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Case No: CL-2016-000746

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, Fetter Lane, London EC4A 1NL

Date: 16 January 2018

Before :

MR JUSTICE ANDREW BAKER

- -

Between :

PHONES 4U LIMITED (in administration)	**Claimant**
- and -	
EE LIMITED	**Defendant**

- -
- -

David Allison QC and Georgina Peters (instructed by **Allen & Overy LLP**) for the **Claimant**
David Wolfson QC and James Nadin (instructed by **Addleshaw Goddard LLP**) for the **Defendant**

Hearing dates: 6, 7 December 2017

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker :

Introduction

1. The Claimant ('Phones 4U') was in recent times, until September 2014, a very well-known retail name, in towns and cities across the UK and online. Its core business was the selling of mobile phone contracts to users, whether original contracts creating new network connections or upgrade contracts for existing connections. Phones 4U traded both pay monthly and pay as you go services. Its primary revenue stream comprised commissions or revenue shares in respect of the customer connections it sold.

2. The Defendant ('EE') was and is one of the major mobile network operators in the UK, providing connections and network services both under its newer 'EE' brand and also under the longer-established 'Orange' and 'T-Mobile' brands. One of the main independent intermediaries through which EE's services were sold, until September 2014, was Phones 4U.

3. In September 2014, the primary trading relationship between Phones 4U and EE was governed by a written agreement relating to consumer pay monthly acquisition, retention and in-life management dated 8 October 2012 ('the Trading Agreement'). It contained the terms of business between Phones 4U and EE relating to pay monthly contracts. The vast majority of both Phones 4U's claim in these proceedings and EE's counterclaim the subject of this judgment arises, I was told, out of the Trading Agreement. The Trading Agreement was set to run until 30 September 2015.

4. The terms of business between the parties applicable in September 2014 for pay as you go connections were agreed in, or are evidenced by, an exchange of emails in October 2013 ('the PAYG Terms'). The PAYG Terms were set to run until 31 December 2014. They were additional terms agreed between the parties in relation to pay as you go services as contemplated by clause 4.3.4 of the Trading Agreement. The termination provisions of the Trading Agreement to which I refer below therefore applied also to the PAYG Terms.

5. In the rest of this judgment, where I intend to refer specifically to one or other of the Trading Agreement or the PAYG Terms, I have tried to use language making that clear. Where I refer to 'the contract' or its termination without any such specificity, I mean to refer to the Trading Agreement and PAYG Terms collectively (and in those instances, it will not matter to the analysis whether strictly they formed a single, aggregate contract, or were by nature two separate contracts.)

6. From 2012, Phones 4U's business model faced a series of mounting pressures: in 2012, Three ended its trading relationship with Phones 4U; from February 2013, Phones 4U was no longer authorised to sell new O_2 connections; O_2 then decided in January 2014 not to renew its contract with Phones 4U for any type of connections; in early August 2014, Vodafone issued a notice terminating its contract with Phones 4U with effect from early February 2015.

7. On Friday 12 September 2014, EE notified Phones 4U that it would not renew or replace the Trading Agreement when it expired on 30 September 2015. The Board of Directors of Phones 4U met that afternoon and resolved *inter alia* to seek the

appointment of administrators. Phones 4U's retail shops and outlets remained open and traded over the weekend of 13-14 September 2014, as did its website for online transactions. On the morning of Monday 15 September 2014, however, the retail shops and outlets did not open for business and online trading was suspended. That cessation of trading has turned out to be permanent. A major issue in the proceedings is whether it was permanent, or was likely (and if so how likely) to be or become permanent, as of 1 pm on 17 September 2014.

8. That date and time are critical because at 1.02 pm, EE sent the administrators an email indicating *inter alia* that EE was terminating the contract by a letter said to be attached. The relevant letter was not in fact attached as advertised and a further email was sent at 1.21 pm to cure that omission. The termination letter dated 17 September 2014 and thus sent by EE was in the following terms:

> "We refer to the Agreement [i.e. the Trading Agreement].
>
> In accordance with clause 14.1.2 of the Agreement, we hereby terminate the Agreement with immediate effect.
>
> As a result, we hereby terminate with immediately [*sic*.] effect your authority to sell and promote all EE products and services contemplated by the Agreement … .
>
> Nothing in this notice shall be construed as a waiver of any rights EE may have with respect to the Agreement … . Without limiting the generality of the previous sentence, nothing herein shall be deemed to constitute a waiver of any default or termination event, and EE hereby reserves all rights and remedies it may have under the Agreement … .
>
> This notice is governed by English law."

9. It is common ground that the appointment of administrators on 15 September 2014 was not a breach of contract on the part of Phones 4U but did entitle EE to terminate the contract under the provision of the Trading Agreement invoked by EE in that letter, clause 14.1.2.

10. It is also common ground that, subject to any entitlement to set off any cross-liability of Phones 4U to EE on its counterclaims, EE's liability to Phones 4U in respect of revenue generated from EE contracts sold by Phones 4U survives termination, such that sums have fallen due to date and will continue to fall due until a date in 2021. Arrangements are in place for the ongoing provision by EE of the information needed to enable Phones 4U to calculate its entitlements. The possibility of disagreement over the sums due cannot be ruled out. However, it seems on any view that very large sums are and will be due to Phones 4U, subject to the impact (if any) of EE's counterclaims. For its part, Phones 4U presently estimates that its aggregate *prima facie* entitlement is likely to reach c.£120 million.

11. This judgment deals with Phones 4U's application for a summary judgment under CPR Part 24 dismissing EE's primary counterclaim. That is a claim for damages for the loss of bargain resulting from the termination of the contract. EE asserts loss of over £200 million. Phones 4U is sceptical of EE's ability to prove anything like that large a loss, but accepts that *quantum* cannot be assessed without a trial. Avoiding

any need to engage in such a trial is one of the reasons favouring a summary dismissal of the loss of bargain counterclaim, if Phones 4U can show that it does not have realistic prospects of success as to liability.

12. EE has also pleaded a counterclaim based upon a statement on the Phones 4U website referring to both EE and Vodafone in explaining why Phones 4U were offline, promising an update as soon as possible and concluding with a sad face emoji, and a notice containing that statement said to have been posted in the windows of some of Phones 4U's retail shops. The claim alleges that this involved the making by Phones 4U of unauthorised, false or misleading representations relating to the Trading Agreement, in breach of clause 13.1.4 thereof. EE is yet to identify any consequent loss or damage. So there may be room to doubt whether the case will offer the court at trial an opportunity to consider the use of the sad face emoji as creating or involving a breach of contract. Be that as it may, there was no suggestion that this further counterclaim was a reason against granting summary judgment on the loss of bargain damages counterclaim if such a judgment were otherwise justified. In the rest of this judgment, references to EE's counterclaim are to the primary, loss of bargain counterclaim only, unless the contrary is stated.

13. References to capitalised terms below, if they are not terms I define in this judgment, are references to defined terms from the Trading Agreement.

The Issues

14. The foundation of the counterclaim is an alleged obligation on the part of Phones 4U, labelled by EE the 'Key Obligation', to undertake what I shall label 'Key Activities', *viz.* (a) to market and sell Products under the EE Marks, (b) to market and promote the Services, (c) to procure Customers for the Services and (d) to promote and resell Apple Products in conjunction with the Network Services in accordance with the Apple Terms. The Key Obligation is said to arise, on the true construction of the Trading Agreement, as an obligation under clause 4.1.1 thereof, by which EE appointed Phones 4U, and Phones 4U agreed to act, as a non-exclusive dealer authorised to carry out the Key Activities in accordance with the terms and subject to the conditions set out in the Trading Agreement.

15. The existence of the Key Obligation, or its precise scope if it existed, is open to debate. Indeed, Phones 4U's summary judgment application proposed that there was no real prospect of success for EE on its existence. However, that ground for summary judgment was not pressed, because of the extent to which EE has sought to rely on matters of background fact. Phones 4U will say the matters alleged are largely if not entirely inadmissible on the construction of clause 4.1.1 of the Trading Agreement, but it did not press the proposition that the relevant arguments could be disposed of by way of summary judgment.

16. As regards the PAYG Terms, it is common ground that one express provision was that the number of EE PAYG connections procured by Phones 4U would be at least 30% of the total number of PAYG connections procured by Phones 4U. EE says that on the stateents of case, Phones 4U has accepted that that obligation applied on a monthly basis; but in argument, I understood Phones 4U only to accept a single obligation for the whole period of the PAYG Terms. Be that as it may, EE says that on the true construction of that minimum proportion provision, alternatively under an

implied term, Phones 4U was obliged "*to procure new and upgrade PAYG connections for EE for the life of the [PAYG Terms]*". This I shall call the 'PAYG Obligation'. Again, the existence of the PAYG Obligation is firmly disputed by Phones 4U; but it did not pursue the argument that EE has no real prospect of establishing its existence at a trial.

17. The existence of the Key Obligation and the PAYG Obligation therefore falls to be assumed for the purposes of the arguments Phones 4U did pursue. Those arguments were that:

    i) There was no breach of the Key Obligation or the PAYG Obligation.

    ii) Alternatively, (a) neither the Key Obligation nor the PAYG Obligation was a condition, (b) by 1 pm on 17 September 2014, any breach had not deprived EE of substantially the whole benefit of the Trading Agreement or PAYG Terms respectively and (c) as of 1 pm on 17 September 2014, Phones 4U had not renounced the Trading Agreement or PAYG Terms. Therefore, EE can have no claim for damages for loss of bargain.

    iii) In any event, EE terminated the Trading Agreement and PAYG Terms under clause 14.1.2 rather than for breach, so that EE has no loss of bargain claim even if when EE terminated those arrangements Phones 4U was guilty of repudiatory breach or renunciation.

    For each issue, Phones 4U's submission was that EE has no real prospect of success and there is no other reason compelling the court to dispose of the counterclaim at a trial.

18. Before moving on, I should say something for clarity about the terminology I use. By 'condition', I mean a promissory obligation construed to be of the essence such that any breach entitles the innocent party to treat the contract as discharged and claim damages for the loss of its bargain. By 'repudiatory breach', I mean a breach of condition, or a breach of an obligation other than a condition the seriousness of which breach entitles the innocent party to treat the contract as discharged and claim damages for the loss of its bargain. By 'renunciation', I mean the conveying by one party to a contract to the other, unequivocally and whether by words or conduct or a combination of both, that it regards itself as not bound by the contract or that it intends not to perform it to an extent or in a manner that would amount to a repudiatory breach. Thus, I use the term 'repudiatory breach' only to describe an actual breach justifying termination and a loss of bargain claim, as distinct from an anticipatory breach (of which a renunciation is one class). Repudiatory breaches and anticipatory breaches are species of 'repudiation' (as I may use that term).

19. The issues for me, therefore, as to which (I repeat) the question in each case is whether EE has a real prospect of success (or there is some other compelling reason for a trial), are these:

    i) Was there a breach of the Key Obligation or the PAYG Obligation by Phones 4U?

ii) If so, was it a repudiatory breach, (a) because the Key Obligation or PAYG Obligation respectively is a condition, or (b) because the breach was sufficiently serious?

iii) Was there a renunciation by Phones 4U?

iv) Do the terms of EE's termination letter defeat any claim by EE for damages for loss of bargain?

EE's Pleading

20. The counterclaim as originally pleaded was seriously deficient in its analysis. It alleged:

i) Firstly, that on or about 14 September 2014 the Board of Directors of Phones 4U resolved to cease trading. But that was not alleged itself to be a breach of contract. Nor was it alleged to have been communicated to EE so as (perhaps) to be part of some allegation of renunciation.

ii) Secondly, that Phones 4U's stores did not open for business on Monday 15 September 2014. There is no dispute of fact as to that. But it was also not alleged itself to be a breach of contract. As regards any possible allegation of renunciation, it is perhaps difficult to imagine that EE was unaware (and, on the evidence, it plainly was aware), but strictly there was no allegation that the store closure came to EE's attention.

iii) Thirdly, that "*Since that time, in breach of the Key Obligation, [Phones 4U] has not*" undertaken any of the Key Activities and equally "*since that time, in breach of the PAYG Obligation …, [Phones 4U] has not procured any new PAYG connections, PAYG upgrades or PAYG SIMO connections [i.e. SIM only purchases]*" (my emphasis throughout). The Defence and Counterclaim is dated 10 February 2017. Therefore, these pleas alleged actual breaches of the Key Obligation and PAYG Obligation by a continuous failure to perform over a period of just under 29 months from 15 September 2014. But it is common ground that the Trading Agreement and PAYG Terms were terminated on 17 September 2014. Save to the extent that they alleged a failure to perform on Monday 15 September 2014, Tuesday 16 September 2014 and the morning of Wednesday 17 September 2014, these allegations of actual breach were demurrable and apt to be struck out.

21. Stripped of the unsustainable allegations of actual breach after termination, the only plea of breach was that for 2½ days Phones 4U did not carry out any Key Activities and did not procure any new PAYG connections (respectively). It was not alleged that the Key Obligation or PAYG Obligation was a condition. It was alleged that "*Phones 4U's cessation of trading went to the root of the Trading Agreement, and deprived EE of substantially the whole benefit [thereof]*", with a materially similar allegation about the PAYG Terms. But that is unarguable, without more, for a 2½-day closure in the context of a 3-year Trading Agreement with a year still to run and a 14-month PAYG trading period with 3½ months left to run.

22. Finally, it was alleged for each of the Trading Agreement and the PAYG Terms, further or alternatively, that "*by ceasing trading, [Phones 4U] evinced an intention not to perform its obligations*". But even if the failure to plead contemporaneous awareness that Phones 4U had not been trading for 2½ days were forgiven (on the basis perhaps that EE must have been aware and was not to be criticised for not thinking to say so in the pleading), to my mind it is not arguable that not trading for 2½ days demonstrated unequivocally an intention not to perform ever thereafter, or not to perform thereafter to a sufficient extent as to be repudiatory.

23. Matters do not rest there, however. It is plain from the approach adopted by Phones 4U to the application, and from the evidence it served for it, that if there were a case for it to answer at a trial that by 1 pm on 17 September 2014 Phones 4U had closed down permanently, then it did not pursue a summary judgment on the basis that there was no repudiation. Mr Allison QC accepted in opening the application that if there be a realistic prospect of EE establishing a permanent cessation of trading by the time of the termination letter, then "*even though … shadowy, there is a counterclaim of sorts*" (subject to the point on the termination letter). I was nonetheless uncomfortable to be asked to assess the prospects of success, or other need for a trial, of allegations of repudiatory breach or renunciation that, in effect, were yet to be pleaded.

24. At my encouragement, therefore, a draft Amended Defence and Counterclaim was prepared overnight after the first day of the hearing to show me how, as presently advised, EE's case will be put. I allowed Phones 4U to supplement its argument in writing to deal with the proposed amendments and it did so on 13 December 2017. EE responded on 15 December 2017 inviting me to disregard those additional submissions (arguing that they went further than the scope of my permission) but indicating in any event that on its side EE had nothing to add to the submissions made at the hearing.

25. I am grateful to those concerned for all that additional effort. Leaving aside any arguments over costs, there is no objection to the proposed amendments other than Phones 4U's contention that they would still not raise a case of sufficient merit to avoid summary judgment. So no separate issue arises on the proposal to amend: if EE would have real prospects of success (or other compelling reason for a trial) as the counterclaim is now proposed to be pleaded, there should be permission to amend and no summary judgment; if rather Phones 4U's application for summary judgment would still succeed, then it is pointless to amend and I should just dismiss the counterclaim.

26. The real summary judgment argument, therefore, concerns the viability on its merits (or other compelling reason for trial) of a counterclaim as set out in the draft amended pleading.

27. The Key Obligation and PAYG Obligation, as pleaded, remain the same. It is still the case that neither is alleged to be a condition. The relevant period of actual non-trading is now rightly limited to the 2½-day period running up to the sending of EE's termination letter. The failure during that 2½-day period to carry out the Key Activities or procure PAYG connections is alleged to be in breach of the Key Obligation, respectively the PAYG Obligation. But that is not alleged, without more, to justify termination and loss of bargain damages.

28. The critical new allegations, therefore, are that:

    i) those actual breaches (as alleged, and although now temporally limited) were "*serious breaches which had caused significant damage to EE's business*";

    ii) on the objective facts as they stood when EE terminated, the breaches "*were (at the very least) likely to continue for the foreseeable future (and to cause further significant damage to EE's business)*"; and

    iii) there was therefore a repudiatory breach;

    further or alternatively

    iv) there was a renunciation on the basis that "*the material available to a reasonable person in the position of EE [when EE terminated] … would have conveyed to that person that [Phones 4U] did not intend to perform its obligations …*". In that regard, extensive particulars are now given of communications and conduct on the part of Phones 4U said to have been evident to EE at the time.

KPIs & Material Breach

29. Apart from the point arising on EE's termination letter, a substantial theme in Phones 4U's attack on the counterclaim was to contend that it runs so counter to the scheme of the Trading Agreement as to be fatally flawed. In that respect, Phones 4U relied on the contractual scheme for Key Performance Indicators ('KPIs') and termination for material breach. It is convenient to summarise that scheme now.

30. By clause 11.1 of the Trading Agreement, each party undertook to the other that it would maintain its respective KPIs set out in Schedule 8. By clause 11.5, if either party breached any of its KPIs it was to pay liquidated damages as specified in Schedule 8. The quantitative detail in Schedule 8 is said to be commercially sensitive still today, so I shall not set it out. To understand the summary judgment argument, though, it is necessary to identify the following essential features:

    i) Phones 4U's KPIs included a minimum and maximum limit, measured by calendar quarters, on the proportion of EE pay monthly connections sold by Phones 4U out of all such connections sold by it.

    ii) Subject to various qualifications, if Phones 4U did not hit the minimum new connections KPI in a quarter, EE was to give Phones 4U written notice and Phones 4U was to pay liquidated damages to EE.

    iii) If Phones 4U exceeded the maximum new connections KPI in a quarter, EE was to give written notice and Phones 4U was to pay liquidated damages.

    iv) There were other Phones 4U KPIs, in relation to SIM only purchases, JUMP sales (which referred to a Phones 4U product or service called 'Just Update My Phone') and cases of 'Disconnect/Connect' (where a customer terminated an existing EE contract within 120 days of taking out a new contract under the same EE brand).

v) Failures to maintain Phones 4U's KPIs other than its minimum KPI for new connections would never give EE a right to terminate the Trading Agreement, although they might affect its ongoing scope; for example too many JUMP sales could lead to a withdrawal of EE's authority to sell JUMP plans for EE connections.

vi) By clause 14.4.2 of the Trading Agreement, however, a failure to meet the minimum new connections KPI for two consecutive quarters not remedied by the end of the following quarter would give EE a right to terminate the Trading Agreement for material breach under clause 14.1.1.

31. Under the PAYG Terms, the only express performance requirement was the commitment by Phones 4U that EE would get the stated minimum proportion of PAYG contracts sold by Phones 4U, either measured monthly or (it may be) measured only across the 14-month period of the PAYG Terms.

32. Phones 4U contends, in summary, that those features of the KPI and material breach scheme of the Trading Agreement, and the nature of that sole PAYG performance requirement, are fundamentally inconsistent with any suggestion that Phones 4U not trading for 2½ days could be (a) a breach of contract at all, in any event (b) a repudiatory breach, under either the Trading Agreement or the PAYG Terms.

Breach?

33. I found Phones 4U's contention that there was no viable case of breach of the Key Obligation or PAYG Obligation difficult to square with its concession of those Obligations as pleaded (for the purposes of this summary judgment hearing). In his opening argument on the application, Mr Allison QC submitted that the obligation alleged by EE was an obligation to procure connections over the life of the contract and there was not alleged to be an obligation to carry out the Key Activities (or procure PAYG connections) day by day. But that does not seem right to me, as regards what EE has alleged. In his skeleton argument, Mr Wolfson QC did say the allegation was that Phones 4U was obliged "*to procure connections for EE over the life of the agreements*", but (a) that was expressly said only to be a summary, and more importantly (b) the sense of "*over the life*" as used by Mr Wolfson QC was "*throughout*". I see the potential force of an argument that no such obligation appears in the Trading Agreement (or the exchange of emails evidencing the PAYG Terms) and that such an obligation does not sit with the KPI regime summarised above. But that will be the argument against the existence of the obligations alleged, or part of that argument; it is not an argument against breach if those obligations existed.

34. Similarly, the argument for Phones 4U was put in the written submissions on the draft amended pleading as being that on the proper construction of the contracts, neither the Trading Agreement nor the PAYG Terms imposed on Phones 4U any obligation to market, sell, procure connections etc., on any periodic basis. At most, it was said, there were imposed on Phones 4U the quarterly obligation under the Trading Agreement to hit its KPIs and the minimum proportion PAYG requirement set by the PAYG Terms. But that is to say that there was no Key Obligation or PAYG Obligation as alleged; again, it is not an argument against breach.

35. If Phones 4U could not press for summary judgment on the ground that the pleaded obligations did not exist, as it accepted, then it could not sensibly seek summary judgment on the ground that there was no breach. The Trading Agreement contained a *Force Majeure* provision (clause 16). Subject to any reliance upon that provision (and no reliance on it is pleaded by Phones 4U), *if* Phones 4U had affirmative obligations to carry out the Key Activities and to procure PAYG connections throughout the term of the respective contracts, then on the face of things it failed to perform those obligations, acting thereby in breach of contract, on Monday 15 September 2014, Tuesday 16 September 2014 and the morning of Wednesday 17 September 2014. Fuller development at trial of the evidence and argument as to the existence, and if they existed the scope, of the Key Obligation and PAYG Obligation may perhaps reveal some flaw in that simple logic as to breach such that there might be some relevant obligation but nonetheless no breach. But on the presently assumed basis that at trial EE might establish the Key Obligation and the PAYG Obligation as pleaded, in my judgment equally it will have a real prospect of establishing breach as alleged.

Repudiatory Breach?

Was the Key Obligation or PAYG Obligation a Condition?

36. As I have already noted, EE does not allege breach of condition. In that regard, a remark in Phones 4U's skeleton argument for the hearing led to a suggestion in EE's skeleton argument that Phones 4U had conceded for summary judgment purposes that the pleaded obligations might be conditions. That confusion was however resolved early in the argument, Mr Allison QC making it plain that there had been no intention to concede more than that if Phones 4U had permanently shut up shop by the time EE terminated, as he understood EE to be alleging, then that might have justified a termination for breach. As a result, no harm was caused by the possible over-statement in the Phones 4U skeleton of the extent of the concession; and Mr Wolfson QC's argument of actual breach (as opposed to renunciation) was squarely the argument of repudiatory breach of an innominate term to which I now turn.

Was the Breach Sufficiently Serious?

37. As I observed above, the critical allegations are that: (a) the extant breaches were by 1 pm on 17 September 2014 serious breaches which had already caused significant damage to EE's business; and (b) those breaches were likely to continue for the foreseeable future whereby to cause further significant damage to EE's business.

38. It seems to me that the first allegation does not have any real prospect of success, at all events if the intention is to allege damage by the time of termination sufficient that EE had already then been deprived of substantially the whole benefit it was intended to receive under the Trading Agreement or PAYG Terms. As is recognised by EE's plea as to its alleged loss and damage caused by termination, its financial interest in the successful performance of the Trading Agreement and PAYG Terms was in the procurement by Phones 4U of EE connections, generating revenue for EE. I can see an argument that a failure to market or promote EE's Products and Services over a prolonged period might be damaging to EE, if in the meantime Phones 4U were continuing to market and promote the products and services of other mobile networks. Even then I should have thought any resulting loss and damage would probably be

quantified by an assessment of connections lost or not generated. However, I think it fanciful to suppose that the failure by Phones 4U to engage in any marketing or promotion, for any of the mobile networks, for 2½ days, in the context of a decision to bring in administrators, caused EE any identifiable or quantifiable loss or damage apart from a loss of connections.

39. In the context of a Trading Agreement with just over a year to run, or the PAYG Terms with 3½ months to run, in my judgment it is equally fanciful to suppose that this 2½ days of lost connections might be held at trial to have deprived EE of substantially the whole benefit of the respective contract. That is all the more so for the Trading Agreement since on 9 September 2014 EE had put Phones 4U on notice that it appeared to be heading, so EE believed, towards a breach of the maximum KPI for new connections for Q3 2014. In that letter, EE asked for an explanation of what steps would be taken to ensure that come 30 September 2014 that KPI would be maintained, and threatened, in substance, to claim that it could terminate for breach if it was not. Thus, the immediate context of the brief non-trading period prior to termination in the week of 15 September 2014, apart from that of administration, was that of EE complaining and threatening termination on the basis that Phones 4U had been selling too many EE connections, not too few.

40. If the case for a repudiatory breach is to be regarded as having a real prospect of success, therefore, it can only be because of the likelihood of Phones 4U's cessation of trading continuing for substantially the whole of the remaining contract term. In that regard, EE relied on *Maple Flock Co Ltd v Universal Furniture Products (Wembley) Ltd* [1934] 1 KB 148 at 157, *per* Lord Hewart CJ and *Hongkong Fir Shipping Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 1 QB 26 at 57, *per* Sellers LJ, and at 72, *per* Diplock LJ. The submission was that it is sufficient for there to have been reasonable grounds for concluding that a breach would be likely to continue (or be repeated) until (or such that) substantially the whole benefit of a contract would be lost. If that were the position, upon the facts as they stood at the time of termination (whether or not known to EE at the time), then (so EE submitted) the breach went to the root and justified termination at common law.

41. That formulation of the test was said to be supported by the authors of "Contractual Duties: Performance, Breach, Termination and Remedies" (2nd Ed). At para. 8-042, discussing repudiation in the context of instalment contracts, the authors suggest that it is apparent from the cases that the courts "*are primarily concerned to assess whether the relevant breach which has already occurred is serious and whether the facts support the innocent party's apprehension that there is a real commercial risk that breach of the same or similar gravity will recur*." I do not think, however, that the authors intend to suggest that the existence of a real, that is to say non-fanciful, risk of further breach is necessarily sufficient. Indeed, the primary point they make, as appears from the next sentence, is that a single failure of performance in an instalment contract, even if serious enough to justify rejection of the tendered performance on that occasion, will not ordinarily be sufficient to throw up the whole contract. They note, in my view correctly, that the courts will have regard both to the guilty party's capacity to avoid breach in the future and to "*the importance and urgency of the [innocent party's] need to be assured that future performance will comply with the contract*."

42. It seems to me there may be an important issue of principle here whether it is necessary for the innocent party to show that on the facts as they were at termination the probability was, that is to say it was more probable than not that, breach would continue or be repeated sufficiently to deprive it of substantially the whole benefit of its bargain. Although a summary judgment application can be a suitable vehicle for the determination of issues of principle, the question whether a breach of contract was or was liable to become sufficiently serious in its consequences as to go to the root of a contract is inherently a fact-sensitive evaluation. Moreover, it is an evaluation in respect of which the preferable or most apt formulation of the principle may well be coloured by the detailed factual circumstances of the case before the court.

43. For its part, Phones 4U emphasised that in assessing whether a party has been deprived of substantially the whole benefit of a contract, what falls to be considered is the position as at termination: see *Ampurius Nu Holmes Holdings Ltd v Telford Homes (Creekside) Ltd* [2013] 4 All ER 377, *per* Lewison LJ at [44] and [64]. It accepted that a factor in the overall assessment could be the likely future events, judged by reference to the facts as they stood (assessed objectively) at the date of termination. However, Phones 4U submitted that likely future events were permissibly considered only as regards the likely future consequences of a breach or breaches extant at that time. That I think goes too far. In particular, it would render irrelevant a high probability, even a near certainty, of further serious breaches occurring in the future, unless it could be said that such breaches if indeed they occurred would be consequences of a breach that had already occurred before termination.

44. As to the position on the facts in this case, Phones 4U contended that EE's revised pleading contained two critical flaws. Firstly, it submitted that, the minimum new connections KPI for Q3 2014 being set to be maintained, there was no prospect of material breach for the purpose of the express contractual termination regime unless, and then until, that KPI was not met in Q2 2015 after not being met in both Q4 2014 and Q1 2015. Until that point, any breach would fall to be remedied by liquidated damages which were described expressly in Schedule 8 to the Trading Agreement as compensation for EE's "*loss of net margin*". The difficulty with that submission, in my judgment, as with the submission as to pre-termination breach, is that it seeks to clothe considerations that are in truth reasons, it may even be powerful reasons, for denying the existence of the obligations alleged, with decisive significance for the importance of breaches of those obligations if they did exist.

45. Moreover, or it may be in particular, that submission fails to distinguish between two different interests of EE's in the trading relationship with Phones 4U. The KPIs generally say nothing as to the volume of EE business to be generated by Phones 4U. That is because, with one exception (the JUMP KPI), the KPIs are measures of Phones 4U's performance as seller of connections for EE relative to its performance as seller of connections for other mobile networks. Accordingly, and with that one exception, it makes no difference to the maintenance or otherwise of Phones 4U's KPIs or to the contractual regime of material breach whether Phones 4U sell 100 or 100,000 EE connections in any given period. Once again, the absence of any absolute performance measure, when such a measure could easily have been expressed, and indeed was expressed in one instance, may be telling as to whether clause 4.1.1 of the Trading Agreement is to be construed as imposing the Key Obligation at all and as to

whether the PAYG Obligation existed (either as a matter of construction or as an implied term). But if those obligations existed, then in my judgment it is realistic to propose that they served to protect EE's interest in generating a substantial volume of sales through Phones 4U. Indeed, the acknowledgement that a permanent cessation of business as at 17 September 2014 would have justified termination for breach, if the alleged obligations existed, recognises that.

46. Phones 4U submitted, secondly, that there is no realistic prospect of EE showing at a trial that breach was likely to continue for the foreseeable future, assessed as at 1 pm on 17 September 2014. Mr Allison QC drew attention to EE's pleaded response to the contention that its counterclaim is in any event excluded by clause 19.1 of the Trading Agreement. That response includes reliance by EE upon clause 19.2.3 by which liability for wilful defaults is excepted from an exclusion of economic loss (including loss of profit) relied on by Phones 4U. The gist of the allegation of wilful default is that there was a decision by the Board of Directors of Phones 4U to cease trading though there was neither legal obligation to cease trading nor compelling financial need to do so as of 15 September 2014 when the shops did not open for business and online trading was suspended. In particularising that allegation, EE joins issue specifically with a threatened assertion in draft Particulars of Claim sent by the solicitors then acting for Phones 4U in October 2016 that Phones 4U was only in a position to continue trading (if at all) for a period of 5 to 6 weeks if suppliers or credit insurers withdrew credit. EE's pleaded contention is that, to the contrary, Phones 4U had the means and would have had the support needed to continue trading at least until January 2015, with further and better particulars to follow disclosure and witness or expert evidence. I observe in passing that it will not be satisfactory for that allegation to be further particularised only after expert evidence rather than prior to expert evidence so that the final case to be advanced at trial is properly apparent before the experts are briefed to opine, if there is to be a trial of the counterclaim.

47. The submission for Phones 4U for this hearing was, of course, that no trial will be required. As regards that wilful default plea, the particular submission was that EE in its revised pleading of repudiatory breach is inviting the court without any proper justification to reach a different view as to the facts than that contended for by EE itself. It is not clear to me that that is the position. In the first place, the comparison is not like for like. The wilful default plea raises for investigation the question whether it was necessary for Phones 4U to cease trading on 15 September 2014, whether that be temporarily, indefinitely, or permanently. The repudiatory breach plea raises for investigation the question whether, given *inter alia* that trading did in fact cease on 15 September 2014 (one important further question being whether that was, at the time, temporary, indefinite, or permanent), the objective likelihood was that the failure to trade would continue for a sufficient period to deprive EE of substantially the whole remaining benefit of the trading arrangements with Phones 4U.

48. Further, even were there an outright inconsistency between the new repudiatory breach plea and the existing wilful default plea, but the new repudiatory breach plea on the evidence had real prospects of success, then the proper resolution of that inconsistency would be for it to be made clear to the extent required that the wilful default plea is in the alternative as to the facts. Any such inconsistency is not to be

resolved by granting summary judgment despite a real prospect of success on the facts of the new primary plea.

49. Further again, if the wilful default plea facts as presently pleaded were established at trial, that would not defeat the new repudiatory breach plea, at least as regards the Trading Agreement, if otherwise well-founded by reference to the prospects as of mid-September 2014 of trading in any material volume for 2015.

50. The true substance, therefore, of the response to the new repudiatory breach plea on the facts is Phones 4U's submission that on the evidence, in the context of a complex, multi-faceted and high value business, it is not realistic to suppose there may be a finding at trial that as at mid-September 2014, the cessation of trading (and therefore breach) was likely to continue for long enough to deprive EE of substantially the whole of its remaining bargain. In support of that submission, Mr Allison QC emphasised that:

i) Phones 4U had only just entered into administration, the administrators having been appointed during the afternoon of 15 September and they having emphasised, in their only public statement prior to EE's termination, that the initial focus would be assessing whether the business could be rescued so they could reopen the stores and trade;

ii) the communications between the administrators and existing or possible trading counterparties, including EE itself, showed the administrators to have been pursuing an attempt to rescue the business as a going concern to enable trading to resume and the stores to reopen;

iii) any decision as to the future viability of the business, including the prospects for reopening stores and resuming trading, lay in the hands of the administrators whose statutory responsibilities, with continuation of the business as a going concern if possible as a first statutory priority, were not constrained by any views that may have been expressed by others, including the Board of Directors, as to what was or was not likely to be achieved;

iv) there was no sensible basis for looking behind the administrators' public statement as to their focus and goals.

51. Those points seem to me fairly made, so far as they go. However, they do not go so far as to render fanciful the prospect that upon the full investigation of the facts that only a trial can achieve the court may conclude that as matters stood at the time of termination on 17 September 2014 in all probability the cessation of trading by Phones 4U would persist for (at least) all of the remaining period of the PAYG Terms and all or the vast majority of the remaining period of the Trading Agreement. In short, the matters emphasised by Mr Allison QC seem to me consistent with a range of possible findings as to the prospects of success for the administrators in saving the business and resuming trading activities, as those prospects stood in mid-September 2014, including a possible finding that those prospects of success were very slim (even if the contract was not terminated by EE, which must logically be the basis for enquiry).

52. Mr Wolfson QC, for his part, emphasised that:

i) the minutes of the Board meeting on Friday 12 September 2014 (at which the decision was made to seek the appointment of administrators on the Monday following) appear to evidence an unqualified decision to cease trading indefinitely after the weekend ahead;

ii) in the application to court on 15 September 2014, the Directors' evidence was that without trading contracts with the major mobile networks Phones 4U had no viable business and they did not believe it would be possible to conclude any such trading contracts before the Trading Agreement expired on 30 September 2015, so that they could see no reasonable prospect of avoiding insolvent liquidation;

iii) it was also the Directors' evidence that it was too early to say whether any sale of the business as a going concern might be achievable;

iv) as a result, and although this could not serve to tie the administrators' hands (see, for example, *Key2Law (Surrey) LLP v De'Antiquis* [2011] EWCA Civ 1597, [2012] BCC 375, at [30] and [97]-[101], and *R (Monarch Airlines Ltd (in administration)) v Airport Coordination Ltd* [2017] EWCA Civ 1892, at [34] and [56](i)-(ii)), it was submitted to the court by leading counsel representing the Directors that it was not expected that rescuing Phones 4U as a going concern or achieving a better result for its creditors than winding it up would realistically be achievable, administration rather than liquidation nonetheless being sought on the basis that it would better facilitate the realising of property to make a distribution to secured or preferential creditors. (Birss J indeed acceded to the application for the appointment of the administrators on the basis that although the Vodafone and EE trading arrangements had, respectively, about six months and about a year still to run before expiry, he was satisfied that since they were not to be renewed there was "*no way the group can avoid insolvent liquidation*": [2017] EWHC 3804 (Ch), at [8]);

v) the actions of the administrators in the early days of their appointment rather suggest that indeed the possibility of any substantial resumption of trading was at best a remote one.

53. I agree with Mr Wolfson QC that even were it clear that at the time of the termination of the trading arrangements with EE, but absent that termination, there was a real or substantial possibility that stores might reopen and/or online trading might resume, it is not clear that EE would therefore fail in its claim of repudiatory breach. The question of the probable longevity of the cessation of trading by Phones 4U, absent EE's termination, and its impact upon EE's business, is not apt for determination by summary judgment. It may be that many of the essential factual circumstances that will fall to be considered in determining that question are already in evidence. However, it does not seem to me realistic or fair to either party, but especially EE, to seek to evaluate the probabilities as they stood in mid-September 2014 without, firstly, full disclosure from Phones 4U, secondly, the factual evidence of the administrators and/or the Directors and, thirdly, the assistance of experts. Nor is it convenient or appropriate, in my judgment, to attempt to formulate precisely how best it may be decided at trial to formulate the test to be satisfied by EE, for the particular facts of this case, to establish that any breach of contract it proves was repudiatory.

54. In all the circumstances, I am not persuaded that EE does not have a realistic prospect of establishing the existence at the time of its termination letter of repudiatory breach on the part of Phones 4U, if it first establishes the existence of the Key Obligation and the PAYG Obligation; and Phones 4U accepted that I was to determine this summary judgment application on the basis that EE has a realistic prospect of establishing that those Obligations existed as alleged.

Renunciation?

55. It was not suggested by either party's argument that the issue arising on EE's termination letter, to which I turn below, might be answered differently as between repudiatory breach and renunciation. Given my conclusion as to repudiatory breach, therefore, it is not necessary to deal at any length with EE's contention that if there were no repudiatory breach by the time it terminated, nonetheless Phones 4U had so conducted itself towards EE and/or communicated with EE as to make it unequivocally to appear that Phones 4U intended no longer to honour its contractual obligations.

56. I do, however, note that (a) all of Phones 4U's conduct towards and communications with EE appear to be in evidence on this application, with no real reason to suppose that there will be anything more to say about them at trial, (b) the principal strength of EE's factual case as to repudiatory breach appears to lie more in matters not known to EE at the time than in anything said to or visible by it, and (c) the requirement for a renunciation to be clear, absolute and unequivocal may be very difficult to satisfy by reference to the first couple of days of a large administration in which at its highest for EE the observable conduct of and communication on behalf of Phones 4U might be said to have left distinctly open the possibility of a resumption of trading, perhaps even in the shorter term. Whilst it is unnecessary to grapple with the problem further, it seems to me provisionally that the suggestion that Phones 4U had by 1 pm on 17 September 2014 renounced its contractual obligations owed to EE is flimsy. Such a conclusion derives support from the language in which the case for EE on renunciation was articulated in its skeleton argument for this hearing. Thus, for example, it was said that to EE a positive decision by administrators to resume trading would have seemed an "*inherently… difficult step*", or that the administrators' public statements "*did not suggest that [Phones 4U] was likely to recommence trading*". That does not seem to me to be the language of unequivocal apparent intent.

57. Mr Wolfson QC submitted that in any event the court could not, or should not, seek to reach any final conclusion as to renunciation without a trial, on the basis that the true impact of Phones 4U's conduct and communications upon a counterparty in the position of EE ought to be evaluated with the benefit of hearing directly from those at EE who observed that conduct or received those communications, even though the legal test is an objective one. I am not convinced by that. EE provided its evidence as to how Phones 4U's conduct and communications were received at the time, in two witness statements for this application from Ms Angela Thomas, EE's Head of Legal for Sales, Retail & Distribution, who sent the termination communications on 17 September 2014. If Phones 4U persuaded the court that were it to accept that evidence, nonetheless it would be clear there was no renunciation, I would have seen no basis for failing to give effect to that conclusion by way of summary judgment if it sufficed for that purpose. There would be no need to defer a judgment to allow for the possibility of additional evidence or colour being brought out by a cross-

examination that *ex hypothesi* Phones 4U would have persuaded the court was not required. (For completeness, I should record that Phones 4U did not rely on this application upon the possibility of a subjective element to the ingredients of a renunciation claim, as suggested *obiter* by Flaux J (as he was then) in *The "Pro Victor"* [2009] EWHC 2974 (Comm), [2010] 2 Lloyd's Rep 158, at [86]-[98].)

58. As it is, my conclusion as to repudiatory breach renders any final view I might have come to as to renunciation insufficient to lead to a summary judgment. The maintenance on the pleadings, if pursued, of the argument of renunciation will not in my judgment materially lengthen or add to the complexity or cost of any trial. Therefore, I say no more at this stage of the proceedings about the contention that Phones 4U had renounced its obligations by the time of EE's termination.

Termination Letter

59. In the light of my findings thus far, the summary judgment sought by Phones 4U can only be justified (if at all) by its contention that the terms of EE's termination letter render unsustainable in law the loss of bargain damages counterclaim.

Approach to the Application

60. Those findings, though, also reinforce the desirability of granting summary judgment, if that contention is correct. For its correctness or incorrectness is quite independent of any of the contentious or possibly contentious matters of fact or evaluative judgment as to the facts that will or may be involved in a trial to determine whether Phones 4U owed the obligations alleged, whether (if so) it acted in repudiatory breach of its obligations or renounced them, and whether (if so) there was wilful default by the Directors, to say nothing of the disputes that will or may arise in relation to EE's claims as to loss and damage resulting from termination.

61. Mr Wolfson QC reminded me that the summary judgment jurisdiction is not designed or appropriately used to conduct a mini-trial in factually complex cases and that it has been said to be inappropriate for cases where the law is uncertain and developing. In this case, there is no question of conducting a mini-trial of any significant or complex matter of fact, or any issue of fact at all, in order to decide whether Phones 4U is correct in its contention about the legal effect of EE's termination letter.

62. As regards not using summary judgment to decide matters of uncertain or developing law, Mr Wolfson QC relied on *Barrett v Enfield LBC* [2001] 2 AC 550, *per* Lord Browne-Wilkinson at 557F-G, a case on striking out a claim for not disclosing a reasonable cause of action under the County Court Rules 1981. Even leaving aside that it is not an authority on summary judgment under CPR Part 24, *Barrett* was a very different kind of case to the present. The plaintiff had been in care from the age of 10 months until he was 17. He sued the local authority alleging negligence by it as his care authority resulting in, so the claim alleged, deep-seated psychological and psychiatric problems. The House of Lords allowed the plaintiff's appeal, restoring a district judge's refusal to strike the claim out that had been reversed by the Court of Appeal, on the basis *inter alia* that since the issue was not clear-cut, the question whether it was fair, just and reasonable to impose a sufficient duty of care for the claim to be viable should not be decided in the abstract on assumed or hypothetical facts, but after a trial in the light of the facts then proved. Lord Browne-Wilkinson's

observation, in such a context, that it was not normally appropriate to strike out a claim in an area of the law that was uncertain and developing, is not to my mind any deterrent against grasping and determining a short point of principle in the law of contract in respect of which the facts are limited, documented and plain before the court on a summary judgment application, if (as in the present case) the point will be decisive.

63. I am of course conscious that a summary judgment in favour of Phones 4U upon this final ground alone may lead to an appeal and, as a result, delay in any event and also, it may be, additional cost (if the judgment were overturned on appeal and the counterclaim then failed at trial on other grounds). But on the other hand, if not appealed or if upheld on appeal, a summary dismissal of the counterclaim now will achieve a huge saving in the parties' and the court's time and in the parties' costs. I strongly suspect there will then be no trial at all, as the parties will find they can resolve any differences over the sums due to Phones 4U on its claim and the other EE counterclaim I mentioned in paragraph 12 above. Even if that would prove to be optimistic, nonetheless I am confident that a trial of Phones 4U's claim, and that other EE counterclaim if pursued, would be a much shorter, simpler and cheaper affair than a trial of EE's primary loss of bargain counterclaim (as to cost, that is relatively speaking – I dare say the trial without the primary counterclaim will still not be cheap in absolute terms).

64. Weighing such competing considerations in the balance is a familiar task, whether it be for a summary judgment application, when considering the desirability of ordering preliminary issues, or indeed in any case management assessment of whether the court should determine the merits otherwise than by conducting a single, final trial of all issues. In that regard, as Mr Wolfson QC put it, there can be a tension between a possible desire to get on and decide that which can be decided and a possible desire to defer any final judgment until everything can be considered in the round.

65. In this case, it seems to me the balance clearly favours determining the legal point that arises on EE's termination notice now and in the remaining parts of this section of my judgment, therefore, I proceed to make that determination. The potential increase in cost if summary judgment is granted now but overturned on appeal will, I think, be much smaller than the potential saving achieved by a summary judgment that is not appealed or that is upheld on appeal. The prospect of delay, if there were an appeal against a summary judgment granted now, is no doubt unwelcome. But there is no evidence that it will cause any particular hardship to EE. Were EE to prevail, after an appeal, even to the point of being the net judgment creditor, and if it will not recover in full in Phones 4U's insolvency, the shortfall in its recovery of any interest awarded in respect of the period of delay would be a prejudice. There is however no evidence as to that; and any such loss would surely be relatively insignificant in the overall scale of this litigation. On the other hand, of course delay defers any ultimate recovery for the benefit of Phones 4U's creditors; but I am in no position to second-guess the assessment by the administrators implicit in their pressing for summary judgment, having had access to high quality legal advice, that it is the preferable course in the administration.

66. If, therefore, Phones 4U is correct as to the effect in law of EE's termination letter, that should be decided now and summary judgment should be granted accordingly dismissing EE's counterclaim.

67. Were I to reject Phones 4U's contention as to the effect of the termination letter, the further question would arise of what order to make. The summary judgment application would fail and the time and cost savings of a summary dismissal of the counterclaim would not be achieved. But I would still have decided a short point of law after full argument on facts that would not change at trial. Though the occasion for doing so would be a failed summary judgment application rather than a trial of a preliminary issue ordered as such, my provisional view is that it would be appropriate nonetheless to treat the point as now concluded and therefore to strike out the material parts of Phones 4U's Reply and Defence to Counterclaim that raised the issue. I express that as a provisional view only because it was not canvassed during argument and I would invite further submissions on it when handing down judgment if it mattered.

Initial Analysis

68. Mr Wolfson QC accepted that it was possible for the terms of a letter or notice terminating a contract under an express, contractual right to terminate, to render unsustainable in law a claim for loss of bargain damages premised upon a repudiatory breach or renunciation extant when the letter or notice was sent. Both sides submitted that the question whether because of its terms EE's termination letter had that effect was a question of the proper construction of that letter. That seeming common ground, however, is not as helpful as might perhaps be thought. Without more, it does not identify the effect or purport that the termination letter must have, properly construing its terms, for it to have that result.

69. That point might be illustrated in a number of ways, but for example it may be seen by considering the reservation of rights language in the penultimate paragraph of the letter (I set out the terms of EE's termination letter in full in paragraph 8 above). If EE otherwise enjoyed an accrued right to damages for the loss of its bargain, EE's explicit reservation of all its rights and remedies and its statement that nothing was waived would seem at first sight to preserve that accrued right. Indeed, I understood Mr Allison QC to accept as much.

70. On the other hand, if to acquire such a right EE had to do something that it did not do prior to or by the termination letter, or had to avoid doing something that it did do by the (other parts of the) termination letter, then the reservation of rights and no waiver statement achieved nothing material: on that basis, there was no relevant right to reserve or to insist had not been waived; rather, no relevant right came into existence. For example, if the right to damages required that a right of termination be exercised that was not exercised by the prior parts of the letter, the reservation of rights/no waiver language merely purported to reserve, it did not purport to exercise, that right. Then, if the prior parts of the letter had not been effective to terminate the contract, EE could subsequently terminate it and could not be told it had lost the right to do so by the letter. But if the contract were terminated by the prior parts of the letter, then there was nothing thereafter left to terminate. For his part, I understood Mr Wolfson QC to accept all of that, although he submitted that the reservation of rights was important in interpreting what the prior parts of the letter did or did not (purport to) do, which is a different point.

71. Logically, therefore, the first issue to be considered is how a right to damages for loss of bargain accrues at common law in the first place. That will allow an examination

from first principle of how the exercise of a contractual right of termination can be capable of preventing such a right from accruing and will inform a consideration of the case law.

72. In this context, it is common to say that in the case of a repudiatory breach or renunciation, the innocent party may "*accept the repudiation*", or "*accept*" it "*as terminating the contract*", and sue for damages for loss of bargain. Both parties indeed used that language in their submissions in this case. It may often be a convenient, or at any rate not an unhelpful, use of language. But if it matters, and a case calling for an examination from principle of the cause of action for loss of bargain damages will be a case where it may matter, that use of language is or may be at best imprecise.

73. More precisely:

i) the cause of action is for damages for the repudiatory breach of contract committed by the guilty party or anticipated by its renunciation;

ii) those damages are, or include, damages for the loss of the innocent party's bargain;

iii) such damages are recoverable only if that loss resulted from the breach;

iv) there will be cases of repudiatory breach where the necessary causation is independent of any action or decision by the innocent party. For example, suppose a failure by the seller to deliver under a sale of goods contract by the end of a delivery period in respect of which time is of the essence. The buyer's damages claim for non-delivery is a loss of bargain damages claim that requires no "*acceptance of repudiation*";

v) leaving such cases aside, the necessary causation for loss of bargain damages to be recoverable is created by the innocent party choosing to treat itself as discharged from further performance of the bargain and communicating that choice to the guilty party. That communication requires no particular form, but it must be clear and unequivocal: *Vitol SA v Norelf Ltd (The Santa Clara)* [1996] AC 800.

74. It is said that the innocent party has an election, that is to say a free choice, whether to treat itself as discharged from its bargain. Again, I leave to one side cases where the bargain is lost as a matter of fact independently of any choice by the innocent party (as in paragraph 73(iv) above). In such cases, *ex hypothesi* the innocent party has no choice to make as to whether the bargain is over and cannot unilaterally extend or resurrect it. Hence, for my non-delivery example above, the principle discussed in *Benjamin's Sale of Goods*, 10th Ed, at para.17-011, esp. at n.98.

75. Where the innocent party does have a free choice to treat the bargain as at an end, and so chooses, the law treats the repudiatory breach or renunciation as causing the loss of bargain notwithstanding that freedom of choice. That both reflects and informs the requirements set by the law for there to be a repudiatory breach or renunciation in the first place. For example, only if an actual breach has deprived the innocent party of substantially the whole of its bargain, or is set to do so, does it seem appropriate in

principle to treat the innocent party's decision to walk away as caused by the breach; and then if the decision to walk away is appropriately treated as caused by the breach, damages for that breach should rightly include damages for the loss of the bargain.

76. In the light of that initial analysis, it is not difficult to see that whether the invocation of an express, contractual right of termination defeats a claim for loss of bargain damages founded upon repudiatory breach or renunciation need not necessarily find the same answer whether or not the express right is triggered by breach. (To be clear, where I refer to a right to terminate being founded upon or triggered by breach, I mean to include both a right to terminate the trigger for which is expressed by reference to the concept of breach of contract and a right to terminate the trigger for which is expressed in terms of conduct and/or events that in fact constitute a breach.) Where the contractual right is triggered by breach, the innocent party can say that by terminating it treated the guilty party's breach as discharging the contract, albeit it expressed itself as relying in that respect on its express contractual right rather than the common law. Where however the contractual termination is independent of any breach, the innocent party has not treated the contract as discharged by breach; if treating the contract as discharged by breach is a pre-requisite of the cause of action, the loss of bargain damages claim will fail. (Indeed Phones 4U's essential submission, at any rate its primary submission, as Mr Allison QC put it, was that the key feature of EE's termination notice is that it expressly terminated otherwise than for breach – to construe it or treat it as terminating for breach would simply be at odds with its plain terms.)

77. Against that background, I now turn to the facts of the present case and the parties' rival contentions, as pleaded, then to the previous authorities.

The Facts

78. By clause 14.1 of the Trading Agreement:

> "14.1 Either party may at any time by giving notice in writing to the other terminate this Agreement with immediate effect:
>
> 14.1.1 if the other party commits a material breach of this Agreement and either such breach is incapable of remedy or, if capable of remedy, has not been remedied to the reasonable satisfaction of the other party within 30 days of a written request from the other party to remedy such breach; or
>
> 14.1.2 if the other party is unable to pay its debts … or takes any steps (or any third party takes any steps in respect of the other party) to: initiate a composition, scheme, or other arrangement with any of its creditors (including any voluntary arrangement); resolve or petition to wind up that other party; appoints an administrator, receiver or manager over all or any part of that other party's business undertakings or assets; pass a resolution for that other party's winding up, or has a petition presented to any court for its winding up or for an administration order or if any analogous event occurs in any jurisdiction."

79. It was common ground and is plain on the wording that the appointment of administrators over Phones 4U upon its application gave EE the right to terminate under clause 14.1.2, by giving notice in writing to Phones 4U. It was also common ground that the appointment of administrators neither was, nor involved, nor

inevitably resulted in, a breach of contract on the part of Phones 4U. As is apparent from my discussion, above, of the allegations of repudiatory breach and renunciation, the breach alleged to have occurred and/or been anticipated was Phones 4U's failure to engage in its normal trading activities as authorised seller of EE products and services. The appointment of administrators did not require that failure to occur.

80. I set out the terms of EE's termination letter in full in paragraph 8 above and will not repeat them here. It is plain on those terms that:

i) EE stated expressly that it was terminating with immediate effect;

ii) EE also stated expressly that it was terminating pursuant to clause 14.1.2;

iii) EE did not identify any breach of contract or renunciation by Phones 4U as causing, justifying or having relevance to its decision to terminate, whether by asserting breach or renunciation in terms or by referring to or asserting facts that are now said to have amounted to breach or renunciation;

iv) EE expressed that in consequence of termination Phones 4U's authority to sell and promote EE products and services was also terminated with immediate effect.

81. With the first of the two emails I referred to in paragraph 8 above, EE sent a more detailed letter setting out what it said were certain consequences of termination and actions it required Phones 4U to take. Like the termination letter itself, that letter contained a reservation of rights and a no waiver statement. In its specific statements as to consequences and required actions, that letter made a number of references to clause 15.1 of the Trading Agreement. That clause spelt out a series of effects or consequences of termination. It applied "*upon termination for any reason or expiry of this Agreement*".

82. As the springboard for an argument, if he needed it, that the consequences of termination pursuant to clause 14.1.2 were different from those of a termination for repudiatory breach or renunciation at common law (aside from any question of loss of bargain damages), Mr Allison QC submitted that clause 15.1, despite that unqualified language, was parasitic upon clause 14 and applied only to terminations under that clause. In my judgment, there is no justification for that restriction upon the meaning and effect of clause 15.1. I proceed therefore on the basis that the opening words of clause 15.1 mean just what they appear to say. To the extent that clause 15.1 goes beyond merely making explicit a number of necessary consequences of a termination (and in some respects it does), it nonetheless would apply if termination were for breach at common law.

83. The characteristic features of the present case, therefore, are that:

i) a contractual right to terminate existed, triggered otherwise than by breach (actual or anticipatory);

ii) that right was expressly exercised;

iii) at the time of termination, (a) no mention was made of any breach (actual or anticipatory) but (b) a repudiatory breach and/or renunciation in fact existed.

84. To complete the factual context, I should add that clause 14.2 of the Trading Agreement also gave EE a right to terminate triggered otherwise than by breach. In the case of that provision, the triggering circumstance was a change in control in respect of Phones 4U where the party gaining control was an EE Competitor. One can readily see how the same issue as arises here after a termination at the time founded upon clause 14.1.2 could arise after a termination justified at the time by reference to clause 14.2.

85. Those are the factual circumstances in which the parties plead as follows:

i) Phones 4U alleges in its Particulars of Claim that by the termination letter, EE terminated the Trading Agreement with immediate effect in accordance with clause 14.1.2.

ii) EE admitted in its Defence that by the termination letter, it terminated the Trading Agreement with immediate effect and that the letter stated that the termination was in accordance with clause 14.1.2, but it averred that by the letter it "*accepted [Phones 4U's] repudiatory breach of the Trading Agreement*". (I should perhaps add that the Defence made it clear that EE use the term 'repudiatory breach' to cover renunciation as well.) On a strict view, EE did not plead a case on whether, if the termination letter did not terminate for breach, it was effective as a termination under clause 14.1.2. But it was plain from the argument on this application that that was accepted (which would have been the effect of CPR 16.5(5) anyway).

iii) The position is now put beyond doubt by the draft Amended Defence which pleads as a primary case that the termination letter both terminated for breach and exercised EE's right of termination under clause 14.1.2, and as an alternative case that if it was not effective to terminate for breach, it was effective to terminate under clause 14.1.2.

iv) In its Reply, which in this respect will not I think require consequential amendment, Phones 4U denies that the termination letter constituted an acceptance of any repudiatory breach, avers that by that letter EE purported to exercise its contractual right to terminate under clause 14.1.2 upon the occurrence of a triggering event that did not constitute any breach and avers that, in the circumstances, EE terminated solely under clause 14.1.2, upon the ground of the appointment of the administrators.

86. Hence, the issue for determination is indeed a pure point of principle, namely whether a claim for damages for loss of bargain is necessarily bad in law given the features identified in paragraph 83 above.

The Case Law

87. In its skeleton argument for the hearing, Phones 4U referred to the principle established by *Boston Deep Sea Fishing & Ice Co v Ansell* (1888) 39 Ch D 339, namely that a party that terminates a contract for a bad reason may subsequently

defend itself against a claim for wrongful termination by reference to a good reason extant at the time of termination, whether or not then known to that party. That principle, it was submitted, does not apply here since termination was in this case valid and effective under clause 14.1.2 as cited by EE when terminating. In oral argument, Mr Allison QC added that the principle is in any event only defensive.

88. In the skeleton argument, Phones 4U developed three propositions for cases where the same conduct both triggers a contractual right of termination and amounts to repudiatory breach or renunciation justifying termination at common law. In oral argument, it became clear though that Mr Allison QC's primary submission was that in a case where a contractual right to terminate not founded upon breach accrues and is the only right expressly exercised, no common law damages claim for loss of bargain can be sustained.

89. EE also referred in its skeleton argument to the *Boston Deep Sea Fishing* principle. For the case where there is both a contractual right to terminate and a common law right to terminate for repudiatory breach or renunciation, EE submitted that the starting point was that generally there is no inconsistency between exercising the contractual right and terminating for breach, so that a party can generally elect to exercise both rights together (see *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689). The skeleton argument proceeded to suggest that it is not clear on the authorities how the court is to determine whether a termination notice referring only to the contractual termination right should be taken to have exercised both rights and that several analyses have been attempted. One of these, which in oral argument Mr Wolfson QC advanced as correct, is that the issue is one of the proper construction of the termination communication, the particular question being, he said, whether objectively it conveyed that the innocent party had elected "*to exercise only its contractual right to terminate and to forego its rights at common law*". As well as decided cases, EE referred me to Peel, "The termination paradox" [2013] LMCLQ 519, and Liu, "The Puzzle of Unintended Acceptance of Repudiation" [2011] LMCLQ 4.

90. With that introduction, I turn to review the authorities. That review is a little lengthy, but it is important to be clear about what has actually been decided.

91. In the *Boston Deep Sea Fishing* case, the defendant, Mr Ansell, was dismissed for (alleged) misconduct as managing director of the plaintiff company. His counterclaim for wrongful dismissal failed on the basis that he had been justifiably dismissed for misconduct, although the misconduct cited by the company when dismissing him was not made out at trial, because (unknown to the company at the time of dismissal) he had taken a personal commission from shipbuilders on their contract with the company concluded by him on its behalf. The company, though it knew this not when it dismissed Mr Ansell, had a good ground for his summary dismissal then. That sufficed to defeat the claim for damages for wrongful dismissal.

92. In *Yeoman Credit Ltd v Waragowski* [1961] 1 WLR 1124, the defendant paid the initial deposit for and took delivery on hire-purchase terms of a van. He then paid none of the monthly hire-purchase instalments. The plaintiff terminated, took possession of the van and sued for hire-purchase arrears and damages. Loss of bargain damages were awarded and upheld by the Court of Appeal. The basis of the decision was that there was not a mere failure of an obligation to pay money but a

wholesale failure by the defendant to perform his contract. Plainly, the plaintiff had terminated for breach and clause 7 of the hire-purchase contract, as to remedies, obliged the defendant *inter alia* to pay damages for breach where the plaintiff terminated the hiring.

93. In *Financings Ltd v Baldock* [1963] 2 QB 104, another hire-purchase case with similar contract terms to those in *Yeoman Credit*, the plaintiff exercised a contractual right to terminate the hiring and take possession of the vehicle when the defendant failed to pay the first two monthly instalments. The Court of Appeal held that there was no repudiatory breach, so that loss of bargain damages were not available at common law. To the extent that the express term as to remedies upon termination purported, in effect, to impose a liability for such damages where termination followed a non-repudiatory breach, it was penal and could not be enforced. (See also, to the same effect, *United Dominions Trust (Commercial) Ltd v Ennis* [1968] 1 QB 54.)

94. *Financings Ltd v Baldock* was distinguished in *Lombard North Central plc v Butterworth* [1987] 1 QB 527. That case concerned the five-year lease of a computer with an initial payment and quarterly rental payments thereafter. An express term of the lease agreement provided that punctual payment of each quarterly rental was of the essence of the contract. The first two rentals were paid promptly but the next three were late. The plaintiff terminated, re-took possession of the computer and recovered, in effect, loss of bargain damages under an express clause as to remedies upon termination. Absent the time of the essence clause, there would have been no repudiatory breach. Given that clause, however, there had been repudiatory breaches. The plaintiff had terminated for breach. Loss of bargain damages would therefore have been recoverable and so the contractual remedies clause was not penal. As Mr Wolfson QC submitted, it seems from the facts set out by Mustill LJ at 533C-H that the plaintiff's termination letter expressly justified termination by reference to the express terms of the lease. The Court of Appeal would appear to have assumed that that letter enabled the plaintiff to recover loss of bargain damages for repudiatory breach at common law had it so chosen, but no point to the contrary seems to have been taken.

95. Moving to more recent decisions, the first is the decision of David Donaldson QC, sitting as a deputy judge of the High Court, in *And So To Bed Ltd v Dixon* [2001] FSR 47. The defendants, Mr and Mrs Dixon, were franchisees of an 'And So To Bed' shop in Harrogate. Their franchise was terminated by the claimant. The termination was expressed to be effected under clause 13 of the franchise agreement which entitled the claimant summarily to terminate the agreement for breach unless rectified within 14 days of notification or for failure to pay franchise licence fees, amongst other grounds. The claimant sued for loss of bargain damages consequent upon its termination, alleging that the agreement had been repudiated by the defendants. That claim was upheld, on the basis that (a) one of the three breaches of contract cited in the termination letter was by nature repudiatory and (b) loss of bargain damages were therefore recoverable although termination was expressed to be under the express contractual term. At [35], Mr Donaldson QC stated, *obiter*, that on the *Boston Deep Sea Fishing* principle there was no reason why a termination letter should not be treated as an 'acceptance' of a repudiatory breach other than any such breach as was inherent in the factual basis on which the contractual power was stated to be

exercised. That view cannot stand with the decision in *Leofelis v Lonsdale*, considered below. Even upon his view of the law, Mr Donaldson QC was not sure the principle he stated could extend to "*cases of pure renunciation, that is to say words or acts which are not in themselves breaches [but] evince an intention not to continue with or to be bound by the contract*".

96. Shipbuilding comes next. In *Stocznia Gdanska SA v Latvian Shipping Co et al* [2001] 1 Lloyd's Rep 537, [2002] 2 Lloyd's Rep 436, the defendant contracted with the claimant shipyard for six reefer vessels. Having paid an initial 5% instalment, in a declining market the defendant was in difficulty funding further payments. It indicated during Q4 1993 that it could no longer perform, thereby renouncing all six contracts. Between December 1993 and June 1994, the claimant issued keel laying notices, one for each contract, then in each case when the keel laying price instalment was not paid, the claimant served notice terminating the contract and referring to express provision, clause 5.05. The termination notices came between early March and mid July 1994.

97. Thomas J awarded loss of bargain damages to the claimant. That decision was upheld by the Court of Appeal on the basis, for the first two contracts, that failure to pay the keel laying instalment within 21 days of its due date, entitling the claimant to terminate under clause 5.05, was a breach of condition. The claimant was therefore entitled to loss of bargain damages for repudiatory breach of the first two contracts upon the basis of its termination for breach. That was so even though clause 5.05 made particular, express provision for remedies in favour of the yard for the case where the vessel to be built for and sold to the defendant was completed and sold to another, that supplemented the claimant's entitlement at common law.

98. For the other contracts, however, the claimant's keel laying notices had been invalid so that termination was not justified by clause 5.05. Since (a) no particular form or formality is required for an 'acceptance of repudiation', (b) a party terminating can rely on grounds other than those he gives at the time (*Boston Deep Sea Fishing* again) and (c) the termination letters unequivocally stated that the contracts were at an end, Thomas J held that those letters operated to 'accept' the defendant's renunciation of the 3rd to 6th contracts. On appeal, the Court of Appeal rejected an argument that the keel laying notices were affirmations following which it was not open to the claimant to terminate the contracts for the defendant's prior renunciation. The Court of Appeal held that the (purported) use of a contractual mechanism for determination was not in that case inconsistent with reliance on the prior renunciation to discharge the contract. They also held in any event that the judge had been correct to find the defendant guilty of continuing renunciation after the allegedly affirmatory conduct. Thomas J's ruling that the termination letters did in fact operate to discharge the contracts for the defendant's renunciation despite citing clause 5.05 was not challenged on appeal. It is not clear to me whether, on its terms (which are not set out in the reported judgments), the termination notice Thomas J was considering could be read as purporting to exercise a right of termination at common law for repudiation despite its reliance upon clause 5.05 (as was the case, for example, in *Force India Formula One Team Ltd v Etihad Airways PJSC et al.* [2010] EWCA Civ 1051). If it could not be so interpreted, then, like Mr Donaldson QC's *obiter* view in *And So To Bed Ltd*, I do not see how Thomas J's decision could now stand with *Leofelis v Lonsdale*.

99. *Stocznia v Latvian Shipping* was considered in another shipbuilding case, *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2008] EWHC 944 (Comm), [2008] 2 Lloyd's Rep 202, [2009] EWCA Civ 75, [2010] QB 27. In that case, concerning three shipbuilding contracts for bulk carriers, the defendant terminated each contract expressly pursuant to an express term, Article 10.1, following and on the basis of the shipyard's failure to deliver the promised ship. The shipyard contended that termination had been solely under those contractual provisions and not for repudiation at common law. Sir Brian Neill, as sole arbitrator, awarded loss of bargain damages at common law on the basis of repudiatory breach.

100. Burton J allowed the shipyard's appeal. The arbitration award treated the question as one of affirmation: the invocation of Article 10.1 to terminate the contracts did not affirm the contracts; therefore loss of bargain damages were available. The judge disagreed. In his view, the buyer had not only used a contractual mechanism for the termination, but had made a claim under and pursuant to its contractual termination that was inconsistent with its rights in respect of an accepted repudiation at common law, namely a claim upon a refund guarantee that responded only to a termination of the shipbuilding contracts pursuant to their terms.

101. The Court of Appeal allowed an appeal by the buyer. The argument for the shipyard on 'acceptance' of repudiation was that the buyer "*did not elect to treat any of the contracts as repudiated in accordance with the general law, but chose instead to exercise the rights of termination given by the contract itself*" (*per* Moore-Bick LJ at [17]). In the event, however, that argument did not matter (see at [43]), because the Court of Appeal decided that upon the proper construction of the shipbuilding contracts, the buyer was entitled to all the relief awarded in arbitration upon a termination under Article 10.1. As to the merits of the argument, they said, *obiter*, that although the buyer was correct to say the termination letters purported to terminate under Article 10.1 and not under the general law, each made it clear that the contract was treated as discharged and that was sufficient for an 'acceptance' of the shipyard's repudiation. In the Court of Appeal's view, no election between terminating under Article 10.1 and terminating under the general law was required, because (contrary to the view of Burton J) the contract and the general law did not provide the buyer with alternative rights with different consequences. (See at [44]-[45].)

102. Whilst Burton J and the Court of Appeal, *obiter*, differed as to its application on the facts, both relied on and applied the *obiter* analysis of Christopher Clarke J (as he was then) in *Dalkia Utilities Services plc v Celtech International Ltd* [2006] EWHC 63 (Comm), [2006] 1 Lloyd's Rep 599. That case concerned a large paper mill. The claimant contracted with the defendant to provide electricity and steam by means of an energy plant taking gas from the main gas supply and converting it into electricity and steam for use by the mill. The claimant exercised an express contractual right of termination under clause 14.4 of the contract triggered by breach of certain payment obligations. It pursued an alternative claim for damages for repudiation. That claim failed, the judge concluding at [134] that there was neither repudiatory breach nor renunciation. He concluded, *obiter*, that the alternative claim would have been unsustainable anyway as the termination letter squarely, and solely, founded termination upon clause 14.4. That was because (see [143]-[144]):

i) Had there been repudiation, the case would have been one where the same conduct gave rise both to a contractual right to terminate and a common law entitlement to treat the contract as discharged for breach.

ii) For such a case, (a) the innocent party may exercise either its contractual or its common-law right of termination, (b) *prima facie* it may exercise both, (c) citing only the contractual basis for termination is not necessarily inconsistent with treating the termination notice as discharging the contract for breach at common law, but (d) there will be such inconsistency if, in context, citing only the contractual basis for termination in a termination notice shows the innocent party to have intended by it to rely only on its contractual right and not on the common law.

iii) On the facts, there was such an inconsistency because there were markedly different consequences arising upon termination, not just requiring an election between remedies at trial, if termination were under clause 14.4 rather than at common law.

103. In *Shell Egypt West Manzala GMBH et al. v Dana Gas Egypt Ltd (formerly Centurion Petroleum Corporation)* [2010] EWHC 465 (Comm), Tomlinson J (as he was then) determined an appeal from an arbitration award. Clause 3.1.8 of the LNG Co-Operation Agreement at issue gave Shell a right to terminate the contract on 30 days' notice if the Closing Date had not occurred by a stated deadline. The arbitrators held that Shell had exercised that contractual right by a letter dated 22 December 2006. They therefore dismissed Shell's claim for loss of bargain damages although they had found that at the time of Shell's termination letter, Centurion was guilty of both (i) renunciation (in my terminology – see at [16] for the gist of the arbitrators' finding) and (ii) a breach of warranty giving Shell a right to terminate under clause 5.2(b) of the contract.

104. The analysis was complicated by the fact that Shell's termination letter cited clause 3.1.9 rather than clause 3.1.8 as the basis for termination. But clause 3.1.9 did not grant a right of termination, it merely varied some of the consequences of a termination under clause 3.1.8 if the Closing Date deadline had been missed because of a failure to meet a specified condition precedent. In particular, for that case, clause 3.1.9 obliged Centurion to make repayments of amounts paid by Shell under clause 3.1.1, whereas by clause 3.1.8(b) Centurion generally had no such liability following a clause 3.1.8 termination. That complication was itself further complicated because on the facts clause 3.1.9 had not applied.

105. The question was whether the termination letter could properly be regarded as Shell's 'acceptance' of Centurion's renunciation as terminating the contract. Because of the complication of the reference to clause 3.1.9 in the letter, that question raised two issues: firstly, whether properly construed the termination letter purported to effect only a contractual termination under clause 3.1.8; secondly, whether, if so, the loss of bargain damages claim failed. On the first issue – which is the only point actually decided – the judge concluded at [35]-[36] that the arbitrators had been correct to construe the termination letter as purporting to terminate solely under clause 3.1.8. Shell's contrary argument, rejected by the judge, was that the error on the face of the letter as to the applicability of clause 3.1.9 meant it could not be read as an unequivocal communication of an intention to terminate under clause 3.1.8. The

second issue was conceded by Shell, although at [31(ii)] Tomlinson J indicated that he thought the concession was rightly made, and I shall come back to that.

106. *Leofelis SA et al. v Lonsdale Sports Ltd et al.* [2012] EWHC 485 (Ch), [2012] EWCA Civ 985 involved a summary judgment application, as does the present case. The facts and procedural history are complex, but what matters for my purposes is only this: Leofelis had purported to terminate the subject licence agreement on the basis that Lonsdale was in repudiatory breach because of an injunction obtained from the German courts; that was a bad termination; but there was a real prospect that at a trial Leofelis might establish a different repudiatory breach by Lonsdale which would have justified its termination but of which it had been unaware when purporting to terminate. Under *Boston Deep Sea Fishing*, that would give Leofelis a good defence to any claim by Lonsdale for loss of bargain damages relying on Leofelis' wrongful purported termination as a renunciation. But could it give Leofelis a good cause of action for loss of bargain damages flowing from termination?

107. Roth J held that it could not ([2012] EWHC 485 (Ch) at [61], [62]-[68]). Leofelis had terminated the contract ignorant of, and therefore irrespective of, any repudiatory breach it might now establish at trial. That defeated any loss of bargain claim founded upon that repudiatory breach even if Leofelis would have terminated for that breach had it known of it. (Of the actual termination of the contract, strictly speaking I think it more accurate to say that Leofelis brought about termination. Leofelis' purported termination founded upon the German injunction was ineffective, since it was wrongful and was not accepted by Lonsdale as a renunciation. But Leofelis treated its termination as effective and stopped performing. That in turn led to a valid termination after notice by Lonsdale.)

108. With respect, that seems to me correct in principle. The hypothetical, namely what Leofelis might have done had it not stopped performing as it actually did so as to bring about termination, would be central to the claim *by Lonsdale* for loss of bargain damages. Leofelis would say that (actual) termination did not deprive Lonsdale of valuable rights, since Lonsdale was itself guilty of the repudiatory breach of which Leofelis was ignorant at the time, for which Leofelis could have terminated. But the loss of bargain claim *by Leofelis* could not be founded upon hypothetical facts.

109. Leofelis appealed. Lloyd LJ, with whom Lewison LJ agreed, approved Roth J's decision and reasoning, so far as it went ([2012] EWCA Civ 985 at [17]-[21], [27]-[28]). However, Leofelis developed a new argument on appeal, namely that the German injunction that triggered its repudiation of the agreement was in turn caused by the breach by Lonsdale that on the summary judgment application it was being assumed might be established at trial. Thus, so the new argument went, that breach might ultimately be held to have caused the demise of the contract after all, so loss flowing from the termination of the contract could be recovered as damages for that breach. Lloyd LJ concluded that it would not be right to dismiss the appeal before Leofelis had reflected the new argument properly in a draft amended statement of case by reference to which its viability could be scrutinised further. Pill LJ concurred in that result, although as I read what he said at [46] he may have been content to treat what had been said in argument on the new point as a sufficient basis for a possibly viable claim to allow the summary judgment appeal without waiting for an amended pleading.

110. Lloyd LJ also rejected a further new argument for Leofelis, and on this point Pill LJ agreed without qualification. This yet further argument, if sound, would have required the appeal to be allowed without more ado; its rejection is therefore part of the *ratio* of the case in the Court of Appeal. The argument asserted that the loss of bargain damages claim was necessarily sound, if at trial any repudiatory breach by Lonsdale were proved, because Leofelis had purported to terminate for breach; it was irrelevant that the sole alleged breach identified as the ground for termination was not in fact a breach. That was rejected because, *per* Lloyd LJ at [33], the law did not allow the innocent party to assert, so as to found a loss of bargain claim, that it did terminate upon the lawful basis that *ex hypothesi* had not in fact been relied on at the time; *per* Pill LJ at [44], "*If the premature determination of the contract is for reasons other than those that subsequently emerge, a claim for post-termination loss cannot be sustained*".

111. I turn next to *Cavenagh v William Evans Ltd* [2012] EWCA Civ 697, [2013] 1 WLR 238. It was decided by the Court of Appeal after the first instance decision in *Leofelis*, but Roth J's judgment was not cited; in turn, *Cavenagh* does not appear to have been cited to the Court of Appeal in *Leofelis*.

112. In *Cavenagh*, the claimant managing director's contract was terminated under a term of the contract entitling the company to terminate with immediate effect (i.e. without any notice period), irrespective of any breach by the claimant, with a consequent liability to make a payment in lieu of notice. The termination letter stated that it followed a decision that the role of managing director was no longer viable for the company – in short, the claimant was redundant. In the county court, the claimant's claim for the payment in lieu was dismissed on the ground that, unknown to the company at the time, it could when terminating have dismissed the claimant for gross misconduct. The Court of Appeal allowed the claimant's appeal. This was not a claim for damages for wrongful dismissal that could be defended under *Boston Deep Sea Fishing* by reference to the gross misconduct subsequently discovered. That the claimant could have been dismissed for misconduct was not capable of re-characterising as such a dismissal that which had actually happened, which was something different, namely a lawful termination under an express right of termination unrelated to any possible misconduct. That the company chose so to terminate in ignorance of any misconduct did not alter the purport and therefore the effect of the termination letter. The purport and effect of the termination letter was that it lawfully terminated the claimant's contract under the express contractual term; the consequences of such a termination therefore applied, although they were different to the consequences of a dismissal for misconduct which the company would have been entitled to effect at the time.

113. That leaves *Newland Shipping and Forwarding Ltd v Toba Trading FZC* [2014] EWHC 661 (Comm). Clause 7 of a contract for the sale of 5,000 m.t. of ULSD to be delivered in several lots required payment for each lot within two days of pricing against seller's invoice, railway bill and customs declaration, and gave a right to cancel for a failure to pay for more than five days, expressed to carry with it a right to sell the cargo to other customers and an obligation on the buyer to compensate the seller for all losses and demurrage connected with the failure to pay. Clause 12 excluded all damages liabilities not provided for expressly by the contract. The claimant seller claimed to have exercised its right under clause 7 to cancel on 8 April

2011, and sued for losses thereunder, following a failure to pay for more than five days after a payment had fallen due on 25 March 2011. The defendant buyer argued that the seller had not exercised its clause 7 cancellation right because (so the buyer contended) the cancellation notice sent by the seller instead purported to terminate at common law for repudiatory breach.

114. In deciding that issue, Leggatt J referred principally to *Dalkia* and *Stocznia v Gearbulk*. He held at [56]-[57] that (in my use of terminology) (i) there was no repudiatory breach – the contractual right of cancellation for failure to pay within five days did not make such a failure a repudiatory breach – but (ii) there was a renunciation by the buyer. Thus (see [58]), on 8 April 2011, when cancelling, the seller had (i) a contractual right to cancel founded upon a non-repudiatory breach, and giving rise to consequences different from those of a termination for repudiation at common law, and (ii) a common law right to terminate for anticipatory breach. Considering the seller's cancellation notice on its terms, Leggatt J held at [62]-[66] that it was properly to be interpreted as (purporting to) cancel or terminate both under clause 7 and in exercise of the seller's common law rights. The differences in the consequences of a clause 7 cancellation and a common law termination were not such as to make it impossible to effect both. Therefore, there had been an effective cancellation and termination and the terms of the cancellation notice did not preclude the recovery under clause 7 pursued by the seller. Leggatt J expressed the view, *obiter*, at [67] that if clause 7 cancellation and common law termination could not occur together, then since the seller's notice had purported to exercise both rights it would have been effective to exercise neither.

115. Thus, *Newland Shipping* is a case in which the basis upon which liability was pursued was one of the bases upon which the contract was in fact brought to an end. It decides nothing for a case such as the present, where it is said that the contract was brought to an end upon a sole basis other than that upon which EE now claims.

Decisive Analysis

116. The key question emerging from my initial analysis at paragraphs 72 to 76 above was whether it is necessary, for the common law claim for damages for loss of bargain made here, that EE terminated for breach (actual or anticipatory) by Phones 4U. If that is what EE had to do and communicate to Phones 4U that it was doing, then Phones 4U's summary judgment argument arises, saying that the termination letter just did not satisfy that requirement.

117. As a matter of first principle, following that initial analysis, I would say that is indeed what EE must show. The loss of bargain damages claim requires EE to show that the termination of the contract, which created the loss of bargain, resulted from the repudiatory breach or renunciation by Phones 4U that it is presently to be assumed EE might prove at trial. That in turn requires EE to show that the contract was terminated by its exercise of its common law right to terminate for that breach, respectively that renunciation. (No allegation is made, akin to that made in *Leofelis v Lonsdale* on appeal, that the termination resulted in any event from (the facts constituting) the alleged repudiation.) If, as Phones 4U says, EE's termination letter communicated only a termination under clause 14.1.2 independent of the repudiatory breach or renunciation now alleged, then the contract was not terminated at common law for

repudiation. That it could have been so terminated (if EE makes good its allegation of repudiation) cannot be used to re-characterise the facts.

118. None of the authorities is a precise precedent for the situation in this case. The closest cases are *Cavenagh* and *Shell Egypt*. *Cavenagh* is not a precedent for exactly this case, because there was no loss of bargain claim there by the employer; however, the basis upon which the Court of Appeal decided the case would rule out any such claim. The dismissal of the arbitration appeal in *Shell Egypt* would have been a decision directly in point, albeit at first instance so not binding on me, but for the concession I referred to in paragraph 105 above. I said I would come back to Tomlinson J's view that the concession was rightly made, and I do so now.

119. That view, expressed in terms at [31(ii)], was built upon the starting point expressed at [31(i)], namely that Shell had to show "*that their Termination Letter did not communicate a clear intention to terminate contractually under Clause 3.1.8 rather than to terminate for repudiatory breach*". Mr Wolfson QC criticised that, arguing that the correct starting point was the presumption against giving up valuable rights (see *Gilbert-Ash*) and that there had been numerous cases where failure to refer to the common law right of termination had not defeated a common law loss of bargain damages claim. To my mind, those criticisms are misplaced. *Shell Egypt* was an arbitration appeal where arbitrators had held that the termination letter did not communicate a decision to terminate for repudiatory breach but rather communicated solely a decision to terminate under clause 3.1.8. Tomlinson J's particular formulation of what Shell had to show was apt for a case in which they had to persuade the court that in so holding the arbitrators had erred in law. Further, as my review of the cases has found, none is a decision contrary to that of the arbitrators upheld by Tomlinson J.

120. The principle as formulated by Tomlinson J also, and this is its importance for the present case, takes it as a given that a decision to terminate for the repudiatory breach later relied upon must in fact have been communicated. Hence, the critical question (*per* Tomlinson J at [32]) was whether Shell's termination letter unequivocally communicated (only) an election to terminate under clause 3.1.8, because if so, it could not "*also serve as effective to accept Centurion's repudiatory breach as terminating the contract*" (that being the proposition Tomlinson J saw as rightly conceded, see [31(ii)]).

121. Mr Wolfson QC argued that Tomlinson J was wrong to say, at [31(ii)], that resort by Shell to clause 3.1.8 was "*inconsistent*" with terminating for repudiatory breach at common law because (a) the clause was not triggered by breach and (b) it provided for Centurion to have no liability to repay amounts previously paid to it under clause 3.1.1. Tomlinson J said that to distinguish the case on its facts from *Stocznia v Latvian Shipping* and to relate it to the analysis in *Dalkia* at [144]. To my mind, none of that affects the correctness in principle of the proposition that if a termination letter communicates clearly a decision to terminate only under an express contractual right to terminate that has arisen irrespective of any breach, then it cannot be said that the contract was terminated for breach and so a claim for damages for loss of bargain at common law cannot run. The matters identified by Tomlinson J as 'inconsistencies' are not like the "*markedly different consequences*" of common law and contractual termination in *Dalkia*. Given the Court of Appeal's decision in *Stocznia v Gearbulk*, I can see room for the argument that if clause 3.1.8 had been triggered by (the facts

constituting) the very breach later complained of, (b) above might not have been a sufficient inconsistency of consequence to drive an interpretation of Shell's termination letter that it did not exercise the common law termination right but only the contractual right. But that, again, does not affect the soundness of the test taken by Tomlinson J to be correct.

122. *Shell Egypt* was also criticised by Liu [2011] LMCLQ 4, relied on by Mr Wolfson QC. Leaving aside the point actually decided by Tomlinson J (as to the purport of Shell's termination letter, on its proper construction), Liu's criticism of the judge's approach as a matter of principle seems to me to have depended on the proposition that it is sufficient, for the loss of bargain claim at common law, that the claimant should have communicated unequivocally that it treated the contract as discharged, whatever it might say as to why. There were *dicta* that could be read as supporting that proposition (e.g. *per* Rix LJ in *Stocznia v Latvian Shipping* at [32], *per* Moore-Bick LJ in *Stocznia v Gearbulk* at [44]-[45]). However, it has now been authoritatively rejected by *Leofelis v Lonsdale*. It remains true, as Liu emphasised, that 'acceptance' of a repudiation requires no particular formality or form of words (see *Vitol v Norelf*). But it must communicate a decision to terminate for the repudiation later said to found the claim, in exercise of the common law right to terminate arising upon that repudiation, if a normal loss of bargain claim at common law is to be viable (i.e. leaving aside the inventive alternative claim suggested on appeal in *Leofelis v Lonsdale*). Otherwise, the claimant cannot say the termination and therefore its loss of bargain resulted from the repudiation sued upon.

123. I also disagree with Liu's suggestion that it was "*wholly unsatisfactory*" for Shell to have been "*deprived*" of loss of bargain damages where (a) Centurion had been guilty of repudiation and (b) the contract had in fact been terminated. Shell was not 'deprived' of anything. It was taken to have chosen to terminate under clause 3.1.8 alone, a decision carrying a different set of risks and rewards, as built into the contract by the parties, as against a decision to terminate at common law alleging repudiation. It is not unsatisfactory to hold Shell to that element of the bargain. The injustice imagined by Liu assumes a connection between (a) the repudiation and (b) the termination; but the arbitrators' decision, upheld by Tomlinson J, was that Shell had not made that necessary connection.

124. The present case does not concern a (purported) termination of a contract where no basis for terminating is communicated. Under *Boston Deep Sea Fishing*, the party purporting to terminate may defend a claim against it seeking damages for wrongful termination by showing that at the time of termination the other party was guilty of repudiation, whether or not then appreciated by the party terminating. It is not necessary to determine whether a 'bare' termination is sufficient, or if not what more the party terminating must prove, to make good a claim for loss of bargain founded upon the repudiatory breach or renunciation that *ex hypothesi* the guilty party was not told at the time was the basis for it. Roth J and the Court of Appeal in *Leofelis v Lonsdale* refused to be distracted by considering the possible difficulties of such a case and I propose to follow suit. To be clear for completeness, though, a termination communication that does not expressly explain itself is not necessarily a 'bare' termination. In its context, it may convey clearly enough the basis upon which or reason for which the party treating itself as discharged is doing so (see, to illustrate

that point, the example given in *Vitol v Norelf* and cited by *Chitty on Contracts*, 32nd Ed., at para.24-013).

125. This case also does not concern a termination of a contract expressed to be for a repudiatory breach or renunciation that existed and gave rise to a contractual right of termination where only the contractual right is cited as justifying the termination. For such a case, two different issues arise: firstly, whether on the proper construction of the relevant contract, the innocent party only had the contractual right, i.e. whether its common law right was excluded or replaced, not merely supplemented; if not, then, secondly, whether the express reliance on the contractual right of termination defeats a common law claim for loss of bargain damages founded upon the conduct cited by the innocent party when terminating.

126. In such a case, if the innocent party succeeds on the first issue, then it has expressly terminated upon the basis of the very repudiation upon which it subsequently founds its cause of action. It can therefore say that the termination resulted from that repudiation; nothing more is required *prima facie* to found the common law loss of bargain damages claim. Reliance on a contractual right of termination when terminating in such a case is not inherently inconsistent with the subsequent pursuit of that claim. For this type of case, in general I agree with the analysis in *Dalkia* at [143]-[144]. That analysis does not bind me, and was in any event *obiter*. However, it was treated as correct by Burton J and the Court of Appeal (*obiter*) in *Stocznia v Gearbulk*, which was in turn relied on by the Court of Appeal in *Cavenagh*; and Tomlinson J agreed with it in *Shell Egypt* at [31(iii)] (even if, strictly, I think he was wrong to describe it as authoritative). I would therefore be most reluctant to differ from the analysis in *Dalkia* if I disagreed with it. As it is, I agree with it.

127. In expressing that agreement, I emphasise the careful precision of Christopher Clarke J's language in *Dalkia* at [144]. The common law claim would not be viable, he said, if the terms by which the innocent party terminated showed, in context, "*that [it] was not intending to accept the repudiation and was only relying on the contractual clause*". That is required, given that *ex hypothesi* there has been a termination expressly upon the basis of the relevant conduct, if the innocent party is to fail in its assertion that the repudiatory breach or renunciation constituted by that conduct resulted in its loss of bargain. There was a focus in *Dalkia* on consequences of termination, not because they are the test, but because there were in that case such "*diametrically opposing consequences*" flowing from termination under clause 14.4, as against termination at common law, as to require the termination letter to be read as communicating that the contract was not being terminated at common law (those consequences being relevant because they were an integral part of the contractual context in which the letter fell to be construed).

128. Thus understood, the *Dalkia* analysis is important for the present case. It says the common law claim for damages for loss of bargain can fail because the termination communication conveys that the contract was not terminated in exercise of a common law right founded upon repudiation, even where the very conduct later sued upon as a repudiation at common law was cited as the factual basis for the termination. That is only coherent if the common law loss of bargain claim indeed requires the claimant to show that it in fact terminated the contract in exercise of the common law right sued upon.

129. Finally, as to what this case is not, it is not a case of a purported termination alleging repudiation A that cannot be made out but where different repudiation B existed at the time, *ex hypothesi* not relied on by the innocent party when purporting to terminate. In such a case, the innocent party has no liability for wrongful termination because it could have terminated lawfully for repudiation B (see *Boston Deep Sea Fishing*). But that does not allow the innocent party to say it did terminate for repudiation B when the plain fact is it did not; so it cannot sue for loss of bargain damages resulting from repudiation B (see *Leofelis v Lonsdale*). There may be an exception to that if there is a causal connection such that what in fact constituted repudiation B resulted in the termination of the contract, even though its immediate cause was the innocent party's own repudiation by claiming to terminate upon the basis of its unsound allegation of repudiation A (*ibid*).

130. It seems to me the present case is, if anything, a weaker case for the loss of bargain claim than the precedent now set by *Leofelis v Lonsdale*. In the type of case for which *Leofelis v Lonsdale* is the precedent, the innocent party can say that it did (purport to) terminate for repudiation at common law, albeit with unsound particulars of the repudiation. In the present case, as in *Shell Egypt* and *Cavenagh*, EE cannot even say that. It expressly, and lawfully, terminated in exercise of a contractual right that arose independently of the repudiation now alleged. Leofelis could not say it had in fact terminated for the repudiatory breach it might establish at a trial; therefore its loss of bargain damages claim was unsound and was rightly dismissed summarily by Roth J, only saved on appeal by the possibility that it might have a viable case on the facts to the effect that the repudiatory breach nonetheless caused the actual termination. *A fortiori*, as it seems to me, EE cannot say it terminated for the repudiation it now wishes to try to prove at trial; therefore its loss of bargain damages claim is unsound. EE has not alleged any causal connection of the sort that rescued Leofelis in the Court of Appeal; as I noted at the outset, Mr Wolfson QC accepted that the issue in this case was one of the construction of EE's termination letter only.

131. Absent any causation plea such as was considered in *Leofelis v Lonsdale*, I agree with Mr Wolfson QC that the issue is one of the construction of EE's termination letter. Upon the analysis I have set out above, the relevant issue of construction is whether by its termination letter EE purported to exercise a common law right to terminate for the repudiatory breach and/or renunciation now alleged. EE requires an affirmative answer. The mere existence of such a right at common law at the time of termination would *prima facie* suffice to defeat a claim by Phones 4U, if one were made, for damages for wrongful termination. But that does not mean any such right was in fact exercised.

132. I find EE's termination letter as sent entirely clear (see paragraphs 8 and 80 above). It communicated unequivocally that EE was terminating in exercise of, and only of, its right to do so under clause 14.1.2, a right independent of any breach. Phones 4U was not accused of breach. EE made clear it was not to be taken as waiving any breach that might exist, any rights in respect of which were reserved. But a right merely reserved is a right not exercised. EE can still sue upon any breach of contract committed by Phones 4U prior to termination. For any such breach, it may pursue all remedies that may be available to it bearing in mind that the contract was terminated under clause 14.1.2 and not for breach. But what EE cannot do is re-characterise the events after the fact and claim that it terminated for breach when that is simply not

what it did. Nor can it say that it treated Phones 4U's renunciation (as now alleged) as bringing the contract to an end when that, again, is just not what actually happened.

Conclusion

133. For all those reasons, in my judgment EE has no real prospect of success on its primary counterclaim, even were it to amend as proposed. There is no other compelling reason why that claim should be allowed to proceed to a trial despite its lack of prospects. Indeed, to the contrary, the fact that EE's claim will fail upon the short point of the effect in law of its termination letter renders it highly undesirable to allow a trial of all the other disputed issues to which it gives rise. In the circumstances, there should be summary judgment dismissing that claim, as sought by Phones 4U, and I shall refuse permission for EE to amend.