My Shipbuilding Contract has been cancelled – what next?

By: Nick Vineall QC

4 Pump Court, London, England

1. There are lots of disputes about the termination of shipbuilding contracts (SBCs). The typical case is one in which the purchaser has become markedly less enthusiastic about paying the final instalment and accepting delivery since finding out that the ship he is about to buy is worth less than he has agreed to pay for it. Much attention is focused on the circumstances and grounds on which the SBC can be cancelled by the unenthusiastic buyer. But what about the *consequences* of a termination? What happens after the Tribunal has determined whether the cancellation was lawful or not? Often the contract gives a straightforward answer, but sometimes, where the contract fails to make express provision, English law provides some rather counterintuitive answers to the problems that can arise.

2. This paper looks at some common scenarios and highlights some potentially tricky points.

Preliminaries

3. We will assume for the purposes of simplicity that all SBC's are of the same *general* form (almost all are), and we will also use some easy-to-calculate figures for our examples:

    3.1. The buyer pays the yard by "instalments". There are going to be 5 x $10m instalments payable on contract signing, on steel cutting, on keel laying, on launching, and on delivery.

    3.2. The instalments are expressed to be advances against the total contract price.

3.3. The contract has a date for delivery, and a later "drop dead" date, after which the buyer is entitled to cancel if the yard has not by then tendered a contractually compliant vessel.

3.4. The yard provides repayment guarantees each time the buyer pays an instalment.

3.5. Title passes to the buyer on delivery.

4. We will also assume that the buyer would have spent $2m on buyer supervision costs by the time of delivery. So the buyer's total outgoings would have been $52m. We will have to consider the position if at the time of delivery the vessel would have been worth more than that, or less than that.

Types of termination

5. There are at least eight conceptually distinct circumstances in which a termination may take place.

Buyer terminates first

(1) The buyer might terminate solely in reliance on a contractual provision which (he says) entitles him to do so. The classic example is failure by the yard to tender a compliant vessel by the drop dead date. We will call a termination on an express contractual ground a "contractual termination".

(2) The buyer might terminate solely in reliance on what he contends is a repudiatory breach of contract – a so called common law termination.

(3) The buyer might terminate in reliance on both a common law right and an express contractual right.

(4) Finally the buyer may purport to terminate on one or more of the above grounds, but the yard says that the termination is unlawful, and says that that purported

termination is itself a repudiatory breach of contract which the yard accepts, bringing the contract to an end.

And then symmetrically for yard-prompted terminations:

Yard terminates first

(5) The yard might terminate solely in reliance on a contractual position which (it contends) permits the yard to cancel. An example might be that the buyer fails to pay an instalment within a time limit stipulated by the contract.

(6) The yard might terminate solely in reliance on what it contends is its common law right to end the contract. Examples of this are likely to be quite rare in practice but might arise if a buyer made plain by its conduct that it was not going to take delivery of the vessel when (in the future) she was completed, even though the buyer was not at that moment in breach of any obligation that had so far become due to be performed.

(7) The yard might terminate in reliance on both a contractual right and a common law right to terminate.

(8) And finally the yard may purport to terminate, but the buyer might then say that the purported termination was wrongful, and itself constitutes a repudiatory breach by the yard which the buyer then accepts as discharging the contract.

6. It is of course theoretically possible that one party will purport to terminate and the other will continue to insist on performance, but in practice it is usually the case that the parties are agreed that the contract is at an end and the question is whether the party who first purported to terminate did so validly, or whether their termination was itself repudiatory and it is the other party that as validly terminated the contract.

7. Before considering some issues that arise in relation to remedies following termination, it is worth pausing to mention some issues that may arise from the interaction between common law and contractual terminations.

8. English law has struggled slightly with the vexed questions which can arise where the terms of a termination notice are ambiguous as to whether common law or contractual rights (or both) are being exercised, and in particular where there are different and mutually inconsistent consequences of the different types of termination. The present position is helpfully summarised by Leggatt J in Newland Shipping v Toba Trading 2014 EWHC 661 (Comm Ct) in these terms:

> 52 The decision of the Court of Appeal in the *Gearbulk* case further confirms that there is in general no inconsistency between terminating a contract pursuant to a contractual right and doing so under the general law where there has been a repudiatory breach. … Amongst other developments, it is now clear law that acceptance of a repudiatory breach does not extinguish all the obligations created by a contract but only those primary obligations which define the performance characteristic of the contract (e.g. the sale and purchase of goods). Other secondary and ancillary rights and obligations which regulate the termination of the contract and its consequences or are otherwise as a matter of construction intended to survive termination are not affected. There is therefore generally no inconsistency between exercising a contractual right of cancellation and enforcing its contractual consequences on the one hand and, on the other hand, terminating the contract for a repudiatory breach. It follows that, where both rights are available, a party can generally elect to exercise both rights at the same time.
>
> 53 There can, however, be cases, of which the *Dalkia* case is an example, where exercising one of these rights is inconsistent with exercising the other because the consequences of their exercise conflict. In such a case a party who has a contractual right to cancel the contract and a right to terminate the contract under the general law cannot exercise both rights and will necessarily have to elect between them. In accordance with general principle, to make a valid election, a party in this position must clearly communicate its choice to exercise one of the rights rather that the other.
>
> 54 Cases where both rights can be exercised simultaneously themselves seem to me to be of two kinds. In cases where the consequences of contractual termination and termination under the general law are identical, it is not necessary to specify which right is being exercised in order to bring about an effective termination. In such cases there is no difference in substance between the two rights which are, as Moore-Bick LJ put it in the *Gearbulk* case at [20], "in effect one and the same". However, in cases where the consequences of exercising the two rights are different, but not inconsistent, it is necessary to make it clear which right is being exercised or that both rights are being exercised; otherwise there will not be the certainty required for an effective termination.

9. This gives rise to our first lesson:

> **Lesson 1: A party giving a termination notice ought to identify clearly whether they are exercising contractual right(s), or a common law right to terminate, or**

both. If a party is trying to exercise both rights it is important to consider whether it is in fact possible to exercise both rights at once.

10. For what follows we shall assume that the Tribunal or court has decided whether the party who first purported to terminate did so lawfully or not, and consider some of the issues that might arise thereafter in terms of deciding who has to pay what to whom.

Common law remedies when a repudiatory breach is accepted

11. A common law termination is a termination in which the innocent party elects to treat the contract as at an end following a repudiatory breach by the other party. The effect of such a termination is to bring to an end all future obligations of either party under the contract. In other words,

> "there is substituted by implication of law for the primary obligations of the party in default which remain unperformed a secondary obligation to pay money compensation to the other party for the loss sustained by him in consequence of their nonperformance in the future and (b) the unperformed primary obligations of that other party are discharged."[1]

12. But parties remain entitled to claim damages arising from any historic breaches of contract.

13. We should therefore consider common law and contractual remedies on a valid termination first by the buyer, and then by the yard.

Buyer's common law remedies on a valid buyer termination

14. Suppose that the buyer has paid the first four instalments ($40m) and then terminates validly at common law. The buyer is entitled to damages. He has paid $40m, and so far he has (say) spent $1.5m on buyer supervisory services, so he has spent $41.5m and he

[1] Photo Production Ltd v Securicor [1980] AC 827 @ 849 per Lord Diplock

has nothing much to show for it – there is a part-built ship, but it belongs to the yard, not to the buyer.

15. What then are the buyer's common law claims?

16. On the basis of the fundamental principles of compensatory damages for breach of contract, the buyer is entitled to a sum of money to put him in the position he would have been in had the contract been performed.

17. Let us suppose the market is strong and on delivery the vessel would have been worth $55m (ie rather more than the total price payable to the yard of $50m). I suggest that the buyer's damages are $44.5m, calculated like this[2]:

- Position had the contract been performed:
  - Outgoings $50m + $2m = $ 52m
  - Received in return vessel worth $ 55m
  - So would have been better off by $ 3m
- Actual position as is
  - buyer has parted with $41.5m being
    4 x $10m instalments plus
    $1.5m of supervisions costs ($ 41.5m)
- Sum of money required to compensate = **$44.5m[3]**

18. So that $44.5m represents $40m of wasted instalments, $1.5m of wasted supervision costs, and $3m representing the profit that would have been made.

19. Let us suppose instead that the market is bad and the vessel would have been worth only $45m on delivery. This time the buyer's damages are only $34.5m.

[2] I am assuming that the Vessel is a generic vessel and there is an available market for vessels of a similar type. If the vessel is bespoke and highly specialised the buyer might be able to argue for specific trading losses arising from its inability to trade the vessel it contracted to receive until such time as it could procure a replacement from elsewhere, or have such a replacement built at another yard.

[3] If the buyer had received designs, which the buyer was free to use, he probably ought also to bring into account the value to him of the designs the yard has provided to him.

- Position had the contract been performed:
    - Outgoings $50m + $2m = $ 52m
    - Received in return vessel worth $ 45m
    - So would have been worse off by ($ 7m)
- Actual position as is
    - buyer has parted with $41.5m being 4 x $10m instalments plus $1.5m of supervisions costs ($ 41.5m)
- Sum of money required to compensate = **$34.5m**

20. This time the *damages* are $10m less than before – and that is because the vessel that ought to have been delivered was worth $10m less than in the first scenario.

21. Note that the sum awarded by way of damages is less than the buyer has so far paid – so he doesn't even get all his instalments back. That result strikes some people as strange. One might think that the law of restitution could be resorted to in order to enable the innocent buyer to recover all of what he has paid, on the basis of what used to be called a total failure of consideration or what is now called "failure of basis". But there is high authority to suggest that a restitutionary remedy is not available in these circumstances. We consider this next.

A restitutionary claim by a buyer who validly terminates, in order to get his money back?

22. Although we are here considering a restitutionary claim by an innocent buyer, the problems with such a claim arise from what was said in Hyundai v Papadopoulos [1980] 1 WLR 1129 (HL) and Stocznia v Latvia [1998] 1 WLR 574 about the availability of a restitutionary claim by a party who *was* in breach of contract.

23. Hyundai was a termination by the yard, on the basis of failure by the defaulting buyer to pay the second instalment. The yard relied on an express contractual right to terminate in those circumstances. The buyer had procured guarantees of its obligations to pay

instalments, and the yard claimed the amount of the second instalment from the guarantors.

24. The guarantors accepted that, until the termination of the contract, both they and the buyers had been liable to pay the second instalment. But, argued the guarantors, at the moment when the yard exercised its right to cancel the contract, that liability ended and the yard was left only with a claim *for damages*; and indeed said the guarantor, the buyer would on the authority of Dies v. British and International Mining and Finance Corporation Ltd. [1939] 1 K.B. 724 be entitled to return of the second instalment had it in fact been paid – so that showed that it could not still have ben payable.

25. There are, I suggest, two good answers which might have been given to the buyer's arguments. The first is the straightforward one that acceptance of a repudiatory breach does not release the guilty party of obligations accrued at the time of termination. That was one of the answers that the HL gave: see eg Lord Edmund Davies at 1141C-D.

26. The second good response would have been to say that the Dies point did not assist the buyer because (a) in Dies the buyer's right to restitution of the monies paid was admittedly subject to the seller's cross claim for damages and (b) Dies was about rights which the buyer had to *get back* money which *had* been paid prior to termination, not about whether termination itself provides a *defence* to a claim in respect of a payment due before termination.

27. In other words the real flaw in the buyer's argument based on Dies was that all that that argument would show is that *if* the buyer had paid the second instalment, it might have a claim to get *some* of it back. Dies would never have provided a defence to the contention that the second instalment was due before termination and remained due after termination, albeit perhaps subject to some sort of cross claim in restitution.

28. But the majority of the HL went further than they needed to and held that Dies did not apply at all. They said that Dies only applies to a pure sale of goods or sale of land case, and not to a case where some consideration had been provided as the contract

proceeded. They noted that in a construction contract, where a builder works on the employers land, there is no question of the defaulting buyer being entitled to get their early instalments back after a termination by the builder. That of course is right, but the point is that the employer has had work done on his land – and the builder can hardly take that work away and sell it to someone else.

29. The majority of the House of Lords said that the shipbuilding contract in question was very like a building contract. Lord Fraser said this (1148H):

> Much of the plausibility of the argument on behalf of the guarantors seemed to me to be derived from the assumption that the *contract* price was simply a *purchase* price. That is not so, and once that misconception has been removed I think it is clear that the shipbuilding contract has little similarity with a contract of sale and much more similarity, so far as the present issues are concerned, with contracts in which the party entitled to be paid had either performed work or provided services for which payment is due by the date of cancellation. In contracts of the latter class, which of course includes building and construction contracts, accrued rights to payment are not (in the absence of express provisions) destroyed by cancellation of the contract.

30. But is an SBC really like a building contract? In some ways it is. But in terms of how and when benefit passes to the employer/buyer the position could hardly be more different. True it is that the shipyard does design work as it goes along, and builds a ship bit by bit much as builder builds a building. But there is an absolutely fundamental distinction which is that the shipyard owns the ship until delivery, whereas the builder does not own the building it is building on the owner's land. In a building contract the owner has the (ever larger) building throughout the time when it is being built, and all that the builder has is the money it is paid. In a shipbuilding contract the yard has both the instalments and the ship right up until delivery. The distinction is underlined by the fact in an SBC the instalment payments are merely advances against the ultimate contract price. They are not, in a legal sense, payments for the work done to be in the next stage.

31. Lord Keith and Lord Russell dissented on the question of whether the majority were right to say that the termination had no effect on the yard's right to claim the second instalment from the buyer.

32. The House of Lords considered the point again in Stocznia v Latvian Shipping [1998] 1 WLR 574. Again this dealt with the question of whether a defaulting buyer had a restitutionary claim. Insofar as relevant for present purposes, the facts were that the buyer had failed to pay the second instalment and the yard exercised a contractual right under clause 5.05 to "rescind". The HL held that clause 5.05 did not oust the common law right to claim the second instalment as a debt, despite the termination. But the buyers argued that, if that debt was due, and the money were to be paid over to the yard, the buyers would be entitled immediately to recover the same sum on the basis that it would have been paid for a consideration which had wholly failed – the Papadopoulos point again.

33. Lord Goff who gave the leading speech said that he was "content to approach this aspect of the case on the premise, common to both parties, that the issue is one of total failure of consideration …"

34. Lord Goff applied Hyundai v Papadopoulos, analysed the SBC as going beyond a mere contract of sale, and said it was a contract in which "the design and construction of the vessel form part of the consideration for which the price is to be paid." He said that

> "the test is not whether the promisee has received a specific benefit, but rather whether the promisor has performed any part of the contractual duties in respect of which payment is due."

35. So, the Court decided, if the buyer *had* paid the second instalment it could not claim it back on the basis of a total failure of consideration.

36. The position is therefore that the defaulting buyer cannot (as the law stands) claim a restitutionary right to return of the surplus of instalments paid over any yard damages claim.

37. Note that the result relies on three things:

(1) There is no extant express contractual obligation obliging the yard to return any surplus to the buyer after a valid termination by the yard

(2) As a matter of law a restitutionary claim can only lie where there has been a total failure of consideration or failure of basis

(3) That in a SBC there is *not* a total failure of consideration if the vessel is part designed and built by the yard.

38. But for the moment we need to go back and consider the position of the innocent buyer who has validly exercised a right to cancel. In a poor market he may not be able to recover his outlay, and the question is whether he can use the law of restitution to reclaim the instalments he has paid.

39. The answer must be that in the absence of any express contractual right, he cannot do so, if the Hyundai and Stocznia reasoning is correct. The reasoning that precludes a defaulting buyer from a restitutionary claim applies equally to an innocent buyer. There is no total failure of consideration and therefore there can be no restitutionary claim.

Lesson 2

A buyer should always ensure there is an express contractual term entitling him to return of instalments if he validly terminates the SBC. Otherwise he will find he is out of pocket if he terminates in a poor market.

Typical contractual remedies on a valid buyer termination

40. We have seen the difficulty that can arise for a buyer who validly terminates in a poor market – he may not be able to recover all of his outlay as common law damages. But almost every SBC solves this problem by providing that on a valid cancellation the yard must repay any instalments already paid. So for innocent buyers it is almost always easy to overcome the problem that Hyundai and Stocznia v Latvia have created for a restitutionary claims.

41. Indeed, SBCs almost invariably require the yard to obtain third party guarantees of those obligations, so that the buyer is not faced with the prospect of trying to enforce against an overseas yard that may have little in the way of resources.

Interplay of contractual and common law remedies on a buyer termination

42. The first interesting question is "What if the contractual remedy of return of instalments is expressed to be the only, or the exclusive remedy available to the buyer upon a yard default?" For instance, suppose that SBC clause 18 sets out a right to return of instalments, and clause 19 says this:

"The termination rights and the consequences of termination set out in clause 18 shall be the sole and exclusive remedies of the buyer in connection with circumstances giving rise to the right to terminate."

43. English law says that it *is* possible to contract out of common law rights to terminate, but pretty clear words are needed to do so, because there is a presumption that neither party intends to abandon valuable remedies arising as a matter of law[4]. As More-Bick LJ said in Stocznia v Gearbulk [2010] QB 27 @ #23:

"The court is unlikely to be satisfied that a party to a contract has abandoned valuable rights arising by operation of law unless the terms of the contract make it sufficiently

[4] Modern Engineering Bristol Ltd v Gilbert-Ash [1974 AC 689, 717

clear that that was intended. The more valuable the right, the clearer the language will need to be."

44. It is submitted that a clause like the one above is so clear that it would be sufficient to oust any common law claim for damages. Indeed it might well be that such a clause not only bars the common law consequences but prevents a common law termination at all, because the parties have contracted out of that right and replaced it with the contractual right to terminate.

45. English law proceeds on the charming conceit that (say) a Chinese shipyard and a Polish buyer will well understand the English law concepts of termination for repudiatory breach. I am not entirely persuaded by that. But that is the approach taken and so:

Lesson 3: if the parties wants to exclude common law remedies – so that only the express contractual remedies are available – very clear words must be used to achieve that.

46. The second question on the interplay of common law and contractual rights is one that arises surprisingly often in practice. A buyer validly terminates in a poor market[5]. The buyer will rely on its express contractual right to return of instalments, and then often tries to add to that a common law claim for damages for expenditure wasted on site supervision.

47. I suggest that such claims are likely often to be invalid. If the market value falls short of the total instalments by more than the wasted costs of supervision, the stand alone common law claim for damages will be less than the total amount of the instalments (see paragraph 19 above). So the contractual claim for return of instalments overtops the total common law claim for damages. It is difficult to see how the separate express

[5] Of course buyers almost never terminate in a rising market even if entitled to do so since it is in their interests to wait for a vessel which, when it is delivered (albeit late) - is going to be worth more than they paid for it.

contractual right to the total amount of the wasted instalments should bring with it a further stand-alone claim for wasted expenditure on top of the contractual.

Lesson 4: If a buyer wants to be able to recover wasted supervision costs if he cancels in a falling market, express provision should be made to give him that right

Valid terminations by the yard

48. As noted above a common law termination might be instigated by the yard, but yard terminations in practice arise more often when the buyer *purports* to terminate when it is not (as it turns out) entitled to, and the yard treats that wrongful termination as a fundamental breach which it elects to accept. But the consequences of a common law termination will be the same whatever the precise circumstances giving rise to the termination.

49. We will again take as our example a scenario in which the buyer has paid $40m of the total price of $50m, and we will assume that the yard has already spent $40m and would have spent another $5m to get the Vessel to completion.

50. The starting point is again the common law measure of damage – a sum of money to put the yard in the position it would have been in had the contract been performed; but there is a complication that the yard is under an obligation to mitigate its losses (in fact strictly speaking it is under an obligation not unreasonably to fail to mitigate its losses).

51. Let us suppose that the market is strong, so that the vessel in its finished state would be worth $55m, and let us suppose it is in fact worth $50m (ie $55m less the cost of the work to complete it).

- Position had the contract been performed:
    - yard's outgoings $45m $ 45m
    - Received from buyer $ 50m

- So yard profit would have been **$ 5m**

- Actual position as is
  - yard has vessel worth $50m
  - yard has spent $45m
  - yard has received instalments of $40m

    So overall the yard is up by **$ 45m**

52. We can also run the figures in a poor market – assuming an open market value of a complete vessel is only $45m and we have $5m worth of work still to be done, giving an actual value of $40m. We then have

- Position had the contract been performed:
  - yard's outgoings $45m $ 45m
  - Received from buyer $ 50m
  - So yard profit would have been **$ 5m**
- Actual position as is
  - yard has vessel worth $40m
  - yard has spent $45m
  - yard has received instalments of $40m

    So overall the yard is up by **$ 35m**

53. Obviously in neither of these circumstances does the yard have a claim for damages. The yard is laughing – it has got the buyer's instalment monies, and it has got the vessel.

54. So, can it really be the common law position that the yard (although it obviously has no claim for damages) can keep the vessel *and* keep the buyer's instalments? Can it really be that the yard is better off by $40m (or $30m in the poor market) as against the position it would have been in had the contract been performed?

55. Again, one might think that the obvious answer was the common law cannot be so silly, and there must be some obligation on the yard to repay money so as to leave it covering

its cost and having its expected $5m profit, but repaying any balance (ie any overall surplus) to the buyer.

56. This brings us back to the issue of restitutionary claims, although this time we are considering restitutionary claims by a party in default.

57. The argument for the buyer to get at least most of his money back gets off to a relatively promising would start because of Dies v British and International Mining and Finance Corp Limited [1939] 1 KB 724. There was a contract for the sale of rifles and ammunition for £270,000. The purchaser, Dies, paid £100,000 in advance. Dies then refused to take delivery or make further payment and the seller accepted the buyer's repudiatory breach, terminating the contract. Dies sued for the return of his £100,000, accepting that the Seller could set off against it and damages for breach of contract that the seller could make out. Stable J held that the buyer could recover, although he said that the basis of the right was *not* a total failure of consideration but "is derived from the terms of the contract and the principled of law applicable."

58. The Dies case has recently been treated by Leggatt J as good authority for the proposition that a party who is in repudiatory breach of contract is not thereby deprived of a right to claim in unjust enrichment: Newland Shipping v Toba Trading 2014 EWHC 661 (Comm).

59. But as we have already seen, there is a serious problem. At the moment English law – in the form of Hyundai and Stocznia v Latvian requires there to be a total failure of basis if there is to be a claim for restitution, *and* holds that in a typical SBC there is no total failure of consideration or total failure of basis.

60. This lead to an important lesson.

Lesson 5: A buyer should insist on an express provision which operates when the buyer is in breach and the yard has validly terminated, and which obliges the yard to pay

back any surplus remaining in its hands after the yard's common law damages claims have been satisfied.

61. This is a lesson which has not been widely understood. So for instance

- Article 10 of the AWES form ("Default by Purchaser") contains no such provision
- Article XXII of the CMAC form ("buyer's default") is slightly more favourable to the buyer. If and when the vessel (whether complete or incomplete) is sold, then if there is any surplus left from the proceeds of that sale at the end of the day, *that* surplus is to be repaid to the buyer. But article XXII would not assist a buyer in a case where the vessel was never sold, and there are some points of uncertainty about how exactly this provision might operate

Is there any alternative argument open to the buyer to escape the Hyundai/Stocznia result?

62. The apparent results caused by the unavailability of a restitutionary remedy, where there is no suitable contractual provision to return a surplus to the buyer, can be truly ludicrous from a commercial point of view.

63. Suppose that the instalments for our $50m vessel are front loaded so that 10% is payable on contract and 60% at steel cutting, with another 5% on keel laying etc. The buyer pays the first two instalments and defaults on the third and the yard cancels. The yard has received $35m of the contract price but has only got as far as keel laying. The yard can keep the entirety of the $35m even though it may have spent perhaps only $10m on the work done prior to cancellation. One can see that the yard is entitled to its wasted expenditure (let us say $10m, and also to the profit it would have made on the contract had it been performed (let us say $5m) – but why should it be entitled to keep the additional $20m surplus?

64. Is it possible that there is some different route available to the defaulting buyer in order to avoid this result?

65. A just result could be achieved, I suggest, by one of three possible routes:

65.1. The first is to treat the buyer as having received nothing of value, so that there has in fact been a total failure of consideration or basis. But short of the House of Lords reconsidering and overruling the approach taken in Stocznia and Hyundai, it is only the boldest of judges or tribunals who would be prepared to try to distinguish those cases on their facts and say there was absolutely no consideration at all. But the point is surely well arguable in the Supreme Court: the critical question ought to be not whether some benefit has been received by the buyer but whether the benefit received is part of the bargained-for benefit. It is surely questionable to say that the buyer had any real interest – had ever really bargained for – anything less than delivery of the completed ship. The yard's obligation to build it (and perhaps design it) was, in truth, collateral to the only obligation of any interest to the buyer, which is to take delivery of the completed vessel

65.2. The second option is to argue that the law is too strict in requiring there to be a total failure of basis before a restitutionary remedy is available. In the case of an *innocent* party who is seeking restitution (ie where it is the payee who is in breach of contract) the unjust enrichment claim is an alternative to an action for damages for breach, and there is no great injustice in confining the claimant to his remedy in damages[6]. But as we have seen the problem arises in an acute form where the payer is the party in breach. He obviously has no claim in damages and so his only available remedy is restitutionary. It surely makes little sense in this scenario that receiving a very very modest benefit should prevent the payer from receiving back any part of the money he has paid. But

65.3. Is there a third option? I cannot see any other basis in the existing jurisprudence for a claim in unjust enrichment, but it would perhaps be possible for the courts

[6] And in addition it may be open to the innocent party to claim recovery of the money paid as damages for wasted expenditure: see the discussion in Chitty at 29-063

> to fashion a new remedy by holding that the true basis of Dies is that where a party has through his own breach caused a contract to be terminated, there is a term to be implied as a matter of law that once the innocent party is "made whole" – ie placed in the position they would have been in had the contract been performed – any balance remaining in the innocent party's hands is to be repaid to the contract breaker. There are undoubtedly serious objections to an implied term of this type (would the yard have an obligation to sell, and if so when?). Perhaps what is needed is a court prepared to use the law of restitution to fashion an obligation of this sort, in order to do justice even to a contract breaker. There is certainly scope for some imagination because it is generally accepted that the result in Dies is correct, even though the precise basis for the result is somewhat opaque.

66. The present state of the law on this particular point is clearly unsatisfactory.

Nick Vineall QC was called in 1988 and took silk in 1996. He practises as a barrister and arbitrator from 4 Pump Court, Temple, London. He has a broad based commercial and construction practice. Much of his work involves shipbuilding and offshore engineering disputes and he has been instructed as counsel or sat as an arbitrator in London, Singapore, Hong Kong, Vietnam and Rotterdam, under LMAA, ICC, LCIA, NAI and other rules.

He is a Bencher of Middle Temple and was appointed a Deputy High Court judge in 2017.