is insufficient to just state its imprecision. Once the law is consistently stated by avoiding substitution of waiver for election or estoppel, commercial people will be able to put their mind to important questions, such as: Am I, by my conduct, choosing to terminate or affirm my contract? Would my conduct be regarded in law as I am terminating without intending to do so? Does my act of accepting defective shipping documents signify that I accept the goods? What do I reject by complying with an uncontractual order given by the other party? Is it the right to damages, or just the right to reject the uncontractual order?

C. Recommendation

111 It is hoped that this article demystifies the concept of the right of election and provides guidance for an informed choice. But there is need for further action. Reviewing the authorities, it has been revealed that there is no meaningful use of "waiver". The instances in which it has been used can be limited to cases where the contract remained unaltered by a mere concession, or there was a binding variation, or equitable estoppel, or election. Thus, if the words "waive" or "waiver" were abandoned from statutes, legal texts and judgments, only then would we mean what we mean to say and commercial people would look at the mirror and perhaps say to Alice: "I do know which way to go".