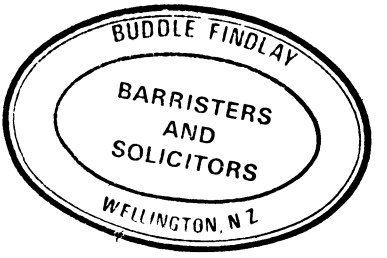
tainty has until now been given as a reason for rejecting such an approach,[111] but Morris has answered the uncertainty question in a very compelling way:[112]

> . . . The proper law of tort theory is not open to one objection which has been raised through the proper law of contract theory, namely, that it produces grave uncertainty in commercial matters. A shipping company or insurance company may legitimately need to know what law will govern its contracts before it makes them. But a tort is not a consensual transaction. Tort liability is nearly always unexpected. A motorist does not legitimately need to know what law will determine his liability to pay damages if he runs down a pedestrian. His social duty is not to run the pedestrian down; he ought not to be concerned (at least until after the accident) with the questions whether the law imposes on him a strict liability or only a duty of care, or whether his liability is to be governed by the law of state x or the law of state y. A duty not to cause harm is a good social rule, though it may not always hold good in the domestic law of torts.

When confronted with a tortious situation having a conflict of laws aspect, the Court should be concerned with doing justice to both parties, and relying on technical rules which may work an injustice.

There have been problems in the United States with the development of a new rule, but it is submitted that Morse[113] is correct when he says that the American revolution in this field has done much to expose some of the "artificiality and inadequacy of traditional thinking". It may even be said that the decision of the House of Lords in *Chaplin* v. *Boys*[114] shows the House of Lords to be grappling with the old approaches, and endeavouring to provide them with the necessary flexibility required in a modern conflicts rule. Whatever the steps taken to modernise, the courts should certainly not be content to rely any longer on the highly artificial and technical rules that have bedevilled this area of private international law for far too long.



111 Indeed, all members of the House of Lords in *Chaplin* v. *Boys* [1971] A.C. 356 extolled the virtues of certainty while creating one of the most uncertain authorities in recent years.

112 J. H. C. Morris "The Proper Law of a Tort" (1951) 64 Harv. L.R. 880, 894.

113 C. G. J. Morse *Torts in Private International Law* (1978, North Holland Publishing Co. Ltd., Amsterdam) 268.

114 [1971] A.C. 356.

Deviation in contracts of sea carriage: after the demise of fundamental breach

Jerry Hubbard*

This paper is an examination of the law of deviation in contracts of carriage by sea in the light of the decisions of the House of Lords on the fundamental breach heresy developed by the English Court of Appeal.

In the nineteen-fifties the English Court of Appeal, supported by some judges of the High Court, created the doctrine of fundamental breach in order to defeat the effect of the wide exemption clauses found in common form contracts. As every student of the law of contract now knows, the doctrine was ill-founded and at least since 1983 the doctrine must be regarded as entirely overruled by the House of Lords.[1] The chief architect of the theory had already accepted defeat when that case came before him in the Court of Appeal.[2]

The origin of the heresy was said to lie in the cases on deviation in contracts of carriage by sea.[3] In the House of Lords extensive references were made to these cases[4] and while they were held not to constitute authority for a doctrine of fundamental breach they were not overruled; indeed Lord Wilberforce was at pains to preserve them in *Photo Production Ltd.* v. *Securicor Transport Ltd.*[5] It is the purpose of this paper to see whether these cases on deviation can still be regarded as good law in the light of the decisions of the House of Lords and also in the light of legislative intervention.[6]

I. THE DEVELOPMENT OF THE LAW ON DEVIATION

References to the doctrine of deviation are to be found in the early compilations of the laws of the sea; thus the Imperial Laws of the Haunce Towns

* LL.B. (London). Senior Tutor at Wellington Polytechnic.

1 *George Mitchell (Chesterhall) Ltd.* v. *Finney Lock Seeds Ltd.* [1983] 2 A.C. 803.
2 [1983] 1 Q.B. 284.
3 Raoul Colinvaux (ed) *Carver's Carriage by Sea* (13 ed. Stevens, London, 1982) vol 1, section 267.
4 *Suisse Atlantique Société O'Armement Maritime S A.* v *N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361.
5 [1980] A.C. 827.
6 The Sea Carriage of Goods Act 1940; the Carriage of Goods Act 1979; and the Contractual Remedies Act 1979.

1614:[7] "If a master without cause will sail in another haven that he is fraighted, and loss do happen he shall answer the same of his own means." The Laws of Wisby[8] contained a similar provision. It is clear that these early laws recognised that the carrier was under an overriding obligation to follow the course of the contract voyage, and that deviation from that course would have serious consequences for the carrier.

The first case in which deviation and its effect was considered by the courts was *Davis* v. *Garrett*[9] where P delivered to D 114¼ tons of lime for carriage on the barge *Safety* from the Medway to the Regents Canal. The bill of lading provided that the carrier would be liable, " . . . the act of God, the King's enemies, fire and all and every other dangers and accidents of the seas, rivers and navigation excepted . . . ". Without any apparent reason, the master called at two ports in the opposite direction to the normal and direct route to the Regents Canal. As a result the barge was delayed twenty-four hours and was caught in a storm; the lime being wetted, the barge was destroyed by fire.

The defendant raised two questions: (a) Whether the damage sustained by the plaintiff was so proximate to the wrongful act of the defendant as to form the subject of an action. (b) Whether the declaration was bad in that it did not allege that the defendant had undertaken to carry the lime directly to the Regents Canal. As to (a) it was pointed out that to sustain such a defence would mean that a master would only rarely be liable in such cases, but Tindal C.J. continued:[10]

> But we think the real answer to the objection is, that no wrong doer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss, if his wrongful act had never been done. (It might admit of a different construction if he could shew, not only that the same loss might have happened, but that it must have happened if the act complained of had not been done; but there is no evidence to that extent in the present case.)

As to (b), in the course of rejecting the defendant's claim it was stated:

> And we cannot but think that the law does imply a duty in the owner of a vessel, whether a general ship or hired for the special purpose of the voyage, to proceed without unnecessary deviation in the usual and customary course.

In this case we see nearly all the elements of the law on deviation. The master of a ship is under a strict duty to follow the course of the voyage for which the ship has been contracted. The contract of carriage as evidenced by the bill of lading, contains clauses which provide either, as in this case, that the carriers will not be liable for losses incurred in certain specified circumstances, or that in the event of a loss occurring, the liability of the carrier to compensate the cargo owner is limited. In the event that the ship deviates from her proper course, the owner is entitled to repudiate the contract. Should the cargo owner exercise this right, then

7 Abridged in Gerard de Malynes *Lex Mercatoria* (Professional Books Edition, Abingdon, Oxford, 1981) part I, 125, 126.
8 Ibid., 130.
9 (1830) 6 Bing 716; 130 E.R. 1456.
10 Ibid., 724, 1459.

the contract goes and the carrier cannot rely on the clauses in the bill of lading which would otherwise absolve him from all liability or limit that liability as the case may be.

The true basis of this rule was not at first clear. In particular there was doubt as to whether there had to be a causal relationship between the loss and the deviation. *Davis* v. *Garrett* appeared to be authority for the proposition that for a deviation to deprive a shipowner of the benefit of any limitation on his liability, the cargo owners had to show that the loss was directly attributable to the deviation or at least that the loss had occurred during the deviation, the shipowner being unable to establish that the loss would have occurred in any event. There is a line of authority which would seem to endorse this view. In *Scaramang & Co.* v. *Stamp*[11] in 1880 and in *James Morrison & Co. Ltd.* v. *Shaw Savill & Co. Ltd.*[12] it was seen as material that the loss had occurred, if not as a direct consequence of the deviation then at least that it had occurred during the deviation. This attitude had received some support in the House of Lords in *Glynn* v. *Margetson & Co.*[13]

However a different approach had become apparent in the year that *Scaramang & Co.* v. *Stamp* was decided. In *Balian & Sons* v. *Joly, Victoria & Co. Ltd.* Lord Esher M.R. stated:[14]

> It was sufficient to say that the cases showed that if the master deviated from the voyage contracted for in the bill of lading the shipowner would be deprived of all stipulations in the bill of lading which limited his liability as a carrier by water.

The next case of note directly raised the question of causation: the necessity to establish a link between the deviation and the loss that was suffered. In *Joseph Thorley Ltd.* v. *Orchis S.S. Co. Ltd.*[15] the damage to the goods occurred as they were being unloaded at the port of destination. The loss was covered by the exceptions in the bill of lading. However it appeared that the vessel had not proceeded directly to London from Limassol but had called at two additional ports in Asia Minor. This was held to have been a deviation. Per Collins M.R.:[16]

> The principle underlying those judgments [in *Balian & Sons* v. *Joly, Victoria & Co. Ltd.*] seems to be that the undertaking not to deviate has the effect of a condition, or a warranty in the sense in which the word is used in speaking of the warranty of seaworthiness, and, if that condition is not complied with, the failure to comply with it displaces the contract. It goes to the root of the contract, and its performance is a condition precedent to the right of the shipowner to put the contract in suit.

Thus it followed that it was not necessary to trace the loss suffered to the actual deviation. The decision in *Joseph Thorley Ltd.* v. *Orchis S.S. Co. Ltd.* was followed some two years later in *Internationale Guano En Superphosphaatwerken* v. *Robert MacAndrew & Co.*[17] It should be noted that although the deviation did entitle the cargo owner to rescind the contract, the carrier retained

11 (1880) 5 C.P.D. 295.
12 [1916] 2 K.B. 783.
13 [1893] A.C. 351.
14 (1890) 6 T.L.R. 345, 347.
15 [1907] 1 K.B. 660.
16 Ibid., 667.
17 [1909] 2 K.B. 360.

the protection that he would have had as a common carrier. Thus he was not liable for that portion of the damage that was attributable to the nature of the cargo itself.

It may be that the two lines of authority can be reconciled. It appears that where the loss is caused by the deviation or occurs whilst the deviation is in progress the carrier may not rely on any protection that he may have in the bill of lading. Furthermore, any protection he might have as a common carrier is also lost. If, however, the loss arises other than through the deviation or after the vessel has returned to her proper course then the contract in the bill of lading will not avail the carrier, but he may rely on such protection as he may have as a common carrier.

In 1936 in *Hain S.S. Co. Ltd.* v. *Tate & Lyle Ltd.*, the House of Lords considered the effect of a deviation on the contract of carriage.[18]

The *Tregenna* was chartered from H by F to load a cargo of sugar for delivery to P. The cargo was to have been loaded from various ports as ordered by F. As a result of a breakdown in the telegraph services the master did not receive F's instruction to proceed to the final port to complete the loading. The master therefore cleared for Queenstown. On discovering the error F contacted the master who altered course for the final port. Having loaded the rest of the sugar the vessel went aground as she was leaving the port and some of the cargo was lost. The remainder of the cargo was taken to Liverpool in another vessel. H claimed a lien on the cargo for a contribution for the loss from the grounding, under the law of general average. To obtain the release of the sugar P entered into a Lloyds' average bond under which P. undertook to pay a contribution for the general average loss. The House of Lords held that in the circumstances there had been a deviation.

In considering the effect of deviation Lord Atkin stated that two views were apparent from the authorities (a) that a deviation automatically displaces the contract or (b) its only effect was to destroy the exceptions clause. His lordship continued:[19]

> I venture to think that the true view is that the departure from the voyage contracted to be made is . . . a breach of such a serious character that however slight the deviation the other party to the contract is entitled to treat it as going to the root of the contract, and to declare himself as no longer bound by any of its terms.[20]

After suggesting as a possible justification for the rule that deviation from the voyage for which the contract had been made could deprive the cargo owner of his insurance cover, he continued:

> If this view be correct then the breach by deviation does not automatically cancel the express contract, otherwise the shipowner by his own wrong can get rid of his own

18 [1936] 2 All E.R. 597. Deviation had already been in issue before the House of Lords in *Glynn* v. *Margetson & Co.* (supra n.13), but that case was concerned with whether a deviation existed rather than the effect thereof.

19 Ibid., 601.

20 This has been held to go too far, see *Heyman* v. *Darwins Ltd.* [1942] A.C. 356.

> contract. Nor does it affect merely the exceptions clauses. This would make those clauses alone subject to a condition of no deviation, a construction for which I can find no justification. It is quite inconsistent with the cases which have treated deviation as precluding enforcement of the demurrage provisions.[21] The event falls within the ordinary law of contract. The party who is affected by the breach has the right to say, I am not now bound by the contract whether it is expressed in the charterparty or bill of lading or otherwise . . . . But on the other hand, as he can elect to treat the contract as ended, so he can elect to treat the contract as subsisting: and if he does this with knowledge of his rights he must in accordance with the general law of contract be held bound.

His lordship held that as endorsee of the bills of lading, P was not liable either for contribution or for freight. However it was liable on the Lloyds' average bond into which it had entered. The question of the owner's claim for freight on a *quantum meruit* claim was left open. On the question of the respondent's liability for the balance of freight the Court of Appeal had held that it was not payable.[22] But Lord Maugham was of the opinion that a claim could lie in the appropriate circumstances for freight on a *quantum meruit* basis. This view was based on the ground that while deviation was a breach which gave the shipper or consignee the right to repudiate the contract the contract remained in force until the shipper or consignee elected to repudiate it.

In view of the draconian effect of deviation on the liabilities of the shipowner, it is not surprising that draftsmen of bills of lading attempted to define the voyage by means of "liberty clauses" which are designed to leave the master free to pursue whatever course seemed expedient. The *contra proferentum* rule was applied to the construction of such clauses.[23]

II. THE DOCTRINE "COMES ASHORE"

In order to limit the effect of the sweeping exemption clauses in common form contracts the English Court of Appeal, supported by some judges of the High Court, used the deviation cases to found the doctrine of fundamental breach. Devlin J. stated:[24]

> The ordinary law of contract, . . . as discussed in *Hain Steamship Co.* v. *Tate & Lyle Ld.*, involves that, where there has been a breach of a fundamental term of a contract giving the other party the right to rescind it, then, unless and until, with full knowledge of all the facts, he elects to affirm the contract and not to rescind it, the special terms of the contract go and cannot be relied upon by the refaulting party.

This was taken up by the Court of Appeal, in particular by Lord Denning in such cases as *Karsales (Harrow) Ltd.* v. *Wallis*[25] where he recognised a " . . . general principle that a breach which goes to the root of the contract disentitles the party from relying on the exempting clause."[26]

21 E.g. *United States Shipping Board* v. *Bunge y Born Limitada Sociatad* [1925] All E.R. Rep. 173. (Author's footnote).
22 (1934) 39 Com. Cas. 259.
23 *Glynn* v. *Margetson & Co.*, supra n.13.
24 *Alexander* v. *Railway Executive* [1951] 2 K.B. 882, 889.
25 [1956] 1 W.L.R. 936.
26 Ibid., 941.

It is clear now that the deviation cases were not authority for any such doctrine. The statements quoted above directly contradict the view of the law held by their Lordships in the *Hain S.S.* case. It is true that in some of the earlier cases,[27] it was said that deviation precluded the carrier from relying on the special contract, but this referred to the bill of lading as a whole, as compared with the rights and obligations of the common carrier which, as we have seen, could be held to apply to the contract in certain circumstances. There is no doubt that in the event of a deviation occurring, the owner of the cargo could, if he so chose, repudiate the whole bill of lading. If he did not so choose then the contract there evidenced remained in force together with any limitations on the carrier's liability.

The first decision in which the House of Lords repudiated the concept of 'fundamental breach' as a rule of substantive law was *Suisse Atlantique Société D'Armement Maritime S.A.* v. *Rotterdamsche Kolen Centrale.*[28] Unfortunately the judgments are not entirely clear and are open to more than one interpretation. This allowed the Court of Appeal to retain the doctrine of fundamental breach for a further fourteen years,[29] until it was finally laid to rest by the House of Lords in 1980.[30]

With the benefit of hindsight it is possible to derive a consistent doctrine from the judgments in the House of Lords, if it is borne in mind that *Suisse Atlantique* was concerned with the somewhat specialised area of charterparties. It is clear that the effect of breaches of contract is a matter of construction of the contract. Following Lord Wilberforce it is necessary to look to the contract to determine whether the act or omission in question does in fact constitute a breach of contract. Lord Reid makes this clear and also that there is no substantive rule of law such as that developed by the Court of Appeal under the title "fundamental breach".[31]

The Court of Appeal, as has been stated earlier, did not give up the concept of fundamental breach even in the face of the clear statements by the House of Lords in *Suisse Atlantique.* In *Harbutt's "Plasticine" Ltd.* v. *Wayne Tank & Pump Co. Ltd.*[32] the Court of Appeal distinguished *Suisse Atlantique* on the ground that in *Harbutt's "Plasticine",* no election was possible since the subject matter of the contract and the factory in which it was constructed was destroyed by the breach. This led to problems in later cases. The reconcilation of the conflicting decisions in the Court of Appeal and the House of Lords caused no little difficulty.[33] The Court of Appeal met a final defeat at the hands of the House of Lords in *Photo Production Ltd.* v. *Securicor Transport Ltd.*[34]

27 E.g. *Davis* v. *Garrett* supra n.9.
28 Supra n.4.
29 *Harbutt's "Plasticine" Ltd.* v. *Wayne Tank & Pump Co. Ltd.* [1970] 1 Q.B. 447.
30 In *Photo Production Ltd.* v. *Securicor Transport Ltd.,* supra n.5.
31 *Suisse Atlantique* supra n.4.
32 Supra n.29.
33 *Kenyon, Son & Craven Ltd.* v. *Baxter Hoare & Co. Ltd.* [1971] 1 W.L.R. 519; P. N. Leigh-Jones and M. A. Pickering "Fundamental Breach: The Aftermath of *Harbutt's 'Plasticine'* " (1971) 87 L.Q.R. 515.
34 Supra n.5.

The House of Lords overruled the decision in *Harbutt's "Plasticine"* and reversed the Court of Appeal's decision in *Photo Productions*. Per Lord Wilberforce:[35]

> I have no second thoughts as to the main proposition [in *Suisse Atlantique*] that the question whether, and to what extent, an exclusion clause is to be applied to a fundamental breach, or a breach of a fundamental term, or indeed to any breach of contract, is a matter of construction of the contract.

However of importance for this paper is the later observation of Lord Wilberforce:[36]

> I must add to this, by way of exception to the decision not to 'gloss' the *Suisse Atlantique* [1967] 1 A.C. 361, a brief observation on the deviation cases, ... I suggested in the *Suisse Atlantique* that these cases can be regarded as proceeding upon normal principles applicable to the law of contract generally viz., that it is a matter of the parties' intentions whether and to what extent clauses in shipping contracts can be applied after a deviation, i.e. a departure from the contractually agreed voyage or adventure. It may be preferable that they should be considered as a body of authority sui generis with special rules derived from historical and commercial reasons. What on either view they cannot do is to lay down different rules as to contracts generally from those stated by this House in *Heyman* v. *Darwins Ltd.*[37]

III. ARE THE DEVIATION CASES SUI GENERIS?

It remains to be seen whether the deviation cases can be fitted into the general law of contract after *Photo Production* or, as Lord Wilberforce said, must they be regarded as a line of authority *sui generis* and thus not subject to the law of contract as applied in other contracts. If this is so then *ipso facto* the principles laid down in those cases cannot be applied to contracts other than those for the carriage of goods by sea. This is a novel proposition and before it is accepted that such a unique type of contract exists it is necessary to endeavour to reconcile the deviation cases with the rest of the law of contract. If this does not prove to be possible then either these cases must be regarded as having been overruled or the law of deviation in contracts of carriage must indeed be seen as a regime peculiar to those cases, apart from the rest of the law of contract.

In order to see whether the deviation cases can be fitted into the general law of contract it is necessary to establish a framework within which it is possible to analyse contractual terms. In *Moschi* v. *Lep Air Services Ltd.*[38] Lord Diplock analysed the contractual obligations on the basis of primary and secondary obligations. He developed this analysis in *Photo Production.*[39] The approach has not met with universal approval.[40] Nevertheless it is respectfully suggested that Lord Diplock's classification of contractual obligations does provide a basis on which a comparative analysis of contractual terms may be undertaken.

35 Supra n.5, 842.
36 Supra n.5, 845.
37 Supra n.20. (Author's footnote).
38 [1973] A.C. 331.
40 Lord Denning M.R. supra n.2, 300.
39 Supra n.5.

When a contract is made each party undertakes the obligations expressed or implied in the contract. Such undertakings are in Lord Diplock's analysis called "primary obligations". Of these obligations he says:[41]

> A basic principle of the common law of contract, to which there are no exceptions that are relevant in the instant case, is that parties to a contract are free to determine for themselves what primary obligations they will accept.

He points out that while these primary obligations may be expressly stated in the contract, in many commercial contracts there will be primary obligations which are not stated but are implied by law. The parties are free to modify these implied obligations by express words.

If the contract of carriage of goods by sea is examined in the light of this definition of primary obligations we find that the carrier undertakes to carry the goods from where the goods are delivered to the carrier for shipment, to the place where the carrier is to deliver them to the person entitled to receive them. The contract will also provide that the ship is to follow a particular route. If no route is specified, as in *Davis* v. *Garrett,* then by implication the carrier must follow the most direct route, or, if there be one, the customary route for the voyage. In practice, as we have seen, the route is defined in such way as to give almost complete freedom to the carrier to pursue any course that he or the master sees fit. Unless otherwise specified the goods must be stowed below deck, but if the bill of lading is endorsed to that effect the goods may be carried on deck. In some trades on deck carriage is customary. If the nature of the goods so requires, the carrier must undertake to ensure that the goods are maintained within specific temperature limits. The shipper undertakes to pay the freight and to ensure that the goods are properly prepared for shipment by sea, including conformity with international regulations relating to the labelling of dangerous goods. All these are properly called primary obligations. Lord Diplock recognised that there may be exceptions to the principle of freedom of contract. Contracts of carriage of goods by sea are an example of where such exceptions exist.

The Sea Carriage of Goods Act 1940 provides in section 7(1) that "The Hague Rules as set out in the schedule shall apply to any contract for the carriage of goods outward bound from New Zealand." These rules contain the basic stipulations to be found in a contract for carriage by sea. Article III(8) states that any provision in a contract of carriage (that is subject to the Act) which has the effect of relieving the carrier of liability other than as provided in the Rules, shall be void. Under Article III(1) the carrier is required to exercise due diligence to ensure that the ship is seaworthy, has been properly manned and equipped and that the holds etc. are properly prepared for the reception of the cargo. Under Article III(2) "The carrier shall properly and carefully load, handle, stow, carry, keep and care for and discharge the goods carried."

The extent of the carrier's obligation is defined in Article IV(1)-(4) in that the carrier is not responsible for loss arising through a variety of causes. Such causes are referred to as excepted perils but this description obscures the fact that

41 Supra n.5, 848.

such clauses define the obligation of one of the parties. Is there any restriction at Common Law on the extent to which the carrier may reduce his obligations under contracts of carriage? At Common Law, the principle of freedom of contract means that the parties to a contract are at liberty to specify their primary contractual obligations as they see fit. It was the English Court of Appeal's attempt to restrict this freedom by the doctrine of fundamental breach, of which House of Lords so strongly disapproved in *Suisse Atlantique* and in *Photo Production.* It is clear that underlying or fundamental primary obligations may be negated by the parties if they so chose, by the use of appropriate language. Of course if the agreement is so constructed that one of the parties does not provide consideration for the duties imposed upon the other party then the agreement may not be enforced as a simple contract. There is a line of authority where the courts endeavoured to avoid this result by means of a rule of construction called the "main purpose rule". A statement of the rule is to be found in the judgment of Lord Halsbury in *Glynn* v. *Margetson & Co.*:[42]

> Looking at the whole of the instrument, and seeing what one must regard, . . . as its main purpose, one must reject words, indeed whole provisions, if they are inconsistent with what one assumes to be the main purpose of the contract.

These words were quoted, apparently with approval, by Lords Upjohn and Wilberforce in *Suisse Atlantique.*[43] Thus if a clause in a contract renders the contract meaningless then the clause may be disregarded. However it is clear from the "honour clause" cases that the courts will recognise and give effect to the intention of the parties that the obligations set out in the agreement will not be enforceable in the courts.[44] Such cases must be taken to exemplify the "use of very clear words" referred to by Atkin L.J. However we are dealing with commercial contracts drawn up by business people. In the absence of such clear expressions to the contrary, it is presumed that the contract of carriage does impose some obligation upon the carrier which is enforceable in the courts. Support for this may be found in the recent case of *Tor Line A.B.* v. *Alltrans Group of Canada Ltd.*[45] In this case under a Baltime Charter the owners were only liable in the case of delay or loss occasioned by the owner's default or by that of their manager, but not otherwise. It was held that this clause did not protect the owner where the vessel did not comply with the description in respect of the height of the main deck. Lord Roskill referred to *Suisse Atlantique* and to *Photo Production* and said:[46]

> In truth if clause 13 were to be construed so as to allow a breach of the warranties as to description in clause 26 to be committed or a failure to deliver the vessel at all to take place without financial redress to the charterers, the charter virtually ceases to be a contract for the letting of the vessel . . . and becomes no more than a statement of intent by the owners in return for which the charterers are obliged to pay large sums by way of hire, though if the owners fail to carry out their promises as to description

42 Supra n.13, 357.
43 Supra n.4, 428 and 430.
44 *Rose & Frank Co.* v. *J. R. Crompton & Bros. Ltd.* [1925] A.C. 445, applied in *Jones* v. *Vernon's Pools Ltd.* [1938] 1 All E.R. 626.
45 [1984] 1 W.L.R. 48.
46 Ibid., 58.

> or delivery, are entitled to nothing in lieu. I find it difficult to believe that this can accord with the true common intention of the parties and I do not think that this conclusion can accord with the true construction of the charter in which the parties in the present case are supposed to have expressed that true common intention in writing.

However it must be remembered that this must be regarded as no more than a rule of construction and is not a rule of law. In *Photo Production* itself Lord Diplock refers to this problem.[47]

According to Lord Diplock's analysis, in the event that a party is in breach of one or more of his primary obligations then this will be a breach of contract. Except where the court may compel performance by awarding a decree of specific performance or an injunction, this will give rise to "substituted secondary obligations". As with the primary obligations the sources of these secondary obligations are the contract itself, the general law and statute. In the case of a breach of the primary obligation there will exist a right to compensation in law, referred to as the "general secondary obligation". Such a failure to perform a primary obligation by one of the parties, although giving rise to this general secondary obligation, does not, according to Lord Diplock, affect the rights and duties of the parties in respect of the unperformed obligations of that party. There are two exceptions to this rule: (a) Where the failure to perform the primary obligation either deprives the party not at fault of all or substantially all of the benefit of the contract;[48] and (b) where the parties either expressly or by implication have agreed that any breach of the obligation in question, no matter how slight, will entitle the other party to "rescind", or in the New Zealand situation, to cancel the contract.[49] If the innocent party elects to cancel the contract then there will arise for the party in breach an additional secondary obligation to provide compensation, not only for the obligations the non performance of which were the breach giving rise to the right to cancel, but also for the obligations performance of which had not fallen due but which had been brought to an end by the cancellation of the contract. This additional secondary obligation is referred to by Lord Diplock as the "anticipatory secondary obligation". The contract may prescribe these secondary obligations in the same way that it may define the primary obligations. The only restriction on the freedom of the parties in this matter is that the agreement must retain its nature as a contract and that any such secondary obligations to pay monetary compensation must not infringe the equitable rule against the imposition of penalties.

How then, do the cases on deviation fit with Lord Diplock's analysis? Lord Diplock refers to deviation cases in his analysis in *Photo Production*. He states that an agreement not to deviate is a term, any breach of which by the implication of the Common Law the parties have agreed, shall give the cargo owner the right to cancel the contract.

47 Supra n.5, 849.
48 Section 7(4)(b), Contractual Remedies Act 1979; *Hong Kong Fir Shipping Co.* v. *Kawasaki Kisen Kaisha Ltd.* [1962] 2 Q.B. 26.
49 Section 7(4)(a), Contractual Remedies Act 1979.

In the event that the cargo owner elects to cancel the contract it is necessary to examine the effect of such a decision in the light of the authorities and Lord Diplock's analysis. The first point to note is that cancellation of the contract changes the primary obligations of the carrier. Those provisions of the contract which limit the obligation of the carrier as under Article IV(1)-(4) go and the carrier is liable for any loss to the cargo save that caused by acts of God or of the Queen's enemies. As we have seen, if the loss occurs as a result of or during the course of the deviation the carrier will be liable even for losses caused by these events. To this extent it may be argued that the law on deviation is not in accord with the general law of contract. However, because *Hain S.S. Co. Ltd.* v. *Tate & Lyle Ltd.*,[50] is, as we have seen, high authority for the proposition that contracts for carriage by sea are subject to the general law of contract, it is necessary to read the provisions of Article IV referred to above as being subject to the implied stipulation that the vessel be following the contract voyage.

As in the case of primary obligations, parties to a contract are free to modify the secondary obligations as they see fit. In the case of contracts of carriage by sea this freedom is limited by the Hague Rules as incorporated into the contract by the Sea Carriage of Goods Act 1940. Where the secondary obligations are modified by the contract, whether by the parties or by statute, the effect of cancellation for breach of a primary obligation has to be considered. In contracts of carriage of goods by sea there are, under the Hague Rules, provisions as to the secondary obligations imposed on the carried in the event of a breach by the carrier. The way in which these provisions have been treated by the courts where deviation has occurred is not easy to reconcile with Lord Diplock's analysis.

Article IV (5) says that *in any event* (Author's italics) the carrier's liability shall not exceed $200 per package unless the shipper has declared the value prior to shipment. This is known as the 'package limitation' and lies at the centre of many disputes. In *Ailsa Craig Fishing Co. Ltd.* v. *Malvern Fishing Co. Ltd.*,[51] the House of Lords had to interpret a similar clause inserted by the parties in a contract for security services, viz:

> . . . liability shall be limited to the payment by the Company by way of damage of a sum . . . not exceeding 1,000*l* in respect of any one claim arising from any duty assumed by the company . . . and further provided that the total liability of the Company shall not in any circumstances exceed 10,000*l* in respect of all or any incidents arising during any consecutive period of twelve months . . .

This clause was held to be effective in limiting the Company's liability to 1,000*l* where as a result of the Company's negligence a fishing boat worth something over 55,000*l* sank. Although not referred to by their lordships this decision was in line with the analysis of contractual obligations by Lord Diplock. Thus the wording of the package limitation would appear to be conclusive and even where a deviation has occurred, the carrier's liability would be limited to $200. This however is not in line with the earlier authorities which have not been overruled. It must be remembered that contracts for the carriage of goods by sea are inter-

50 Supra n.18.
51 [1983] 1 W.L.R. 964.

national in effect and consideration must therefore be given to the interpretation of the Hague Rules in other jurisdictions.

Some writers declare roundly that in the event of a deviation a carrier may not rely on the package limitation, and quote high authority for this contention.[52] This view is certainly in line with the law as stated in *Hain S.S. Co. Ltd.* v. *Tate & Lyle Ltd.*[53] While there is no recent authority for this, i.e. post *Photo Production,* there is undoubtedly an extensive line of past authorities from both common and civil law jurisdictions which support this view.[54] It is submitted in this paper that these cases from whatever jurisdiction cannot be reconciled with the recent decisions of the House of Lords on the basis of Lord Diplock's analysis, except by use of an implied term to the effect that in the event of a deviation the package limitation will not apply. Alternatively as a matter of construction, the words "in any event" must be taken not to apply to a deviation by the carrier. Neither of these is a particularly satisfactory solution, though on balance the former is to be preferred since "very strained constructions" should be avoided where possible.

Article III(6) requires the loss or damage to be reported within three days of delivery of the goods unless there has been a joint survey and again *in any event* the carrier shall not be liable unless action is commenced within one year of delivery or of when the goods should have been delivered. There is no doubt that if such a procedural provision covers the breach in question, even a breach that has justified the cargo owner in rescinding the contract, then such a provision is binding even though the rest of the contract has been rescinded. In *Heyman* v. *Darwins Ltd.*,[55] the House of Lords held that an arbitration clause applied even where the contract had been rescinded for wrongful repudiation by the defendants. This was applied to a 'time bar clause' in *Port Jackson Stevedoring Pty. Ltd.* v. *Salmond & Spraggon (Australia) Ltd.*,[56] by the Privy Council. In terms of Lord Diplock's analysis, such a term in the contract in fact imposes a primary obligation upon the parties.[57] This primary obligation, as with a term providing for submission of disputes on the contract to arbitration, may be seen as being in the nature of a collateral contract, which is not affected by the cancellation of the main contract.

Domestic marine carriage is governed by a different regime. Since 1979 such carriage has been governed by the Carriage of Goods Act 1979. This legislation does not incorporate exceptions and limitations into the contract as is the case with international carriage but lays down the obligations of the carrier and the consignor/consignee as a matter of general law.[58] The Act has abolished the common carrier at least for domestic carriage. The New Zealand law of contract has been modified in recent years by the Contractual Remedies Act 1979. It would seem that these provisions have not materially changed the law on the effect of deviation upon contract of carriage by sea.[59]

52 W. Tetley *Marine Cargo Claims* (2 ed. Butterworth, Toronto, 1978) p. 26, citing, e.g. *Stag Line Ltd.* v. *Foscolo, Mango & Co.* [1932] A.C. 328.
53 Supra n.18. 54 Tetley, op. cit.
55 Supra n.20. 56 [1981] 1 W.L.R. 138.
57 *Moschi* v. *Lep Air Services Ltd.* supra n.38, 350. 58 Sections 9-15.
59 F. Dawson and D. W. McLauchlan *The Contractual Remedies Act 1979* (Sweet & Maxwell, Auckland, 1981).