RE-EXAMINING THE RELATIONSHIP BETWEEN MUTUAL PROMISES IN CONTRACT LAW

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The question as to whether contractual promises are dependent, interdependent or independent, and their role in determining a promisee's right to withhold performance in response to a non-performing promisor, has received remarkably limited treatment in the Australian and English contract law corpus. Commentators typically provide little by way of an overarching framework for reconciling the numerous modern judgments addressing this question. This lacuna is the consequence of a perception that the jurisprudence concerning the relationship of promises is now otiose, having been usurped by the modern doctrine of termination. This article attempts to systematise the jurisprudence and demonstrate its continuing practical relevance. The analysis suggests that this jurisprudence cannot be dismissed as merely an unruly aberration. It is a robust doctrine in its own right, whose normative bases share much in common with better-recognised doctrines of contract law.

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I Introduction

One of the common responses of a contracting party ('Party X') to an allegation of contractual breach is that their counterparty ('Party Y') is also in breach, and therefore should not complain. Such a response has intuitive ethical appeal. Yet, Australian and English courts appear to ignore such protestations — Party X can terminate the contract but cannot rely on Party Y's breach to avoid performing its obligations. As Higgins J stated: 'A door must be either open or shut; a contract must either subsist or be at an end.'[1]

[1] *Bowes v Chaleyer* (1923) 32 CLR 159, 190. The English common law position is similar: *Fercometal SARL v Mediterranean Shipping Co SA* [1989] 1 AC 788, 805 (Lord Ackner). Both authorities, and the conventional view, are outlined in Andrew Tettenborn, '"I'll Perform if and When You Do": Non-Performance and the Suspension of Contractual Duties' in Kit Barker,

The dogmatism with which this view is expressed is beguiling. In truth, English and Australian courts have long recognised a doctrine of 'dependent' promises, alternatively referred to as conditions precedent (together, the 'Dependency Doctrine'), according to which a promisor's non-performance of an obligation ('Obligation Y') will relieve the promisee of a duty to perform its obligation ('Obligation X') if Obligation X is 'dependent' on Obligation Y. The promisee can therefore effectively suspend performance of Obligation X until the promisor performs Obligation Y, while keeping the contract afoot.[2]

Not each of the promisor's obligations will confer a practical right of suspension on the promisee in response to a promisor's breach. Since the 16th century, English (and subsequently Australian) courts have struggled to articulate a framework for determining when such a relationship exists.[3] Further, since the 19th century, judicial reliance on the Dependency Doctrine has declined as the (now-familiar) doctrine permitting termination inter alia for breach of a 'condition' has grown in prominence.[4] Today, the Dependency Doctrine is sporadically invoked by English and Australian courts. When it is, the combination of conflicting case law and modern disuse produces superficially disparate results. The modern uncertainty about the Dependency Doctrine was recently exposed when the New South Wales Court of Appeal, in *Kay v Playup Australia Pty Ltd* ('*Kay*'), appeared to diverge from a leading commentator on the use of presumptions when applying the Dependency Doctrine.[5]

This article systematises the Dependency Doctrine authorities, focusing on those that have emerged since the right to terminate was established and, on some accounts, swept the Dependency Doctrine aside.[6] This account is both internal and external.[7] It is internal because it tracks trends in the cases, and is

Karen Fairweather and Ross Grantham (eds), *Private Law in the 21st Century* (Hart Publishing, 2017) 325, 329–30.

2 See Tettenborn (n 1) 336–9.

3 This article is not a detailed historical account of the Dependency Doctrine. This has been done elsewhere: see especially SJ Stoljar, 'Dependent and Independent Promises: A Study in the History of Contract' (1957) 2(2) *Sydney Law Review* 217 ('Dependent and Independent Promises'); JW Carter and C Hodgekiss, 'Conditions and Warranties: Forebears and Descendants' (1977) 8(1) *Sydney Law Review* 31.

4 As explored further in Part II(B) below, a condition is a particular class of contractual term identified, broadly, by reference to its importance to the contractual scheme.

5 (2020) 19 BPR 40037, 40051 [65]–[66] (Brereton JA, Macfarlan JA agreeing at 40039 [1], Simpson AJA agreeing at 40068 [132]) ('*Kay*'), quoting JW Carter, LexisNexis, *Carter on Contract*, vol 2 (at Service 37) [29-040].

6 As set out below in Part II(B), this appears to have occurred in the mid-19th century.

7 For a useful explanation of the distinction between internal and external perspectives of private law, see Andrew S Gold and Henry E Smith, 'Sizing Up Private Law' (2020) 70(4) *University of Toronto Law Journal* 489, 489–90.

sensitive to the Dependency Doctrine's historical origins. However, the persistence of the Dependency Doctrine in the face of the expansion of the law of termination requires a functional account. Moreover, in the absence of secure precedent, an account of the Dependency Doctrine's structure requires an analysis of the norms it serves.

Part II provides an overview of the Dependency Doctrine and its intersection with the law of termination. To provide a satisfactory account of the Dependency Doctrine case law, Part III centres attention on the values served by the Dependency Doctrine, namely, freedom of contract, the utility in providing security to transacting parties, advancing relational contracting norms, and constraining opportunism. The article then outlines the architecture of the Dependency Doctrine in four stages. As discussed in Part IV, modern English and Australian courts have described the Dependency Doctrine as a manifestation of freedom of contract and, therefore, no more than the parties' objectively ascertainable will. However, this explanation alone is insufficient to account for the pattern of the cases. As explained in Part V, the Dependency Doctrine was first developed through early cases establishing dependent promises in the context of sale contracts involving simultaneous exchange, and further applied with modification to particular contracts involving non-simultaneous exchange, namely, employment and construction agreements. In these cases, which have become archetypes of dependent obligations, courts were not enforcing the language of the parties, but pursuing a commitment to securing the promisee's performance interest while mitigating the risk of the promisor opportunistically withholding counter-performance.[8] Part VI documents how the courts have extended the Dependency Doctrine beyond these relatively secure foundations to identify further categories of dependent promises arising either because of their connection to the core promises of the contract or because of the need to preserve the contractual order of performance. Part VII explains the final stage, in which courts that would, on the foregoing principles, classify promises as dependent have resisted doing so because of the risk that this would incentivise opportunism by promisees.

II The Modern Dependency Doctrine: An Overview

A *The Dependency Doctrine's Categories*

The question posed by the Dependency Doctrine, completely expressed, is whether the defaulting promisor may enforce the contractual obligation of the

[8] See below Part V(B)(1).

promisee.[9] To answer this question, the Dependency Doctrine carves the promisee's obligations into two primary categories: dependent obligations and independent obligations.[10] If the promisee's promise is dependent on the promisor's performance, the promisor may not enforce it until the promisor tenders performance.[11] A promisee's obligation may not be dependent on all of the promisor's obligations. Accordingly, a promisee seeking relief from performing a particular obligation must establish that obligation's 'dependence' on the promisor's unperformed obligation.[12] Contrastingly, if a promise is an independent obligation, the promisee's obligation to perform it is unconditional.[13] Consequently, a promisor may enforce the promisee's independent obligations irrespective of its own non-performance. In this case, a promisee's only remedy for the promisor's breach will typically be damages or, exceptionally, specific performance.[14]

There is a further category of promises recognised by the Dependency Doctrine: interdependent obligations.[15] Obligations are interdependent where the performance of each party is dependent on the other party's *readiness*, *willingness and ability* to perform.[16] The utility of this third category of promises is discussed in Part V(A).

B *Comparing the Dependency Doctrine to the Conditions–Warranties Distinction*

The Dependency Doctrine's categories can be contrasted with those of the doctrine regulating termination, which draws a distinction between conditions and warranties ('Conditions–Warranties Distinction'). Applying this doctrine, a promisor's breach of condition entitles the promisee to terminate the contract and claim damages.[17] Breach of warranty entitles the promisee to damages.[18]

[9] JW Carter, *Carter's Breach of Contract* (LexisNexis Butterworths, 2nd ed, 2018) 7 [1-08], 13–14 [1-18].

[10] A typology of dependent, interdependent and independent obligations is also set out in *Highfield Property Investments Pty Ltd v Commercial & Residential Developments (SA) Pty Ltd* [2012] SASC 165, [209]–[211] (Blue J) ('*Highfield*').

[11] Carter, *Carter's Breach of Contract* (n 9) 9 [1-13].

[12] Ibid 8 [1-11].

[13] Ibid 9 [1-13].

[14] See below nn 86, 107 and accompanying text.

[15] This term is used interchangeably with the term 'concurrent' obligations: *Highfield* (n 10) [211] (Blue J).

[16] See below n 155 and accompanying text. See also *Highfield* (n 10) [216] (Blue J).

[17] JW Carter, LexisNexis, *Carter on Contract* (online at 27 March 2020) [14-020].

[18] Ibid [14-040].

The courts have more recently developed a further category, 'innominate terms', breach of which entitles the promisee to terminate where breach is sufficiently serious.[19] Courts have propounded various tests for determining the appropriate classification of terms under this scheme, most of which centre on the importance of the relevant term to the contract as a whole.[20] The modern cases tend to classify terms as innominate terms, thus preserving the possibility of termination for breach of a non-essential term which nonetheless has dire consequences.[21]

Between the 16th century and the first half of the 19th century, the concept of termination for breach of condition was obscured by the Dependency Doctrine. Pleading rules in England and Wales directed courts' attention to the conditionality of any obligation the subject of a suit and, consequently, the Dependency Doctrine regulated the parties' performatory relations.[22] However, commencing in the mid-19th century, relaxation of the pleading rules diminished the importance of the Dependency Doctrine at the same time as termination for breach of a condition was becoming mainstream.[23] The Conditions–Warranties Distinction's pre-eminence was established by the time of the United Kingdom's ('UK's') *Sale of Goods Act 1893*,[24] which adopted the then-existing

[19] Ibid [14-070].

[20] See ibid [34-080]. A commonly cited test in Australia is that a term will be a condition if

> it appears from the general nature of the contract considered as a whole, or from some particular term or terms, that the promise is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or a substantial performance of the promise, as the case may be, and that this ought to have been apparent to the promisor.

Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd (1938) 38 SR (NSW) 632, 641–2 (Jordan CJ) ('*Tramways*'), quoted in *Associated Newspapers Ltd v Bancks* (1951) 83 CLR 322, 337 (Dixon, Williams, Webb, Fullagar and Kitto JJ) ('*Associated Newspapers*').

[21] See Neil Andrews, 'Breach of Contract: A Plea for Clarity and Discipline' (2018) 134 (January) *Law Quarterly Review* 117, 129–31.

[22] Carter, *Carter's Breach of Contract* (n 9) 10 [1-14]; Tettenborn (n 1) 331–2; Stoljar, 'Dependent and Independent Promises' (n 3) 217.

[23] Carter, *Carter's Breach of Contract* (n 9) 10–11 [1-14], citing the reforms implemented by the *Common Law Procedure Act 1852*, 15 & 16 Vict, c 76 and the *Supreme Court of Judicature Act 1875*, 38 & 39 Vict, c 77. As to the mainstreaming of the concept of termination for breach of a condition, see Tettenborn (n 1) 332–3, citing *Behn v Burness* (1863) 3 B & S 751; 122 ER 281, 283 (Williams J) ('*Burness*').

[24] The distinction between conditions and warranties has a long lineage, with different accounts of its origins: see, eg, Carter, *Carter's Breach of Contract* (n 9) 14–16 [1-20]; Carter and Hodgekiss (n 3) 36–42; *Cehave NV v Bremer Handelsgesellschaft mbH (The Hansa Nord)* [1976] 1 QB 44, 57–60 (Lord Denning MR) ('*The Hansa Nord*').

categories of 'conditions' and 'warranties'[25] as alleged substitutes for the 'old term[s] … "dependent covenant[s]" … [and] "independent covenant[s]"'.[26]

English and Australian cases have since occasionally merged the Conditions–Warranties Distinction and the Dependency Doctrine.[27] This elision is understandable given their substantial overlap. When a contract is terminated for breach of a condition, the promisee need not perform any subsequent obligations to the promisor. Therefore, classification of a term as a 'condition' can result in a similar outcome to classification of a term as giving rise to 'dependent' obligations (alternatively, as being a 'condition precedent'). In both cases, breach by the promisor excuses counter-performance by the promisee. It may be of little consequence to either that, additionally, the contract is at an end.[28] Conversely, where the promisor breaches a warranty, the promisee's remedy is limited to damages, as would be the case if the promisor had breached a term that is independent of the promisee's obligations.[29]

Nonetheless, there remain practical differences between the Dependency Doctrine and the Conditions–Warranties Distinction. The first difference is a consequence of the former doctrine's focus on the conditionality of the promisee's obligations and the latter's focus on the status of the contract. The Dependency Doctrine assumes that a promisee's obligation will be 'dependent' on a promisor's performance only if the performance of the promisee's obligation was to occur after, or concurrently with, the promisor's performance. If a buyer and seller contract for the sale of goods on terms that the buyer will pay in advance of delivery, the buyer ordinarily cannot contend that its promise to pay is dependent on the seller's delivery.[30] However, a seller's failure to deliver may constitute a breach of a condition, entitling the buyer to terminate.[31] Secondly,

[25] *Sale of Goods Act 1893*, 56 & 57 Vict, c 71, s 11(1)(b).

[26] MD Chalmers, *The Sale of Goods Act, 1893* (William Clowes & Sons, 2nd ed, 1894) 24, quoted in Carter, *Carter's Breach of Contract* (n 9) 15 [1-20].

[27] See, eg, *Burness* (n 23) 283 (Williams J); *Bradford v Williams* (1872) LR 7 Ex 259, 261 (Martin B); *Keegan v Kiernan* (Supreme Court of New South Wales, Court of Appeal, Hutley, Glass and Mahoney JJA, 16 November 1981) 11–12 (Mahoney JA) ('*Keegan*').

[28] Tettenborn (n 1) 331–3.

[29] See Carter, *Carter on Contract* (n 17) [14-040].

[30] The exception to this rule is where the parties have specified that advance payment is conditional: HWR Wade, 'The Principle of Impossibility in Contract' (1940) 56 (October) *Law Quarterly Review* 519, 545 n 68.

[31] GH Treitel, '"Conditions" and "Conditions Precedent"' (1990) 106 (April) *Law Quarterly Review* 185, 188 ('Conditions').

termination results in the discharge of all of the promisee's unaccrued obligations and rights under the contract.[32] By contrast, a promisee can avoid performing its obligations that are dependent on the promisor's performance while retaining the benefit of the promisor's other obligations under the contract.[33] Thus, an employer need not terminate a contract to avoid liability for payment of an absent employee's wages. The employer may simply argue that its obligation to pay has not accrued.[34] Thirdly, whereas the Conditions–Warranties Distinction regulates the parties' rights of termination, the Dependency Doctrine has implications for the enforcement of a party's obligations after termination. Where a contract has been terminated, and a promisee's obligation is dependent on the promisor's performance of an obligation that has been discharged by termination, the promisee's obligation will generally not be enforceable after termination.[35] Conversely, if the promisee's obligation is independent, and accrued before termination, it will generally be enforceable after termination.[36] Fourthly, whereas termination requires the promisee's election, the promisee may avoid performing a dependent obligation on the premise that, until the promisor performs, the promisee's performance is not due.[37]

C *The Present State of Authorities Applying the Dependency Doctrine*

Today, English and Australian commentary and courts give significantly greater attention to the Conditions–Warranties Distinction than to the Dependency Doctrine. Some sources describe the Dependency Doctrine as a 'quaint … anachronism' rendered irrelevant by the Conditions–Warranties Distinction.[38]

The limited scholarly and judicial discussion of the Dependency Doctrine has left its contours under-determined. Traditionally, it is said that promises are

[32] See Carter, *Carter's Breach of Contract* (n 9) 12 [1-16].

[33] Jane Swanton, 'Discharge of Contracts for Breach' (1981) 13(1) *Melbourne University Law Review* 69, 77–8.

[34] Treitel, 'Conditions' (n 31) 192.

[35] See Carter, *Carter's Breach of Contract* (n 9) 12 [1-16].

[36] Ibid. See also *Richmond v Moore Stephens Adelaide Pty Ltd* [2015] SASCFC 147, [196] (Blue J, Stanley J agreeing at [279]) ('*Richmond*').

[37] Anthony Beck, 'The Doctrine of Substantial Performance: Conditions and Conditions Precedent' (1975) 38(4) *Modern Law Review* 413, 423; Edwin Peel, *Treitel: The Law of Contract* (Sweet & Maxwell, 15th ed, 2020) 981 [18-042].

[38] Tettenborn (n 1) 338, citing *Hurst v Bryk* [2002] 1 AC 185, 193 (Lord Millett) and *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, 67 (Diplock LJ) ('*Hongkong*'). John E Stannard and David Capper also treat the Dependency Doctrine as outmoded: John E Stannard and David Capper, *Termination for Breach of Contract* (Oxford University Press, 2014) 38 [2.14].

dependent if the promisee bargained for the promisor's *counter-performance*, whereas promises are independent if the promisee merely bargained for the promisor's *counter-promises*.[39] But this distinction provides no insight into how to ascertain whether a term is dependent, interdependent or independent.

Modern commentaries discussing the Dependency Doctrine describe certain archetypal examples of dependent and independent obligations, with limited further guidance about the application of the Dependency Doctrine beyond these examples.[40] Commentators are at odds as to whether modern courts favour dependence or independence of obligations. Some, including John Carter, argue that courts favour dependence of obligations;[41] Edwin Peel also appears to favour this view.[42] On the other hand, John E Stannard and David Capper, and Sir Kim Lewison, consider that terms will be independent unless they reach a threshold of significance to the contract as a whole.[43] Even overlooking this inconsistency, none of these commentators offers a framework for determining the outer limits of the Dependency Doctrine.

The inconsistency in the commentaries reflects the diffusion of curial tests. Some cases continue to presume that obligations are dependent upon one another.[44] Another established Australian test, however, favours the view that clauses are ordinarily independent, and that they may only be rendered dependent by implication of a term for obvious necessity.[45] Another commonly cited test suggests an inquiry into how closely the obligations are linked without further elaboration.[46] A number of cases treat the Dependency Doctrine as requiring an analysis of the significance of the breached term to the contract as a

[39] The conceptual distinction between a promisee's bargain for counter-performance and a promisee's bargain for counter-promise is articulated in *Fibrosa SA v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, 48 (Viscount Simon LC).

[40] The most detailed discussion is found in Peel (n 37) 911–12 [17-020]–[17-023] and Carter, *Carter's Breach of Contract* (n 9) 18–19 [1-22].

[41] Carter, *Carter's Breach of Contract* (n 9) 18 [1-22]; EG McKendrick, 'Performance' in HG Beale (ed), *Chitty on Contracts* (Sweet & Maxwell, 34th ed, 2021) vol 1, 1833–4 [24-025]; Jack Beatson, Andrew Burrows and John Cartwright, *Anson's Law of Contract* (Oxford University Press, 30th ed, 2016) 547.

[42] Peel (n 37) 911 [17-021].

[43] Stannard and Capper (n 38) 34 [2.05]; Sir Kim Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 7th ed, 2020) 881–2.

[44] See, eg, *O'Hare v Bradfield Bentley Pty Ltd (in liq)* [2019] NSWCA 122, [43] (Gleeson JA); *Hillam v Iacullo* (2015) 90 NSWLR 422, 443 [107] (Leeming JA) ('*Hillam*'); *Paramount Lawyers Pty Ltd v Maneschi* [2012] NSWSC 877, [76] (Rothman J).

[45] First outlined in *Newcombe v Newcombe* (1934) 34 SR (NSW) 446, 450 (Jordan CJ) ('*Newcombe*').

[46] First outlined in *Tito v Waddell [No 2]* [1977] 1 Ch 106, 297 (Megarry V-C) as a test to determine whether an instrument grants unqualified or conditional rights. It has since been cited

whole.[47] The dominant technique, including that adopted on appeal in *Kay*,[48] simply states that the application of the Dependency Doctrine depends on the parties' intention or, more simply, is a matter of construction.[49] This approach does not explain whether primacy should be given to the language, structure and formalities of the contract, or whether preference should be given to the overarching context, and commercial sense, of the transactions.[50] It therefore provides little assistance.

by authorities applying the Dependency Doctrine: see, eg, *Hillam* (n 44) 441 [93] (Leeming JA); *Aalders v PA Putney Finance Australia Pty Ltd* [2011] NSWSC 756, [57] (Ward J) ('*Aalders*').

47 See, eg, *Davidson v Gwynne* (1810) 12 East 381; 104 ER 149, 152 (Lord Ellenborough CJ); *Bettini v Gye* (1876) 1 QBD 183, 188 (Blackburn J); *Huntoon Co v Kolynos (Inc)* [1930] 1 Ch 528, 549–50 (Lord Hanworth MR), 558 (Lawrence LJ), 565 (Romer LJ); *Measures Brothers Ltd v Measures* [1910] 2 Ch 248, 261–2 (Kennedy LJ) ('*Measures*'); *Guy-Pell v Foster* [1930] 2 Ch 169, 182–3 (Lord Hanworth MR), 185–6 (Lawrence LJ) ('*Guy-Pell*'), both quoting *Mersey Steel & Iron Co v Naylor, Benzon & Co* (1884) 9 App Cas 434, 443–4 (Lord Blackburn); *Highfield* (n 10) [213]–[215] (Blue J).

48 *Kay* (n 5) 40052–4 [67]–[81] (Brereton JA, Macfarlan JA agreeing at 40039 [1], Simpson AJA agreeing at 40068 [132]).

49 See eg, *Segboer v A J Richardson Properties Pty Ltd* (2012) 16 BPR 31235, 31247 [82] (Sackville AJA) ('*Segboer*'); *Burton v Palmer* (1980) 2 NSWLR 878, 895 [76] (Mahoney JA) ('*Burton*'); *Direct Acceptance Finance Ltd v Cumberland Furnishing Pty Ltd* [1965] NSWR 1504, 1510 (Walsh J) ('*DAF*'); *McDonald Murholme Pty Ltd v Victorian Radio Network Pty Ltd* [2018] VSC 434, [122] (Sloss J); *Gator Shipping Corporation v Trans-Asiatic Oil Ltd SA* [1978] 2 Lloyd's Rep 357, 370 (Kerr J) ('*The Odenfeld*'). See also *Richmond* (n 36) [196], [210] (Blue J).

50 For example, compare the detailed textual analysis undertaken by the New South Wales Court of Appeal in *Kay* (n 5) 40052–3 [67]–[75] (Brereton JA) with the analysis of the same court in *Burton* (n 49) 895 [76] (Mahoney JA), which places much greater emphasis on the 'commonsense' of the case.

Notably, the Dependency Doctrine is relatively prominent in the United States ('US'). Many cases,[51] commentaries[52] and articles[53] explore the Dependency Doctrine's modern rationale and contours.[54] The relative prominence of the Dependency Doctrine in US law can be explained by the fact that the Conditions–Warranties Distinction is unknown to US law. Instead, termination rests first on proof that the promisor has failed to perform a material obligation on which the promisee's obligations depend, in which case the promisee is entitled to suspend performance.[55] Because of this fundamental difference, it is inappropriate to wholly integrate a discussion of the US, UK and Australian authorities concerning the Dependency Doctrine. Nonetheless, US legal thought is instructive in understanding the utility of the Dependency Doctrine in modern commercial practice.

[51] See, eg, *Mount Ida School for Girls v Rood*, 253 Mich 482 (1931); *Slaughter v Barnett*, 114 Fla 352 (1934); *K & G Construction Co v Harris*, 223 Md 305 (1960); *Hospital Mortgage Group v First Prudential Development Corp*, 411 So 2d 181 (Fla, 1982); *Mega Group Inc v Halton*, 290 AD 2d 673 (2002); *Reaves v Hayes*, 620 SE 2d 726 (NC Ct App, 2005); *Williams v Habul*, 724 SE 2d 104 (2012).

[52] Westlaw, *Williston on Contracts* (online at 7 May 2021) '44 Mutually Dependent or Independent Promises' ('*Williston on Contracts*'); Westlaw, *American Jurisprudence 2d* (online at 10 November 2021) 17A Contracts, '6 Performance or Breach' § 578; Westlaw, *Corpus Juris Secundum* (online at 7 May 2022) 17 Contracts, '16 Actions' § 903.

[53] See, eg, Malcolm L Monroe, 'The Implied Resolutory Condition for Non-Performance of a Contract' (1938) 12(3) *Tulane Law Review* 376; Edwin W Patterson, 'Constructive Conditions in Contracts' (1942) 42(6) *Columbia Law Review* 903; William M McGovern Jr, 'Dependent Promises in the History of Leases and Other Contracts' (1978) 52(4) *Tulane Law Review* 659; E Allan Farnsworth, 'The Problems of Nonperformance in Contract' (1981) 17(2) *New England Law Review* 249 ('Nonperformance'); William J Geller, 'The Problem of Withholding in Response to Breach: A Proposal to Minimize Risk in Continuing Contracts' (1993) 62(1) *Fordham Law Review* 163. By contrast, the leading Australian and English scholarship typically discusses the historical aspect of the Dependency Doctrine: Stoljar, 'Dependent and Independent Promises' (n 3); Carter and Hodgekiss (n 3). A notable exception is Tettenborn (n 1), which usefully synthesises many of the modern authorities.

[54] Some authorities have expressed reservations about the utility of the nomenclature of 'dependent' and 'independent' promises. The *Restatement (Second) of Contracts* prefers to formulate the issue as one of whether performances are to be 'exchanged' under an exchange of promises: American Law Institute, *Restatement (Second) of Contracts* (1981) § 231 ('*Restatement of Contracts*'). Notwithstanding this terminological difference, the analysis in the *Restatement of Contracts* (n 54) is consistent with the analysis in the other leading commentaries.

[55] E Allan Farnsworth, 'Comparative Contract Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006) 899, 924; *Restatement of Contracts* (n 54) § 237.

III The Values Served by the Dependency Doctrine

This article's central claim is that, to describe the structure of the Dependency Doctrine, its authorities must be organised by reference to the values they serve.[56] This is because the Dependency Doctrine dates back to the 16th century and has developed in 'interstitial bursts and without a secure model'.[57] This increases the variety of doctrinal sources on which the courts have drawn, generating principles in 'packs', which alternatively favour the promisee or the promisor.[58] Accordingly, in this area more than others, judicial decision-making cannot be explained solely by reference to precedent. Instead, the Dependency Doctrine is best understood as being shaped by the four values described further below. Each of those values reflects more than mere judicial preferences and is amply grounded in traditional contract law techniques.[59]

A *Autonomy (Freedom of Contract)*

1 *The Value's Claims*

The Dependency Doctrine's most regularly cited commitment is to the classical concept of freedom of contract and its concomitant value of autonomy ('Autonomy Norm').[60] Freedom of contract and the related 'will theory' of contract developed in the late 18th and 19th centuries, respectively.[61] These theories' intellectual foundation was the liberalism of the late 18th century, which exhorted the value of the free development of the individual, and sought to restrict the role of government.[62] In the courts, the theories advanced a model of bargaining which presented the parties as dealing at 'arm's length', negotiating the terms

[56] Such analysis has been advocated in other contexts by Hanoch Dagan: see, eg, Hanoch Dagan, 'Autonomy, Pluralism, and Contract Law Theory' (2013) 76(2) *Law and Contemporary Problems* 19; Hanoch Dagan, 'The Realist Conception of Law' (2007) 57(3) *University of Toronto Law Journal* 607.

[57] Stoljar, 'Dependent and Independent Promises' (n 3) 219.

[58] Michael Steven Green, 'Legal Realism as Theory of Law' (2005) 46(6) *William and Mary Law Review* 1915, 1976 n 192, quoting Leon Green, *Judge and Jury* (Vernon Law Book, 1930) 27 n 2.

[59] See also Hanoch Dagan, *The Law and Ethics of Restitution* (Cambridge University Press, 2004) 7, quoting Don Herzog, *Without Foundations: Justification in Political Theory* (Cornell University Press, 1985) 237.

[60] See Jody S Kraus, 'Philosophy of Contract Law' in Jules Coleman, Kenneth Einar Himma and Scott J Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002) 687–8.

[61] PS Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press, 1979) 398.

[62] Samuel Williston, 'Freedom of Contract' (1921) 6(4) *Cornell Law Quarterly* 365, 365–6.

of the deal in a relatively adversarial setting.[63] The theories also posited a passive role for the courts. The parties were said to be the best judges of their interests, capable of calculating the relevant risks and contingencies.[64] By contrast, the courts were said to lack the competence to replace the parties' decision with the courts' view of what was socially desirable and were consequently relegated to a purely facultative role.[65]

2 *Doctrinal Instantiation*

Freedom of contract has come to be viewed as increasingly outmoded. However, having originated the idea that contractual obligations arise from a meeting of the parties' minds,[66] it has spawned '[t]he entire conceptual apparatus of modern contract doctrine'.[67] Most relevantly for present purposes, freedom of contract has left its imprint through the continuing judicial view that the consequences of any contract ought to depend on the parties' intention.[68] Superficially, this view has been moderated by the objective theory of contract, which rejects the possibility of determining the parties' collective subjective intention.[69] However, the courts have typically treated the objective theory of contract as authorising no more than an inquiry into the parties' shared intention based on its best evidence — that is, what the parties have actually said.[70] The courts have denied that the theory empowers them to alter the meaning of the parties' agreement.[71]

[63] Atiyah (n 61) 402–3; Andrew Grubb and Michael Furmston (eds), *The Law of Contract* (LexisNexis, 4th ed, 2010) 30 [1.39], citing Atiyah (n 61) 681.

[64] Atiyah (n 61) 403.

[65] Ibid 402, 404–5, 408.

[66] DJ Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press, 2001) 221.

[67] Morton J Horwitz, 'The Historical Foundations of Modern Contract Law' (1974) 87(5) *Harvard Law Review* 917, 918. So, for example, contract law's formation requirement of offer and acceptance was intended to reflect the meeting of the minds: Ibbetson (n 66) 222–3. Conversely, a contract could be vitiated by a mistake precisely because of the absence of that fictitious event: at 225–9. Other settled principles — including intention as a formation requirement and fraud and duress as vitiating factors — are all traced to the will theory: at ch 12.

[68] Atiyah (n 61) 681.

[69] The theory at common law is that courts engaged in contractual construction are not purporting to ascertain the parties' subjective intention but their objectively manifested intention. The numerous authorities include, in Australia, *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471, 483 [34] (Gleeson CJ, McHugh, Kirby, Hayne and Callinan JJ) and, in the UK, *Sirius International Insurance Co (Publ) v FAI General Insurance Ltd* [2004] 1 WLR 3251, 3257 [18] (Lord Steyn).

[70] Carter, *Carter on Contract* (n 17) [12-020].

[71] For discussion of the limitations of courts' powers when engaged in contractual construction, see *A-G (Belize) v Belize Telecom Ltd* [2009] 1 WLR 1988, 1993 [16] (Lord Hoffmann for the

It would, however, be naïve to suggest that, when construing contracts, courts consistently live up to this ideal. When courts pursue an objective approach to contractual construction, they are able to substitute the parties' subjective intentions with their own subjective processes for ascertaining the contract's objective meaning.[72] Inescapably, such processes leave space for public policy-based decision-making.[73] Accordingly, the better view is that the courts' consistent appeals to the parties' (objectively manifested) intentions are a form of acoustic separation, at once supplying a conduct rule for private parties, which reinforces the reliability and stability of contract law, while supplying a different decision rule, which permits resort to external standards for courts to apply in individual cases.[74] These external standards include the normative commitments listed in Parts III(B)–(D) below.

B *Security of Transactions*

1 *The Value's Claims*

The Dependency Doctrine's second commitment is to ensuring security of transactions and thereby enhancing social welfare ('Security Norm'). This objective, although not as commonly cited by English and Australian courts, has become increasingly favoured by liberal theorists as a justification for all of contract law.[75] Contract's welfare-enhancing function is explained in two ways. First, contract is said to aid the reciprocal transfer of resources to parties who, because of their subjective preferences, place greater value on them, thus augmenting the parties' 'sum of enjoyment'.[76] Secondly, contract is said to be a central instrument within the credit economy,[77] because it enables the sequencing of performance across time by supplying an enforcement mechanism for future

Judicial Committee); *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99, 109–10 (Gibbs J).

72 *Zell v American Seating Co*, 138 F 2d 641, 647 (Frank J) (2nd Cir, 1943).

73 See also Andrew Robertson, 'The Limits of Voluntariness in Contract' (2005) 29(1) *Melbourne University Law Review* 179, 207–11, discussing the role of public policy when courts engage in 'gap-filling'.

74 See Meir Dan-Cohen, 'Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law' (1984) 97(3) *Harvard Law Review* 625; Emily L Sherwin, 'Law and Equity in Contract Enforcement' (1991) 50(2) *Maryland Law Review* 253, 300–14.

75 Mohr Siebeck, Tübingen and Martinus Nijhoff Publishers, *International Encyclopedia of Comparative Law*, vol 7 (at 2 April 2020) Contracts in General, '1 A General View of Contract' [21], [25].

76 Ibid [25], quoting John Bowring (ed), *The Works of Jeremy Bentham* (William Tait, 1843) vol 1, 330–1. See also Stephen A Smith, *Contract Theory* (Oxford University Press, 2004) 111.

77 Sherwin (n 74) 267.

promised performance. This mechanism minimises the risk to the first performer of a later performer's non-performance. Without it, it is theorised that investment would be inefficiently biased towards economic activity that could be completed effectively simultaneously.[78]

2 *Doctrinal Instantiation*

The above justifications of contract law mark a shift in emphasis from individual liberty to the role of contract in the economy,[79] and have produced different doctrinal outgrowths. Because security-of-contract theorists explain contract by reference to a higher purpose — namely, protection of the individual who engages in exchange[80] — they are permissive of a more active role to secure that exchange. Courts have, to varying degrees, embraced this role, particularly through the implication of terms into commercial contracts.[81] Revealingly, the key criterion they apply for implication is that the term gives the contract 'business efficacy'[82] or that the term is a 'business necessity',[83] suggesting that the implied term must propel forward the overarching transaction. Courts may even imply terms into agreements that would otherwise be void for uncertainty to keep the contract's exchange on foot.[84]

Further, at the remedial stage, the courts have accepted the theory that the appropriate remedy for breach of contract is that which protects the promisee's

[78] *International Encyclopedia of Comparative Law* (n 75) [25], citing Richard A Posner, *Economic Analysis of Law* (Wolters Kluwer, 9th ed, 2014) 95–6.

[79] *International Encyclopedia of Comparative Law* (n 75) [21].

[80] Stephen A Smith, *Contract Theory* (n 76) 112–13.

[81] See, eg, *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 ('*Codelfa*'); *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 ('*BP Refinery*').

[82] The test for implication of a term in fact in Australia requires satisfaction of five cumulative conditions, of which one is business efficacy: *Codelfa* (n 81) 347 (Mason J), quoting *BP Refinery* (n 81) 282–3 (Lord Simon for Viscount Dilhorne, Lords Simon and Keith). In the case of incomplete contracts, the key concern of the courts is to give business efficacy to the contract: GJ Tolhurst and JW Carter, 'The New Law on Implied Terms' (1996) 11(1) *Journal of Contract Law* 76, 79, 86.

[83] This is the test for implication of a term in fact in the UK, see *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742, 753 [17] (Lord Neuberger PSC, Lords Sumption and Hodge JJSC agreeing).

[84] Tolhurst and Carter (n 82) 88; JW Carter and Wayne Courtney, 'Implied Terms in Contracts: Australian Law' (2015) 43(3) *Australian Business Law Review* 246, 251, citing *Foley v Classique Coaches Ltd* [1934] 2 KB 1.

'performance interest'.[85] That this is so is somewhat obscured; competition between the common law and Chancery courts has manifested in modern judicial resistance to the remedy that best protects a promisee's performance interest: specific performance.[86] Nevertheless, when awarding damages, courts typically prefer a measure which will theoretically compensate the promisee for its lost performance. Thus, the promisor who contracts to purchase goods for a contract price that exceeds their value will, upon non-payment, be liable in damages reflecting the agreed price, notwithstanding that the objective value of the goods is lower.[87] Moreover, courts have occasionally demonstrated a willingness to make restitutionary awards where the ordinary measure of damages would be inadequate to protect the plaintiff's performance interest.[88] These judicial tendencies when crafting damages awards point to the courts' desire, so far as possible, to fulfil contract law's underlying objective of ensuring contracts are kept and thus preserve the economic benefits associated with this.[89]

C *Consistency with Relational Contracting Norms*

1 *The Value's Claims*

The Dependency Doctrine's third commitment is to reinforcing the relational character of contracts ('Relational Norm'). Relational contract theorists have supplied three insights of present relevance. First, they have shown that contracts are typically embedded within relationships that precede, and will postdate, the bargain.[90] The parties 'are not fiduciaries … but they are not strangers' to one another either.[91] Secondly, business contracting is often driven by norms

[85] Daniel Friedmann, 'The Performance Interest in Contract Damages' (1995) 111 (October) *Law Quarterly Review* 628, 629–31. See the observations of Lord Goff in *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518, 551.

[86] GH Treitel, *Remedies for Breach of Contract: A Comparative Account* (Oxford University Press, 1988) 70.

[87] Peel (n 37) 6 [1-011].

[88] Richard Austen-Baker, 'A Relational Law of Contract?' (2004) 20(2) *Journal of Contract Law* 125, 140, citing *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 and *A-G v Blake* [2001] 1 AC 268. It should be noted that in *One Step (Support) Ltd v Morris-Garner* [2019] AC 649, 697–8 [114]–[115], Lord Sumption JSC clarified that, where a court awarded damages measured by reference to the benefit gained by the wrongdoer, such award was not grounded in restitution, and instead merely reflected the Court's approximation of the value of the promise breached.

[89] See generally *Stone v Chappel* (2017) 128 SASR 165, 171 [11] (Kourakis CJ).

[90] Ian R Macneil, 'Contracts and the Big Wide World' (1975) 2(2) *Cornell Law Forum* 12, 12.

[91] Todd D Rakoff, 'The Five Justices of Contract Law' [2016] (4) *Wisconsin Law Review* 733, 782.

of trust and cooperation as opposed to strict individualism.[92] Those norms relevantly include: reciprocity, that is that both parties to the contract must obtain some benefits and bear some burdens;[93] contractual solidarity, that is, the baseline of trust required to reach agreement and thereafter hold the agreement together, including by preserving the reciprocal exchange;[94] flexibility; and propriety of means to secure an end.[95] Thirdly, contract litigation is removed from and tends to obscure and degrade the relational norms underlying contract formation.[96] It is consequently best treated as a procedure of last resort.[97]

Relational contract theory occupies a contested normative status in Australian and English contract law.[98] Proponents of the theory might argue that it can be squared with contract's more conventional Autonomy Norm and Security Norm. As to the former, once courts accept that contract terms are 'enveloped'[99] within norms, accounting for those norms becomes the most scrupulous means of honouring the parties' intentions.[100] As to the latter, it is the cooperation that contract secures that enables the possibility of deferred exchange, and therefore a credit economy. Accordingly, the relational norm of cooperation may be inextricably tied to the utilitarian justification for contract enforcement.

[92] The pioneering work is found in Stewart Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28(1) *American Sociological Review* 55; Ian R Macneil, 'The Many Futures of Contracts' (1974) 47(3) *Southern California Law Review* 691. As to the now-widespread acceptance of those works, at least as a description of contracting practice, see Robert E Scott, 'The Case for Formalism in Relational Contract' (2000) 94(3) *Northwestern University Law Review* 847, 852.

[93] Ian R Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (Yale University Press, 1980) 44.

[94] Ibid 14. This can be alternatively framed as the 'foundation of trust necessary for efficient contracting behaviour to occur': George M Cohen, 'The Negligence–Opportunism Tradeoff in Contract Law' (1992) 20(4) *Hofstra Law Review* 941, 943–4.

[95] Ian R Macneil, 'Values in Contract: Internal and External' (1983) 78(2) *Northwestern University Law Review* 340, 362–3.

[96] Robert W Gordon, 'Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law' [1985] (3) *Wisconsin Law Review* 565, 572; Catherine Mitchell, 'Commercial Contract Law and the "Real Deal"' in Christian Twigg-Flesner and Gonzalo Villalta Puig (eds), *Boundaries of Commercial and Trade Law* (Sellier, 2011) 21, 31.

[97] See, eg, Mitchell (n 96) 31, quoting Hugh Collins, *Regulating Contracts* (Oxford University Press, 1999) 326; Ian R Macneil, 'A Primer of Contract Planning' (1975) 48(3) *Southern California Law Review* 627, 695.

[98] See Matthew Lees, 'Contract, Conscience, Communitarian Conspiracies and Confucius: Normativism through the Looking Glass of Relational Contract Theory' (2001) 25(1) *Melbourne University Law Review* 82, 83–4.

[99] Ian R Macneil, 'Relational Contract Theory: Challenges and Queries' (2000) 94(3) *Northwestern University Law Review* 877, 893.

[100] Arlen Duke, 'A Universal Duty of Good Faith: An Economic Perspective' (2007) 33(1) *Monash University Law Review* 182, 196–7.

On the other hand, formalists and functionalists may argue that curial application of relational norms threatens the legitimate role of the common law in managing complexity. For the formalist, the common law's preference for simple models is often expressed in the language of institutional competence.[101] The formalist may, therefore, express reservations about the capacity for courts to correctly identify, and give effect to, all of the relational norms specific to a particular contract, resulting in arbitrary decision-making and legal uncertainty.[102] For the functionalist, the management of complexity through modularity, which hides information that is unimportant, enables the common law to scale, by allowing it to answer 'a cluster of questions in a wholesale and consistent fashion'.[103] The functionalist may therefore observe that associating legal outcomes with norms identified on a case-by-case basis will hinder the generalisability of contract law.

2 *Doctrinal Instantiation*

Reflecting the above contest, Australian and English contract law has largely developed without embracing the Relational Norm, with the norm making inroads into certain doctrines of English and Australian contract law.[104] For example, Australian courts commonly imply into commercial contracts an obligation to cooperate in the doing of acts necessary to the contract's performance or to enable the other party to secure a benefit provided under the contract.[105] Australian courts may imply an obligation of good faith in particular contexts.[106] Australian and English courts also vigilantly seek to preserve the reciprocity of exchange originally secured by the parties' bargain. They will, for ex-

101 Scott (n 92) 875–6.

102 See generally Jonathan Morgan, *Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law* (Cambridge University Press, 2013) 100, 131–7; Catherine Mitchell, 'Behavioural Standards in Contracts and English Contract Law' (2016) 33(3) *Journal of Contract Law* 234, 248–9.

103 Gold and Smith (n 7) 503.

104 Martin A Hogg, 'Competing Theories of Contract: An Emerging Consensus?' in Larry A DiMatteo et al (eds), *Commercial Contract Law: Transatlantic Perspectives* (Cambridge University Press, 2013) 14, 29.

105 Carter, *Carter on Contract* (n 17) [11-070]. The leading case is *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596, 607–8 (Mason J).

106 Carter, *Carter on Contract* (n 17) [11-170]. See, eg, *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349. In England, the courts have also selectively implied terms of good faith into certain contracts, such as employment contracts: *Malik v Bank of Credit & Commerce International SA (in liq)* [1998] AC 20. See also Mathew Boyle, 'The Relational Principle of Trust and Confidence' (2007) 27(4) *Oxford Journal of Legal Studies* 633, 639.

ample, weigh the conduct of the plaintiff before awarding specific performance.[107] Similarly, Australian courts recognise that a promisor's repudiation of the contract may dispense with a promisee's obligations to perform its obligations, even though the repudiation has not been accepted and, consequently, the agreement remains on foot.[108] Finally, Australian and English courts construe contractual terms by reference to vague criteria such as commercial common sense.[109] This leaves room for courts to impose terms reflecting relational norms. Once courts recognise that '[c]redit, not distrust, is the basis of commercial dealings',[110] they can manipulate doctrine to advance relational norms.[111]

D *Constraining Opportunism*

1 *The Value's Claims*

The 'negative corollary'[112] of the Relational Norm is stamping out opportunism by contracting parties ('Anti-Opportunism Norm'). Many definitions of opportunism have been suggested.[113] In this article, one is relevant — namely, the opportunism that may arise because of the sequencing of transactions, making the party that performs first liable to the risk of non-performance by the later-performing party.[114] If this is not policed, parties will incur more upfront transaction costs on precautionary devices to guard against it. They will also invest more in opportunistic behaviour, either because it carries no legal cost or is viewed as acceptable.[115] Some welfare-enhancing deals will never be pursued

[107] *Williams v Frayne* (1937) 58 CLR 710, 719 (Latham CJ); *Lamare v Dixon* (1873) LR 6 HL 414, 423 (Lord Chelmsford).

[108] In Australia, see *Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd* (1954) 90 CLR 235, 246–7 (Dixon CJ), 251–2 (Kitto J). The position in English law is not as clear: see Carter, *Carter on Contract* (n 17) [35-260].

[109] Carter, *Carter on Contract* (n 17) [12-040]. See, eg, *Di Dio Nominees Pty Ltd v Brian Mark Real Estate Pty Ltd* [1992] 2 VR 732, 740 (Marks J); *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, 770–1 (Lord Steyn), quoting *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] 1 AC 191, 201 (Lord Diplock) ('*Antaios*').

[110] *Sanders Brothers v Maclean & Co* (1883) 11 QBD 327, 343 (Bowen LJ).

[111] Grubb and Furmston (n 63) 17–18 [1.23].

[112] Morgan (n 102) 137.

[113] For a summary of the different definitions, including the forms of opportunism relied on in this article, see Cohen (n 94) 953–61.

[114] Posner (n 78) 95–6.

[115] Cohen (n 94) 976.

because of the risk of opportunism.[116] These significant social costs imperil contract law's utilitarian ends and courts have an interest in sanctioning the conduct that produces them.

2 *Doctrinal Instantiation*

Courts have developed various 'safety valves' dealing with opportunism in contract law.[117] Of greatest interest for academics has been the evolution of the law of restitution to respond to this problem. Under Australian law, a partially performing party is entitled to recover in restitution a proportionate part of the contract price, notwithstanding that payment is conditioned on complete performance, if the promisee repudiates the contract (and this repudiation is accepted).[118] Restitution for the value of defective performance may also be available if there are circumstances removing the right to remuneration from 'the exact conditions' of the contract, for example, if the promisee acquiesces in and takes the benefit of the promisor's defective performance.[119]

The courts have also evidenced a strong 'anti-termination bias',[120] recognising that termination may have disproportionate consequences for the promisor,[121] and that allowing termination for trivial breach may abet the promisee's escape from a bad bargain.[122] Similarly, the doctrine of substantial performance provides that, where a contracting party has 'substantially' performed its obli-

[116] Juliet P Kostritsky, 'Taxonomy for Justifying Legal Intervention in an Imperfect World: What to Do When Parties Have Not Achieved Bargains or Have Drafted Incomplete Contracts' [2004] (2) *Wisconsin Law Review* 323, 327–8.

[117] In the US, Henry E Smith has identified equity as historically supplying these safety valves: Henry E Smith, 'The Equitable Dimension of Contract' (2012) 45(3) *Suffolk University Law Review* 897, 903. In modern Anglo-Australian law, those safety valves exist both at common law and equity. As Lord Steyn observed: '[a] thread runs through our contract law that effect must be given to the reasonable expectations of *honest* men': Lord Steyn, 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 (July) *Law Quarterly Review* 433, 433 (emphasis added).

[118] *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560, 596–7 [75]–[76] (Gageler J), 624–30 [164]–[174] (Nettle, Gordon and Edelman JJ). Ordinarily, the restitutionary award should not exceed the contract price: at 605 [102] (Gageler J), 650–1 [215]–[216] (Nettle, Gordon and Edelman JJ).

[119] *Steele v Tardiani* (1946) 72 CLR 386, 402, 405 (Dixon J).

[120] Neil Andrews, 'Breach of Contract: A Plea for Clarity and Discipline' (2018) 134 (January) *Law Quarterly Review* 117, 127.

[121] See, eg, *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235; *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109 ('*Bremer*').

[122] As noted by Roskill LJ in *The Hansa Nord* (n 24) 71: 'contracts are made to be performed and not to be avoided according to the whims of market fluctuation'.

gations under certain classes of contract, that party is entitled to payment subject to deductions,[123] thus limiting a promisee's ability to impose 'oppressive retribution' for a promisor's 'venial faults'.[124] The anti-termination bias of the courts and the doctrine of substantial performance are not isolated judicial contrivances; they are instances of a broader body of authorities in which the courts have utilised interpretation and implication to discipline parties' opportunistic avoidance of performance of their obligations and opportunistic exercise of rights to effect a forfeiture for trivial breach.[125]

IV The Dependency Doctrine as an Instantiation of the Autonomy Norm

A *Dependence as the Parties' Will*

This article now turns to the architecture of the Dependency Doctrine. Such an account must first address the prevailing view, expressed by English and Australian courts, that the guiding criterion for the application of the Dependency Doctrine is the parties' intentions.[126]

Undoubtedly, where the parties communicate an intention to make terms dependent on, or independent of, one another, the courts will, consistently with their longstanding commitment to the Autonomy Norm,[127] enforce this

[123] Nuwan Dias and James Claridge, 'Venial Faults and Oppressive Retribution: The Relationship between Substantial Performance and Damages for Breach of Construction Contracts' (2018) 34(2) *Building and Construction Law Journal* 92, 93. The leading English and Australian cases are *H Dakin & Co Ltd v Lee* [1916] 1 KB 566; *Hoenig v Isaacs* [1952] 2 All ER 176; *O'Sullivan v O'Leary* [1955] VLR 52; *Kiely & Sons Ltd v Medcraft* (1965) 109 SJ 829; *Bolton v Mahadeva* [1972] 1 WLR 1009.

[124] *Jacob & Youngs v Kent*, 129 NE 889, 891 (Cardozo J) (NY, 1921).

[125] The former technique is evident, for example, in the Australian case law construing a promisee's exercise of a discretionary power as subject to a reasonableness constraint, or implying a term that has a similar effect: see, eg, *Meehan v Jones* (1982) 149 CLR 571, 589–90 (Mason J); *Burger King Corporation v Hungry Jack's Pty Ltd* (2001) 69 NSWLR 558, 569 [163], 573 [185] (Sheller, Beazley and Stein JJA). It is also evident in the English and Australian courts' presumptive construction of exclusion clauses as not applying to fundamental breach of contract: *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361, 392–3 (Viscount Dilhorne), 410 (Lord Hodson); *Kamil Export (Aust) Pty Ltd v NPL (Australia) Pty Ltd* [1996] 1 VR 538, 546–53, where Marks J summarised and applied the relevant English and Australian authorities. The courts' willingness to constrain the promisee's exercise of onerous rights for trivial breach is evidenced in *Antaios* (n 109). See also Steyn (n 117) 441: 'the working assumption will be that a fair construction best matches the reasonable expectations of the parties'.

[126] See the authorities cited at n 49.

[127] See above Part III(A).

language. By doing so, the courts give effect to the parties' 'unimpaired … freedom … to make any contract they choose, however extraordinary some of its terms may appear to outsiders'.[128] There are various examples of courts deferring to the express will of the parties, sometimes against their better judgement.[129] Taking just one example, in *Jeppesons Road Pty Ltd v Di Domenico*, the Queensland Court of Appeal held that, in a conveyancing transaction, a vendor's failure to deliver to the purchaser a relatively unimportant notice excused the purchaser of its obligation to pay the purchase price.[130] The essentiality of the vendor's obligation was irrelevant; what mattered was that the vendor had promised to provide this notice 'in exchange' for the purchase price.[131]

Even in the absence of clear language, courts have isolated textual indicia that provide a secure foundation from which they may reason as to the parties' intentions. Typically, reliance on textual indicia results in a finding that the promises are independent.

The first commonly cited indicium of independence is the agreement's silence as to the relationship between the relevant promises, in circumstances where the agreement elsewhere expresses mutual promises to be dependent or interdependent. So, in *Green v Sommerville*, the High Court held that a vendor was not entitled to refuse to convey property if the purchaser tendered the purchase price but was in breach of an obligation to pay default interest.[132] The purchaser's default-interest obligation stood separately from, and made no reference to, the expressly interdependent obligations of the purchaser to pay the purchase price and the vendor to convey the land. This suggested the payment of default interest was not intended to be interdependent with the vendor's obligation to transfer.[133]

Secondly, where obligations appear within separate documents, this will suggest they were intended to be independent.[134] So, in *Gator Shipping Corporation v Trans-Asiatic Oil Ltd SA*, a charterparty provided for the charterer to pay 'hire' (cl 42(b)), and a contemporaneously executed 'side letter' obligated

[128] *Wickman Machine Tool Sales Ltd v L Schuler AG* [1972] 1 WLR 840, 853 (Edmund Davies LJ).

[129] In addition to the case discussed below, see also *Kidner v Stimpson* (1918) 35 TLR 63; *Newcombe* (n 45).

[130] [2005] QCA 391, [32], [48] (Keane JA).

[131] Ibid [21] (Keane JA).

[132] (1979) 141 CLR 594, 599 (Barwick CJ), 608–10 (Mason J) ('*Green*').

[133] Ibid 608–9 (Mason J). For further examples of this reasoning, see *Highfield* (n 10) [215] (Blue J); *Kay* (n 5) 40052 [68]–[69] (Brereton JA).

[134] This point has been made in Lewison (n 43) 884. In addition to the case discussed below, see *Highfield* (n 10) [215] (Blue J).

the owners to repay to the charterers a proportion of that hire in certain circumstances (cl 1).[135] The England and Wales High Court held that the charterers were obliged to continue to make payments under cl 42(b) even where the owners had not complied with cl 1.[136] Although cl 42 and cl 1 formed part of the same transaction, the fact that these obligations appeared in separate documents supported the view that they were independent.[137]

Thirdly, where the promisee's obligation is expressed to arise at a fixed time without reference to the promisor's performance, the courts will ordinarily treat the promisee's obligation as independent of the promisor's performance. So, for example, under the sale of goods legislation in Australia and the UK, the parties can render the obligations of delivery and payment independent by specifying that the price is payable on a day certain irrespective of delivery.[138] This legislation embodies an antecedent common law principle which treats as independent promises to pay purchase money on a fixed day in conveyancing contracts.[139] This principle can be extended to render promises in other contexts independent, such as promises to pay annuities or any other periodical payment.[140]

Fourthly, where the promisee's obligation accrues, or is capable of accruing, before the promisor's performance, courts have treated this as an indicium that the promisee's obligation is independent of the promisor's obligation.[141] For example, in *Direct Acceptance Finance Ltd v Cumberland Furnishing Pty Ltd*, the Full Court of the New South Wales Supreme Court considered a furniture hire agreement, which obliged the dealer to indemnify the hirer where the hirer was exposed to the risk of customer non-payment (cl 4) and, separately, obliged the hirer to, amongst other things, take reasonable steps to keep in contact with customers and recover moneys payable (cl 8).[142] The Court held that the dealer

135 *The Odenfeld* (n 49) 375 (Kerr J).

136 Ibid 371.

137 Ibid 370–1.

138 *Sale of Goods Act 1954* (ACT) s 52(2); *Sale of Goods Act 1923* (NSW) s 51(2); *Sale of Goods Act 1972* (NT) s 51(2); *Sale of Goods Act 1896* (Qld) s 50(2); *Sale of Goods Act 1895* (SA) s 48(2); *Sale of Goods Act 1896* (Tas) s 53(2); *Goods Act 1958* (Vic) s 55(2); *Sale of Goods Act 1895* (WA) s 48(2); *Sale of Goods Act 1979* (UK) s 49(2).

139 The leading case is *Pordage v Cole* (1669) 1 Wms Saund 319; 85 ER 449 ('*Pordage*'). See also *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435, 464–5 (Dixon J) ('*Watson*'), which articulates the principle with respect to the sale of goods.

140 *Watson* (n 139) 452 (Latham CJ).

141 In addition to the case discussed below, see *Gibson v Goldsmid* (1854) 5 De GM & G 757; 43 ER 1064, 1068–9 (Turner LJ) ('*Gibson*'); *Chandler v Webster* [1904] 1 KB 493, 498–9 (Collins MR).

142 *DAF* (n 49) 1508–9 (Walsh J).

was not relieved of its indemnity obligation merely because the hirer had failed to comply with cl 8.[143] Clause 4 was capable of being triggered before the hirer could take any steps to recover amounts payable by the customer under cl 8, and this favoured the view that these obligations were independent.[144]

B *Limitations*

Notwithstanding its prevalence, the account of the Dependency Doctrine as a species of contractual interpretation faces difficulty where it is applied to contracts in the absence of clear language, or reliable textual indicia, evidencing the parties' intent. In these cases, the courts' attempt to read into the parties' silence can yield two equally plausible conclusions. In the US, the *Restatement (Second) of Contracts* ('*Restatement of Contracts*') favours a presumption of dependence in these circumstances, adopting the commercially common-sense view that parties 'ordinarily bargain for performance rather than for a lawsuit'.[145] An alternative view, which favours a presumption of independence, reasons that the parties' silence is a tacit endorsement of the known contract law background rules,[146] such as those concerning termination. On this view, if the promisee fails to expressly condition its obligations on the promisor's performance, the promisee must intend that, in the face of breach, it will continue to perform unless and until it validly exercises its termination rights.[147]

The plausibility of both views suggests the limitations of treating the Dependency Doctrine solely as a manifestation of the Autonomy Norm. There is an air of unreality in suggesting that, in the absence of clear words or compelling indicia, the contract will reveal the parties' intended application of the Dependency Doctrine; it is more likely that they did not turn their minds to it at

[143] Ibid 1510.

[144] Ibid.

[145] *Restatement of Contracts* (n 54) ch 10 (Introductory Note). See also Williston, 'Freedom of Contract' (n 62) 370–1.

[146] Randy E Barnett, 'The Sound of Silence: Default Rules and Contractual Consent' (1992) 78(4) *Virginia Law Review* 821, 880, 894–7.

[147] Such reasoning is found in *Segboer* (n 49) 31248 [86] (Sackville AJA); *DAF* (n 49) 1510 (Walsh J). See also *DRC Distribution Ltd v Ulva Ltd* [2007] EWHC 1716 (QB), [39], in which Flaux J stated that it was not necessary for a provision to use the 'express words' that it was conditional on another provision, but nevertheless rejected a submission that the provision in this case was conditional on the promisor's performance of another provision because

> there is nothing in … the wording of [either clause] to suggest that the performance of one was contingent on the performance of the other, and … in the absence of some such linkage, this argument is doomed to fail.

all.[148] Much of the Dependency Doctrine operates in this space of uncertainty 'where agreement peters out',[149] necessitating resort to alternative guideposts, guided by perceptions of community norms and policy preferences.[150]

V The Security Norm as the Historical Basis of the Dependency Doctrine

A *Simultaneous Transactions and the Security Norm*

1 *Evolution of the Authorities*

In fact, while modern courts are more comfortable expressing the Dependency Doctrine as a technique of contractual construction, this does not reflect its origins or enduring archetypes. The Dependency Doctrine's present form largely arose in the late 18th century in a series of cases which applied a presumption of dependence or interdependence to particular transactions capable of simultaneous, or close to simultaneous, execution,[151] such as the sale of land,[152] goods,[153] and shares or interests in a business.[154] These archetypes persist. Legislation concerning the sale of goods,[155] and judicial decisions concerning the sale of land[156] and shares,[157] provide that a seller's obligation to deliver title and the purchaser's obligation to pay are ordinarily interdependent obligations. Ordinarily, neither the purchaser nor the vendor may complain about the

148 See generally *Williston on Contracts* (n 52) §§ 44:11–44:12.

149 Smith, 'The Equitable Dimension of Contract' (n 117) 913.

150 See Oliver Wendell Holmes, 'The Path of the Law' (1997) 110(5) *Harvard Law Review* 991, 998.

151 Many of the relevant cases are catalogued in Stoljar, 'Dependent and Independent Promises' (n 3) 234–45.

152 See, eg, *Anvert v Ennover* (1733) 2 Barn KB 308; 94 ER 519; *Glazebrook v Woodrow* (1799) 8 TR 366; 101 ER 1436 ('*Glazebrook*'); *Heard v Wadham* (1801) 1 East 619; 102 ER 239.

153 *Morton v Lamb* (1797) 7 Term R 125; 101 ER 890; *Rawson v Johnson* (1801) 1 East 203; 102 ER 79.

154 *Callonel v Briggs* (1703) 1 Salk 112; 91 ER 104; *Lock v Wright* (1721) 8 Mod 40; 88 ER 30; *Kingston v Preston* (1773) ('*Kingston*'), quoted in *Jones v Barkley* (1781) 2 Doug 684; 99 ER 434, 437–8 (Le Blanc) (during argument).

155 *Sale of Goods Act 1954* (ACT) s 32; *Sale of Goods Act 1923* (NSW) s 31; *Sale of Goods Act 1972* (NT) s 31; *Sale of Goods Act 1896* (Qld) s 30; *Sale of Goods Act 1895* (SA) s 28; *Sale of Goods Act 1896* (Tas) s 33; *Goods Act 1958* (Vic) s 35; *Sale of Goods Act 1895* (WA) s 28; *Sale of Goods Act 1979* (UK) s 28. See also *Watson* (n 139) 464 (Dixon J).

156 *Palmer v Lark* [1945] 1 Ch 182, 184–5 (Vaisey J); *Foran v Wight* (1989) 168 CLR 385, 417 (Brennan J); *Green* (n 132) 609 (Mason J); *Net Parts International Pty Ltd v Kenoss Pty Ltd* [2008] NSWCA 324, [39] (Macfarlan JA); *Highfield* (n 10) [212] (Blue J).

157 *Doherty v Fannigan Holdings Ltd* [2018] EWCA Civ 1615, [31]–[43] (Sir Colin Rimer).

other's non-performance if it has not performed or, at least, is not ready, willing and able to do so.

2 *Intersection with the Security Norm*

The above archetypes initially developed without emphasis on contractual language.[158] They were shaped by prevailing business 'customs' or 'mores',[159] which were transformed into 'default rules'.[160] The early cases also hinted at a broader concern to secure the substance of the transaction. So, in *Glazebrook v Woodrow* ('*Glazebrook*'), Lord Kenyon CJ expressed concern that, if the Court did not require conveyance and payment at the same time, if the vendor became bankrupt, the purchaser may have payment enforced against it 'yet be disabled from procuring the property for which [it] had paid'.[161]

Modern commentators have transposed this concern into the Dependency Doctrine's core rationale.[162] This is particularly so in the US, where the *Restatement of Contracts* advocates for a presumption of dependence because it provides the parties with 'maximum protection, consistent with freedom of contract, against disappointment of their expectation of a subsequent exchange' of performances.[163]

Such reasoning draws on the logic of the Security Norm. The alternative of requiring the promisee to perform and claim damages against the non-performing promisor confronts the difficulty that damages may, for various reasons, prove to be under-compensatory.[164] The consequence of this may be that

158 Williston, 'Freedom of Contract' (n 62) 371, describing the courts' inquiry as directed to a 'purely fictitious intention'.

159 LexisNexis, *Corbin on Contracts*, vol 8 (at 2019) 4 Construction and Legal Operation of Contract: Conditions of Legal Duty, '32 Constructive Conditions: Failure to Perform the Agreed Exchange' § 32.4.

160 JW Carter, *The Construction of Commercial Contracts* (Hart Publishing, 2013) [2-20].

161 *Glazebrook* (n 152) 1439 (Lord Kenyon CJ).

162 Patterson (n 53) 909–10; Peter Butler, 'Advance Contractual Payments: Enforcement and Restitution for Failure of Basis' in Charles Rickett and Ross Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart Publishing, 2008) 225, 228; Peel (n 37) 911 [17-021]; Beatson, Burrows and Cartwright (n 41) 547.

163 *Restatement of Contracts* (n 54) § 232.

164 Damages may be under-compensatory because of: the cost of instituting proceedings to claim damages; the challenges of obtaining the full measure of expectation damages where loss is hard to measure; the fact that damages ordinarily do not account for the considerable delays that promisees may suffer; and the risk that a damages award may be unenforceable against an insolvent promisor. See also McGovern (n 53) 690–7; Steven Shavell, 'Why Breach of Contract May Not Be Immoral Given the Incompleteness of Contracts' (2009) 107(8) *Michigan Law Review* 1569, 1575.

the promisor obtains '[s]omething … for nothing'.[165] Left unchecked, this risk would disincentivise exchange. Because a presumption of dependence (or interdependence) militates against this risk, it can be understood as a technique that facilitates welfare-enhancing exchange.

Although modern commentators would posit this as a general explanation for all cases in which courts determine obligations to be dependent or interdependent, it is particularly apposite in the case of simultaneous exchange. When applied in this context, a presumption of dependence applies neutrally, requiring both parties to demonstrate their readiness, willingness and ability to perform. It consequently does not result in risk being shifted to either party. Given this, there is no impediment to applying the Dependency Doctrine to secure this class of transactions.

B *Services Contracts: Balancing the Security Norm and the Anti-Opportunism Norm*

1 *Evolution of the Authorities*

When one turns to non-simultaneous transactions, however, it becomes clear that the courts must be (and are) cautious of the undesirable consequences that flow from the mechanistic enforcement of a presumption of dependence. This is apparent when one observes the application of the Dependency Doctrine in the case of payment obligations in two further archetypes of dependent obligations — common law employment contracts and construction contracts.

It is conventional to observe that, at common law,[166] an employer's obligation to pay wages is dependent on the employee's prior service.[167] This is correct

[165] *Corbin on Contracts* (n 159) § 32.4.

[166] The apportionment of employees' salaries is now largely dealt with in the UK under the *Apportionment Act 1870*, 33 & 34 Vict, c 35, s 2, and by state and federal awards in Australia.

[167] See, eg, Carter, *Carter on Contract* (n 17) [29-210].

so far as it goes. An employer is entitled to refuse to pay an employee for unperformed services[168] and, equally, for services performed following the employee's discharge.[169] But this does not address the amount of work that an employee must render to be entitled to payment.[170] The early case law had, applying the Dependency Doctrine, permitted employers to withhold payment for partially performed services on the basis that payment was dependent on an employee's performance of the entirety of the stipulated services.[171] However, beginning in the 19th century, courts began to transition away from the early rule, recognising that it may cause hardship to an employee by permitting the employer to withhold the entirety of the employee's remuneration because of some slight mistake.[172] The early case law, being well established, was not rejected but distinguished, producing a peculiar accommodation.[173] The courts have continued to treat an employer's payment obligations as dependent on the employee rendering services but, wherever possible, allowed employees to partially recover wages for less than entire performance by treating employment contracts as comprising divisible units of service, each attracting a part payment.[174]

Courts have adopted various techniques for characterising employment contracts as divisible. Where the contract specifies wages at a monthly rate, the courts have no difficulty determining that an employee acquired a wages claim for services rendered each month, even if the wages were payable at the end of the contract and the employee did not complete the entire contract.[175] Equally,

168 *Miles v Wakefield Metropolitan District Council* [1987] 1 AC 539, 553 (Lord Brightman); *Wiluszynski v Tower Hamlets London Borough Council* [1989] ICR 493, 499 (Fox LJ), 503–4 (Nicholls LJ); *Independent Education Union of Australia v Canonical Administrators* (1998) 87 FCR 49, 70–2 (Ryan J); *Csomore v Public Service Board (NSW)* (1986) 10 NSWLR 587, 595 (Rogers J).

169 *Watson* (n 139) 465 (Dixon J); *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 427–8 (Brennan CJ, Dawson and Toohey JJ).

170 Samuel J Stoljar, 'The Great Case of Cutter v Powell' (1956) 34(3) *Canadian Bar Review* 288, 297.

171 The rule appears to be first referred to inconclusively in the law reports of 1431: see Glanville L Williams, 'Partial Performance of Entire Contracts' (Pt I) (1941) 57 (July) *Law Quarterly Review* 373, 375. Today, the leading example of the early authorities is *Cutter v Powell* (1795) 6 Term R 320; 101 ER 573, 576–7 (Grose J) ('*Cutter*').

172 See the reasons in *Button v Thompson* (1869) LR 4 CP 330, 342 (Montague Smith J) ('*Button*'); *Taylor v Laird* (1856) 1 Hurl & N 266; 156 ER 1203, 1206 (Pollock CB) ('*Laird*').

173 See, eg, *Button* (n 172) 340–1 (Montague Smith J).

174 The trend towards treating employment contracts as divisible is observed in Stoljar, 'The Great Case of Cutter v Powell' (n 170) 302.

175 *The Juliana* (1822) 2 Dods 504; 165 ER 1560, 1567–8 (Lord Stowell); *Button* (n 172) 339 (Montague Smith J); *Laird* (n 172) 1206 (Pollock CB).

when wages are expressed on a per annum basis but are payable monthly, the courts have concluded that the employee acquired a monthly right to payment.[176] But the courts have fastened upon other justifications for divisibility, deciding that contracts to pay 'at the rate of' an amount per year are divisible,[177] and even in the absence of such wording, have imported divisibility into those contracts through appeals to the general understanding of the parties[178] or by implying terms to that effect.[179] Consequently, although wages have been rarely perfectly apportioned by reference to the amount of services rendered, an employer has typically been unable to withhold the entirety of the contract sum for the employee's partial non-performance.[180]

Construction contracts are also commonly described as requiring a contractor's 'entire' performance as a condition precedent to the employer's payment.[181] Building on the early authorities characterising employment agreements as 'entire' agreements,[182] courts have typically construed construction contracts as making payment dependent upon performance of the works and thus precluding a contractor from seeking payment until the works (or, more commonly, the relevant stage of the works to which an interim payment attaches) are completed.[183] However, as with employment contracts, the courts have developed techniques for ameliorating the potentially harsh effects of making an employer's payment obligations dependent upon the contractor's performance of the works. The principal technique is the doctrine of substantial performance, which provides that, if a contractor has substantially performed its obligations,

176 *George v Davies* [1911] 2 KB 445, 449 (Lord Coleridge J) ('*George*'); *Healey v SA Française Rubastic* [1917] 1 KB 946, 947 (Avory J). See also *Boston Deep Sea Fishing & Ice Co v Ansell* (1888) 39 Ch D 339, 366, in which Bowen LJ held that an employee may have argued that he was entitled to quarterly payment notwithstanding that his salary was expressed on an annualised basis, but was precluded from doing so because of his conduct subsequent to execution of the original employment agreement.

177 *Moriarty v Regent's Garage & Engineering Co Ltd* [1921] 2 KB 766, 774 (Lord Sterndale MR), 779 (Scrutton LJ).

178 *George* (n 176) 449 (Lord Coleridge J), citing *Cutter* (n 171) 577 (Lawrence J).

179 *Swabey v Port Darwin Gold Mining Co* (1889) 1 Meg 385, 386 (Lord Halsbury LC).

180 Beatson, Burrows and Cartwright (n 41) 477–8; Westlaw AU, *The Laws of Australia* (online at 29 June 2020) 7 Contract: General Principles, '7.5 Performance' [7.5.490].

181 Carter, *Carter on Contract* (n 17) [29-210]; Neil Andrews, Andrew Tettenborn and Graham Virgo, *Contractual Duties: Performance, Breach, Termination and Remedies* (Sweet & Maxwell, 3rd ed, 2020) 342 [15-006].

182 The leading early case is *Appleby v Myers* (1867) LR 2 CP 651, 661 (Blackburn J), which cites, inter alia, *Cutter* (n 171). See also *Sumpter v Hedges* [1898] 1 QB 673, 674 (AL Smith LJ).

183 In addition to the cases cited at n 182 above, see, eg, *Forman & Co Pty Ltd v The Ship 'Liddesdale'* [1900] AC 190, 205 (Lord Hobhouse); *Conquer v Boot* [1928] 2 KB 336, 344 (Talbot J); *Parkinson v Lord* [1925] VLR 22, 26 (Schutt J); *Ettridge v Vermin Board of the District of Murat Bay* [1928] SASR 124, 130 (Napier J for the Court).

it is entitled to payment subject to appropriate deductions reflecting the employer's loss caused by the contractor's breach.[184] Over time, the courts have expanded the definition of 'substantial performance' to accommodate defects of increasing magnitude, in turn enhancing contractors' rights to partially recover remuneration for works even where those works are defective.[185] In Australia, the law of restitution has also evolved to enable the contractor to recover remuneration for partial performance if the contractor accepts the employer's repudiation or if the employer has freely taken the benefit of the contractor's work.[186]

2 *Intersection with the Security Norm and the Anti-Opportunism Norm*

The trend exposed in the courts' application of the Dependency Doctrine to the above archetypal service contracts is as follows: the courts have preserved the dependency between the promisee's payment obligations and the promisor's performance, but they have (amongst other things) altered the amount or quality of service that will trigger a promisor's right to payment. This realignment exposes a tension between courts' desires to secure the promisee's performance interest but to avoid opportunistic withholding of counter-performance.

The concern of the early authorities to preserve promisees' (ie employers') performance interests may principally have been driven by social attitudes towards labour in England prior to the late 19th century.[187] However, such a concern remains defensible, even in a modern context, on the premise that employment and construction contracts present enhanced risks of default to employers and principals, which may warrant making payment dependent on the employee's or contractor's performance. In the case of employment contracts, this is because of the barriers to obtaining specific performance against recalcitrant employees,[188] and the inadequacy of damages for the employer given the likely credit risk of employees.[189] In the case of construction contracts, it is not uncommon for contractors to leave jobs incomplete as they move on to others.[190] Consequently, an employer's most formidable defence against being left with half-completed works is the threat of withholding payment.

184 See above n 123.

185 Dias and Claridge (n 123) 96–7.

186 See the authorities at nn 118–119.

187 Herbert D Laube, 'The Defaulting Employee: Britton v Turner Re-Viewed' (1935) 83(7) *University of Pennsylvania Law Review* 825, 847–8.

188 *Williston on Contracts* (n 52) § 44:48.

189 Patterson (n 53) 919; Stoljar, 'Dependent and Independent Promises' (n 3) 220.

190 Andrews, Tettenborn and Virgo (n 181) 352–3 [15-045], quoting Law Commission, *Law of Contract: Pecuniary Restitution on Breach of Contract* (Law Com No 121, 1983) 36–7.

On the other hand, treating payment as dependent on performance is also especially problematic when applied to these services contracts. In the case of employment contracts, empowering an employer to withhold payment so as to coerce an employee's performance comes uncomfortably close to supplying a mechanism for 'involuntary servitude',[191] which the common law now rejects.[192] But, apart from this, treating a promise to pay as dependent on complete service may undermine contract law's ambitions of facilitating non-simultaneous transactions,[193] by exposing the earlier performing party (ie the promisor) to the risk that, once it renders valuable performance, the other party (ie the promisee) may opportunistically attempt to avoid counter-performance by relying on trivial breach. Far from securing exchange, dependence in these transactions can undermine exchange by placing inordinate risk on the first performing party, thus discouraging their entry into such transactions.

It follows, therefore, that judicial commitment to the Security Norm cannot adequately explain the archetypal examples of dependency in non-simultaneous transactions. Instead, when one moves beyond simultaneous transactions, the courts are forced to balance (and have balanced) the competing objectives of securing the promisor's performance while protecting against the risk of opportunistic withholding of performance by the later-performing promisee.

VI Dependence in Contested Territory

Moving beyond the historical archetypes of dependent obligations, we can observe the courts identifying two broader bases for classifying obligations as dependent. First, courts have treated promisee obligations as generally dependent upon central promisor obligations. Secondly, courts have used the Dependency Doctrine to preserve the parties' agreed order of performance of ancillary obligations.

Both of these categories, although more precarious, are not aberrations. Today, they are best explained as further instantiations of contract's commitment to the Relational Norm.[194] Of course, the Dependency Doctrine long predates the scholarship establishing this norm.[195] But, from early on, the Dependency Doctrine appears to have embodied a nascent understanding of it. The early case law is littered with references to the 'nature' of the class of agreements to

[191] Patterson (n 53) 920.

[192] *De Francesco v Barnum* (1890) 45 Ch D 430, 438 (Fry LJ).

[193] As to which, see above Part III(B)(1).

[194] See also Part III(C) above.

[195] The pioneering work establishing relational norms was published in the mid-20th century: see above n 92.

which the contract belonged,[196] the 'essence' of the transaction,[197] 'common sense',[198] 'common justice'[199] and 'the good sense of the case'.[200] These pronouncements hint at a judicial apprehension of a 'community sense of obligation'[201] — that is, at an inchoate sense of relational norms informing the development of the Dependency Doctrine.

A *Central Promises*

1 *Evolution of the Authorities*

That an obligation's centrality may be crucial to its classification as dependent is identified by Stannard and Capper[202] and Lewison.[203] Such reasoning can be traced to *Boone v Eyre* ('*Boone*'), in which Lord Mansfield CJ distinguished between dependent covenants which went 'to the whole of the consideration on both sides' and independent covenants which went 'only to a part'.[204] As explored further in Part VII(A), Lord Mansfield CJ's test was formulated to prevent a promisee's opportunistic withholding of counter-performance after receiving the substantial benefit of the promisor's performance. However, his renown gave the test greater weight,[205] and early cases applied the test to determine dependence in executory or substantially unexecuted transactions.[206]

Lord Mansfield CJ's test has since been refined by subsequent case law, permitting a promisor's promise to be construed as a condition precedent where it goes to the 'root', or a central aspect, of the contract (hereafter referred to as a 'centrality analysis').[207] For example, in a commercial settlement agreement, a

196 *Wyvil v Stapleton* (1724) 1 Str 615; 93 ER 735, 736 (Pratt CJ).

197 *Kingston* (n 154), quoted in *Jones* (n 154) 438 (Le Blanc) (during argument).

198 *Havelock v Geddes* (1809) 10 East 555; 103 ER 886, 889 (Lord Ellenborough CJ) ('*Havelock*').

199 *Goodisson v Nunn* (1792) 4 Term R 761; 100 ER 1288, 1289 (Lord Kenyon CJ).

200 This is in the note of Serjeant Williams to *Pordage* (n 125) 451 n 4.

201 Patterson (n 53) 913.

202 Stannard and Capper (n 38) 34 [2.05].

203 Lewison (n 43) 881–2.

204 (1779) 1 H Bl 273; 126 ER 160, 160 ('*Boone*').

205 Stoljar, 'Dependent and Independent Promises' (n 3) 243.

206 *Duke of St Albans v Shore* (1789) 1 H Bl 270; 126 ER 158, 163–4 (Lord Loughborough for the Court); *Glazebrook* (n 152) 1440 (Le Blanc J), 1441 (Lawrence J). Both Le Blanc J and Lawrence J referred to and applied *Boone* (n 204); Lord Kenyon CJ did not refer to *Boone* (n 204) but applied reasoning consistent with it.

207 See above n 47.

creditor's promise to release a debtor was held dependent on the debtor's payment of the settlement sum to the creditor,[208] and, in a loan agreement, a borrower's obligation to pay to the lender, in addition to interest and principal, an 'uplift' calculated by reference to the loan amount was held dependent on the loan amount being advanced to the borrower.[209]

These outcomes seem intuitive even without the application of the centrality analysis; in the words of Leeming JA, there is an 'obvious commercial link' between these types of obligations.[210] Yet, a centrality analysis may result in the identification of dependent promisee obligations which are not so obviously connected. For example, in *Measures Brothers Ltd v Measures*, the England and Wales Court of Appeal held that a restraint of trade clause in a fixed-term employment contract, which was expressed to apply to the employee seven years after his employment, was nonetheless unenforceable by the employer when it went into liquidation and prematurely discharged the employee.[211] Because the restraint was located within an agreement whose principal purpose was to establish an employment relationship, Kennedy LJ reasoned that the preservation of that relationship was the 'essential consideration' for the employee's promise not to compete,[212] and in turn concluded that breach of the employer's promise to employ the employee precluded enforcement of the restraint.

The courts have extended the centrality analysis and have treated as equally central any obligation of the promisor which is practically connected to the promisor's central obligations under the contract. Thus, in *Guy-Pell v Foster*, the England and Wales Court of Appeal considered an agreement for the issue of debentures, whereby the purchaser promised to return a percentage of the profit made on the debentures to the seller, and the seller promised to indemnify the purchaser against loss suffered on the debentures.[213] The Court of Appeal held that the purchaser's ancillary promise to hold the debentures until maturity was a condition precedent to the seller's obligation to indemnify him because, if the purchaser did not retain the debentures, he would be unable to perform his central obligation to pay the seller the profit on the debentures.[214]

[208] *Burton* (n 49) 895 [75] (Mahoney JA).

[209] *Hillam* (n 44) 443 [105] (Leeming JA).

[210] Ibid.

[211] *Measures* (n 47) 254 (Cozens-Hardy MR), 262 (Kennedy LJ).

[212] Ibid 261.

[213] *Guy-Pell* (n 47) 176 (Lord Hanworth MR).

[214] Ibid 183 (Lord Hanworth MR), 185, 187–8 (Lawrence LJ).

2 *Intersection with the Relational Norm*

The authorities described above are outgrowths of the archetypes of dependence discussed at Part V. Just as a promise to transfer land is central to a conveyancing transaction, warranting its treatment as interdependent with the purchaser's obligation to pay, so a debtor's promise to pay a settlement sum is central to a settlement agreement, warranting treating payment as a condition precedent to the debtor's release. However, given the analysis in Part V(B), which exposes the courts' consciousness that, in non-simultaneous transactions, treating promisors' obligations as conditions precedent risks shifting inordinate risk onto earlier performing promisors and thus threatening the security of such transactions, an explanation must be provided as to why courts have continued to treat promisors' performance of central promises as conditions precedent across a wide range of non-simultaneous transactions.

The threads of an explanation are found in the fact that variants of the centrality analysis have been grafted onto the numerous tests that now justify termination for breach.[215] It is now common for courts, when determining whether a term is a condition or warranty, to inquire into its 'essentiality' as a motivation for the contract.[216] Even where a term is not a condition, breach of an innominate term going to the 'root of the contract' may justify termination.[217] The clustering of the tests for termination and for determining dependence is telling, and points to a unifying theory grounded in judicial acceptance of the relational character of contracts. In both cases, the courts can be said to recognise that executory contracts ordinarily give effect to *both* a relationship and exchange between the parties,[218] with the latter conditioned on the former. Just as courts recognise that a promisee is entitled to be freed of a sufficiently deteriorated relationship through termination,[219] they may supply an alternative remedy to a promisee to avoid performance on the same premise.

But why is breach of a central promise a useful proxy for a sufficiently deteriorated relationship warranting the promisee's withholding of performance? As discussed in Part III(C)(1), relational contract theorists have long insisted that a transaction is 'enveloped' within norms of, inter alia, reciprocity (maintained through contractual solidarity) and propriety of means. Those norms

[215] See the comments in Stoljar, 'Dependent and Independent Promises' (n 3) 250 n 256.

[216] See above n 20.

[217] *Hongkong* (n 38) 64 (Upjohn LJ).

[218] This is the definition of a 'relational contract' offered by Melvin A Eisenberg, 'Relational Contracts' in Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law* (Oxford University Press, 1995) 291, 296. Eisenberg considers relational contracts to represent the majority of contracts: at 297.

[219] *International Encyclopedia of Comparative Law* (n 75) [102].

give rise to an implicit agreement as to the circumstances in which litigation will be used to enforce a contract.[220] Even the most hard-headed commercial parties ordinarily act on the faith that their counterparties will perform the substance of the transaction; it would be irrational to contract with a party expecting that they will default and that damages will adequately compensate for breach.[221] Sophisticated parties, while conscious that their counterparties may tender materially defective performance also recognise that proceedings will entail a series of 'games, strategies and hurdles' alienated from the vindication of their bargain.[222] They therefore do not contract with a view to using litigation as a substitutionary vehicle for securing the central value of their bargain.

It follows that a promisor who wholly fails to perform the root of the transaction, but insists that the promisee continue its performance and seek damages for the promisor's breach, is violating the relational norms on which exchange is premised. The contract, stripped of performance of its core promises, no longer secures a reciprocal exchange. The relegation of the promisee's rights to an under-compensatory damages claim is an improper co-option of judicial process, contrary to the implied understanding of the parties and 'the good sense of the case'.[223]

In these circumstances, the Dependency Doctrine supplies a remedy of particular utility when viewed through the prism of the Relational Norm. Unlike termination, the remedy supplied by the Dependency Doctrine for breach of a central promise — namely, withholding of performance — does not involve the abandonment of a deteriorated relationship. Instead, it places pressure on the non-performing promisor to return to the negotiating table, to either render performance or negotiate a variation of the terms of performance.[224] Such negotiation may be fruitless and ultimately result in termination. However, it may preserve the contractual regime if the promisor has 'enough value tied up in [its] partial performance' to be incentivised to cure its performance to obtain

[220] See above Part III(C).

[221] See Richard Austen-Baker, 'Comprehensive Contract Theory: A Four-Norm Model of Contract Relations' (2009) 25(3) *Journal of Contract Law* 216, 224: 'contracts are entered into in the expectation of performance, not of breach'. See also *Laird* (n 172) 1206 (Pollock CB): 'agreements should be construed as though made on the supposition that both parties would observe them, not break them'. As to the under-compensatory nature of damages, see above n 164.

[222] Gordon (n 96) 572.

[223] *Pordage* (n 139) 451 n 4 (Serjeant Williams' note).

[224] The *Restatement of Contracts* (n 54) expressly acknowledges that the encouragement of negotiation is the policy objective of conferring on a promisee a right to suspend for breach of a dependent term: at ch 10 (Introductory Note).

counter-performance.[225] Equally, the promisee may have reason to agree to the promisor's proposed cure, as opposed to pursuing termination, where it sees sufficient value in avoiding the duplication of transaction costs or delay associated with contracting with a new party.[226] Critically, the Dependency Doctrine permits any such curative performance to be procured without resort to litigation, a process which tends — through its cost, artificiality, capacity for obstruction, and its bias towards 'repeat players'[227] — to degrade the parties' relationship.[228] Given this, the Dependency Doctrine and the de facto remedy of suspension it supplies provide a unique mechanism for ameliorating intractable conflict and potentially resuscitating the parties' deteriorated relationship.

B *Preserving the Agreed Order of Performance*

1 *Evolution of the Authorities*

The early case law also contains examples of courts applying the Dependency Doctrine to impose a particular order of contractual performance on the parties on pragmatic grounds. The clearest cases were those where the promisee was practically unable to perform without the promisor's counter-performance. In these cases, the courts would reason that the promisor's performance was a condition precedent.[229] In the mid-19th century, Pollock CB would state the principle as follows: '[a promisor] cannot be heard to complain that the [promisee] has not done that which he has wilfully made it impossible that he should do'.[230]

Today, this pragmatic qualification of promisees' obligations is applied by courts construing construction contracts containing interlinked obligations

225 Damien Nyer, 'Withholding Performance for Breach in International Transactions: An Exercise in Equations, Proportions or Coercion?' (2006) 18(1) *Pace International Law Review* 29, 39–40.

226 JW Carter, 'Suspending Contract Performance for Breach' in Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law* (Oxford University Press, 1997) 485, 489–90.

227 Stewart Macaulay, 'An Empirical View of Contract' [1985] (3) *Wisconsin Law Review* 465, 470; Gordon (n 96) 572; Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9(1) *Law & Society Review* 95.

228 Even formalists acknowledge this point: see Morgan (n 102) 107.

229 *Raynay v Alexander* (1605) Yel 76; 80 ER 53, 53 (Popham CJ); *Thomas v Cadwallader* (1744) Willes 496; 125 ER 1286, 1288 (Willes CJ): 'a man cannot repair until the timber is assigned him for such repairs'.

230 *Ellen v Topp* (1851) 6 Ex 424; 155 ER 609, 615.

such that a promisor's non-performance either delays the promisee's performance or renders that performance impossible.[231] So, for example, a builder's obligation to construct a house at a particular sand pad level was held to be dependent upon the owner providing the builder with a sand pad at that level.[232] Similarly, a lessor's obligation to replace the premise's air-conditioning system and the lessee's obligation to fit out the premises were held to be 'mutually dependent'[233] because the air-conditioning system's design could not be conveniently settled until the lessee had supplied adequate plans of the proposed fit-out.[234] Consequently, the lessor was absolved of its obligations where the lessee had refused to undertake the permanent fit-out and had not even submitted an acceptable plan for approval of the permanent fit-out.[235]

The parties' agreed order of performance may also secure practical benefits for the promisee, which the courts will seek to preserve by treating the promisee's obligation as dependent on the promisor's performance. This is evident in the international shipping and sale cases, where English courts have elevated notice clauses, ordinarily treated as independent obligations,[236] to conditions precedent to the charterer or purchaser's obligations.[237] This is because, in this context, a promisor's notice obligations may be essential to coordinating delivery and the subsequent enlivening of the promisee's obligations upon delivery.[238] Similarly, courts have held that a promisor's obligation to provide secu-

[231] The below discussion focuses on the courts' use of the Dependency Doctrine as a technique for qualifying the promisee's obligations where its obligations are interlinked with the promisor's. Courts have also dealt with this interdependence by appeal to the 'prevention principle', which provides that a promisor cannot sue for a promisee's breach caused by the promisor's own breach: *Roberts v Bury Improvement Commissioners* (1870) LR 5 CP 310, 325–6 (Kelly CB, Blackburn and Mellor JJ). In addition to the cases discussed below, see *Clough Engineering Ltd v Oil & Natural Gas Corporation Ltd* (2007) ATPR ¶42-166, 47619 [70] (Gilmour J).

[232] *Elvidge Pty Ltd v BGC Construction Pty Ltd* [2006] WASCA 264, [26] (McLure JA, Roberts-Smith JA agreeing at [1]), [58]–[60] (Buss JA). These comments were ultimately obiter, as neither party had relied on the Dependency Doctrine on the appeal or at trial.

[233] *Sansom Nominees Pty Ltd v Meade* [2005] WASC 9, [153] (EM Heenan J).

[234] Ibid [98] (EM Heenan J).

[235] Ibid [137]–[142] (EM Heenan J).

[236] See below Part VII(A)(1).

[237] See *Luis de Ridder Ltd v Andre & Cie SA (Lausanne)* [1941] 1 All ER 380, 382 (Viscount Caldecote CJ); *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 WLR 74, 81 (Lord Denning MR); *Hyundai Merchant Marine Co Ltd v Karander Maritime Co Inc* [1996] CLC 749, 753–6 (Mance J) ('*Hyundai*').

[238] *Hyundai* (n 237) 754–5 (Mance J). Cf *MSC Mediterranean Shipping Company SA v Cottonex Anstalt* [2015] 1 Lloyd's Rep 359, 366 [42] (Leggatt J) ('*MSC*').

rity is a condition precedent to the promisee's obligation to subsequently perform the substantive transaction.[239] This is because the provision of credit demonstrates the good faith of the promisor, assures the promisee of payment and, further, enables the promisor to meet the costs of performance.[240] These are significant benefits, warranting a conclusion that the promisee would not proceed with the transaction until appropriate credit was provided.

There is residual uncertainty about whether courts will employ the Dependency Doctrine to preserve a contractually specified sequence of performance in the absence of proof of the practical benefit of that sequence. In some cases, courts have resisted a finding of dependence if left unpersuaded of the practical importance of the order of performance.[241] In other cases, however, courts have determined that the promisor's earlier-in-time obligation is a condition precedent to a promisee's later-in-time obligation, entirely on the premise that to hold otherwise would empower the promisor to alter the sequence of the parties' obligations unilaterally.[242] This is a limited example of a genuine uncertainty in the Dependency Doctrine. The most that can be said is that there is insufficient authority to negative the proposition that the courts will be attentive to the contractual order of performance and will utilise the Dependency Doctrine to enforce that order even in the absence of evidence of its practical utility, subject to the matters discussed in Part VII.

2 *Intersection with the Relational Norm*

The relational context of the contractual schemes considered in the above authorities helps explain their outcomes.[243] Noticeably, the authorities all concern the performance of ancillary contractual obligations, which are to be performed in advance of (at least one of) the parties' central obligations. These contractual regimes envisage a more interactive arrangement than a simple exchange, in which future contingencies will typically be more challenging to address *ex*

239 See *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297, 304 (Denning LJ) ('*Trans Trust*'); *Roberts v Brett* (1865) 20 CB NS 148; 144 ER 1060, 1065 (Lord Westbury), 1065 (Lord Cranworth), 1067 (Lord Chelmsford); *Kronos Worldwide Ltd v Sempra Oil Trading Sarl* [2004] 1 CLC 136, 140 [8] (Mance LJ).

240 *Trans Trust* (n 239) 304 (Denning LJ).

241 See, eg, *MSC* (n 238) 366 [42] (Leggatt J); *Roberts v Ghulam Nabie* (1911) 13 WAR 156, 157 (McMillan J, Rooth J agreeing at 158).

242 *Covington Marine Corp v Xiamen Shipbuilding Industry Co* [2006] 1 CLC 624, 646 [64] (Langley J). See also *Acemount Pty Ltd v Sunlong Holdings Pty Ltd [No 2]* [2009] WASC 391, [128] (Hasluck J).

243 As to the importance of construing contracts in their relational context, see Catherine Mitchell, *Contract Law and Contract Practice: Bridging the Gap between Legal Reasoning and Commercial Expectation* (Hart Publishing, 2013) 192.

ante.[244] In that context, the parties will likely place greater value on cooperation in resolving disputes arising from unanticipated contingencies.[245] Bearing this in mind, it seems apt to incentivise the parties to pursue a dispute resolution procedure more likely to produce a cooperative solution, and preserve the parties' relationship, than litigation. The Dependency Doctrine, and the remedy of suspension, provides such a pathway.

'Keeping the deal together'[246] by enabling the parties to renegotiate and the promisor to potentially cure its non-performance, is particularly important in the above contractual schemes because the courts are particularly ill-equipped, relative to the parties, to resolve the parties' coordination disputes. This is exposed when one considers the Court's remedial powers where the promisee sues for non-performance by the promisor of its earlier-in-time obligation, and the promisor counter-sues for the promisee's non-performance of its later-in-time, and practically contingent, obligation. A damages award may be significantly under-compensatory to the promisee because the promisee's loss caused by the promisor's breach may be less readily quantifiable than the promisor's loss caused by the promisee's breach.[247] Specific performance will often also prove to be inutile because, by the time that the remedy is awarded, the time for performance of the parties' central obligations may have elapsed, frustrating the purpose of the transaction. Alternatively, the relationship may have so deteriorated that a court may justly fear that an award will merely '[yoke] the parties together in a continuing hostile relationship'.[248] Given the unsuitability of these remedies, it is unsurprising that courts have favoured a solution which signals that, where a promisor's non-performance materially threatens the sequencing of the transaction, the promisee may withhold performance, and expend its own resources as opposed to the courts', in attempting to cure the promisor's non-performance.

VII Independence as a Safety Valve against Opportunism

The principles outlined in Part VI cast a wide net for classifying promisee obligations as dependent on promisor performance. But not all promises falling

[244] Charles J Goetz and Robert E Scott, 'Principles of Relational Contracts' (1981) 67(6) *Virginia Law Review* 1089, 1090.

[245] See generally Jay M Feinman, 'Relational Contract Theory in Context' (2000) 94(3) *Northwestern University Law Review* 737, 740, on the importance of cooperation for relational contracts.

[246] Farnsworth, 'Nonperformance' (n 53) 283.

[247] See also *Hyundai* (n 237) 753 (Mance J).

[248] *Co-Operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1, 16 (Lord Hoffmann).

within these categories will be so classified. Courts police the boundaries of what constitutes a dependent promise with the techniques they employ in other areas of contract law: that is, through the criterion of opportunism outlined in Part III(D). A review of the authorities reveals three primary indicia of a sufficiently heightened risk of opportunism warranting treating promises as independent, each of which is discussed below. Of these, the first — inordinately disproportionate consequences for the promisor — is the most important, as this concern pervades much of the case law in which obligations have been classified as independent.

A *Evolution of the Authorities*

1 *Disproportionate Consequences for the Promisor*

The judicial concern to resist classifying promisee obligations as dependent where there is obvious disproportion between the value of the promisor's non-performance and the promisee's asserted right to withhold return performance has origins in the early case law. In *Hayes v Bickerstaff* ('*Hayes*'), North CJ expressed concern that treating a term of a lease as a condition precedent would enable the lessor to avoid performance of a covenant of '1000 [pounds] value' where the lessee 'broke a covenant of the value of a penny'.[249] As discussed in Part VII(A)(2), this reasoning may have reflected the common law's unique characterisation of leases. However, since the early 19th century, courts have expressed similar concerns outside of this context.[250]

A modern example of this technique is found in the cases concerning the relationship between notice obligations and commercial indemnities. In contrast to the shipping and sales cases,[251] where notice provisions serve a crucial role in coordinating the parties' execution of a transaction, the utility of notice provisions in commercial indemnities is more marginal. Although notice enables the indemnitor to investigate an indemnity claim, where the indemnitee can bring proceedings, it is those proceedings that will determine the merits of the indemnity claim. Courts have therefore more readily stressed the risk of technical breach of notice provisions depriving an indemnitee of a substantial

[249] (1675) 1 Freem KB 194; 89 ER 138, 138 (North CJ).

[250] In addition to the cases discussed below, see *Winstone v Linn* (1823) 1 B & C 460; 107 ER 171, 175 (Best J); *Macintosh v Midland Counties Railway Co* (1845) 14 M & W 548; 153 ER 592, 597 (Alderson B); *London Gas-Light Co v Vestry of Chelsea* (1860) 8 CB NS 215; 141 ER 1148, 1157 (Erle CJ); *Fearon v Earl of Aylesford* (1884) 14 QBD 792, 799 (Brett MR); *Sydney Attractions Group Pty Ltd v Schulman* [2013] NSWSC 858, [56] (Sackar J) ('*Schulman*').

[251] See also the discussion above in Part VI(B)(1).

benefit and, in turn, have decided that the indemnitor's obligations should be construed as independent of the indemnitee's notice obligations.[252]

2 *Largely Executed Transactions*

As alluded to in Part VI(A), early and modern courts have evinced a concern to render promises in largely executed contracts independent of one another.[253] The leading early example of this is *Boone*. *Boone* concerned an executed contract, in which a purchaser of a plantation with several slaves, having taken possession of the plantation, sought to avoid payment after discovering that the seller did not have title to the slaves.[254] Lord Mansfield CJ held that the purchaser was obliged to make payment notwithstanding the vendor's breach, evincing sensitivity to the risk of any purchaser in such a situation opportunistically seeking to avoid payment on the basis of 'any one [slave] not being the property of the [seller]'.[255] Lord Mansfield CJ's concerns were plainly continuous with those of North CJ in *Hayes*. However, *Boone* was applied by several early decisions to reject the classification of a promisor's obligation as a condition precedent specifically where the promisee had already taken the benefit of the transaction in question.[256]

Perhaps the clearest remnant of the early rule is found in the case of leases, where English and Australian courts have consistently treated a lessor and lessee's obligations as independent (where legislation governing leases does not cover the field).[257] This is the product of the common law's historical view that a lease constituted a temporary conveyance by the lessor of an interest in land

[252] See, eg, *Keegan* (n 27) 11 (Mahoney JA). See also *Heritage Oil & Gas Ltd v Tullow Uganda Ltd* [2014] 2 CLC 61, 74 [36] (Beatson LJ).

[253] Lewison (n 43) 883.

[254] *Boone* (n 204) 160 (Lord Mansfield CJ).

[255] Ibid.

[256] *Campbell v Jones* (1796) 6 Term R 570; 101 ER 708, 710 (Lord Kenyon CJ); *Havelock* (n 198) 890 (Lord Ellenborough CJ); *Stavers v Curling* (1836) 3 Bing NC 355; 132 ER 447, 453 (Tindal CJ) ('*Stavers*'). See also the judgment of Pollock CB in *Newson v Smythies* (1858) 3 Hurl & N 840; 157 ER 707, 709.

[257] See, eg, *Edge v Boileau* (1885) 16 QBD 117, 120 (Pollock B), citing *Dawson v Dyer* (1833) 5 B & Ad 584; 110 ER 906; *Re de Garis and Rowe's Lease* [1924] VLR 38, 40 (McArthur J); *Taylor v Webb* [1937] 2 KB 283, 290 (du Parcq J), successfully appealed on other grounds: at 299 (Slesser LJ), 307 (Scott LJ), 308 (Farwell J); *Dowse v Wynyard Holdings Ltd* [1962] NSWR 252, 263 (Jacobs J); *Yorkbrook Investments Ltd v Batten* (1986) 52 P & CR 51, 62–6 (Wood J for the Court); *Hawkesbury Nominees Pty Ltd v Battik Pty Ltd* [2000] FCA 185, [50] (Hill J); *Masters Home Improvement Australia Pty Ltd v Aventus Cranbourne Thompson Road Pty Ltd* (2019) 59 VR 80, 113–17 [95]–[101] (Croft J).

and that, consequently, the lease constituted a largely executed transaction, supplemented by the lessor and lessee's further executory promises.[258]

The New South Wales Court of Appeal's recent decision in *Kay*[259] is also best rationalised as an application of the presumption against dependence in largely executed transactions. That case concerned a share sale agreement, which provided for the purchaser's payment in three stages as follows: $1 million upon 'exchange', being the date that the purchaser entered into possession of the business; 'nil' on the occurrence of an event, 'Completion', 'subject to' any adjustment in favour of the purchaser; and 'deferred payments' totalling $600,000 commencing on the monthly anniversary of another date, the 'Completion Date', being a prescribed date on which Completion was supposed to occur.[260] A clause in the agreement imposed on the seller an obligation to make appropriate adjustments 'on Completion' reflecting the liabilities accrued up to the Completion Date.[261] When neither party performed their obligations on 'Completion', a question arose as to whether the purchaser's obligation to make deferred payments commenced from the monthly anniversary of the Completion Date, as specified in the agreement, or was deferred until the parties agreed to an adjustment amount. The Court preferred the former view, holding that the purchaser's obligation to make the deferred payments was independent of the adjustment being agreed.[262]

The Court's reasons were complex, a consequence of its attempt to reconstruct the intent of the transaction by reference to textual indicia. Emphasis was placed on the fact that the definition of the deferred payments did not refer to the adjustment, and that the deferred payments were tied to the Completion Date, whereas the adjustment was tied to the technically separate, although conceptually linked, date of Completion.[263] None of this could, however, be dispositive. In an agreement outlining a staged payment process, it would not be unreasonable to conclude, as the trial judge had,[264] that the parties intended

258 *Williston on Contracts* (n 52) § 44:41; LexisNexis, Thomas Editions (3rd ed), *Thompson on Real Property* (online at 5 May 2020) '39 Leasehold Estates' § 39.02(a). See also Farnsworth, 'Nonperformance' (n 53) 257; John A Humbach, 'The Common-Law Conception of Leasing: Mitigation, Habitability, and Dependence of Covenants' (1983) 60(4) *Washington University Law Quarterly* 1213, 1229.

259 See *Kay* (n 5) 40051 [65] (Brereton JA).

260 Ibid 40040 [3].

261 Ibid 40040 [4].

262 Ibid 40054 [80] (Brereton JA, Macfarlan JA agreeing at 40039 [1], Simpson AJA agreeing at 40068 [132]).

263 Ibid 40052 [71]–[72] (Brereton JA, Macfarlan JA agreeing at 40039 [1], Simpson AJA agreeing at 40068 [132]).

264 *Playup Australia Pty Ltd v Kay* (2019) 138 ACSR 374, 388–9 [128]–[136] (Stevenson J).

that completion of each stage was a condition precedent to the next, notwithstanding that each stage was technically distinct.[265] More compelling, however, is the factual matrix of the transaction. The purchaser had entered into possession of the business upon payment of the initial $1 million amount. The usual features of completion had occurred, and the purchaser had taken the benefit of the transaction. Nevertheless, the purchaser refused to pay the deferred payments worth $600,000 because the adjustment amount could not be agreed.[266] The Court of Appeal was alive to all of this, stating that '[f]or most intents and purposes the sale had already been implemented' subject to what were 'by and large, formalities'.[267] The Court's language may have differed from Lord Mansfield CJ's, but its reasons can be neatly synthesised with *Boone* and other early cases which mitigated opportunistic withholding in the case of largely executed transactions.

3 *Imprecise Obligations of the Promisor*

Courts have also held that, where a promisor's obligation is expressed in generalities, or is otherwise uncertain in scope, this will tell against its construction as a condition precedent to the promisee's obligations. A relatively early example of this reasoning is found in *Stavers v Curling*,[268] in which Tindal CJ held that a plaintiff's covenant to procure and deliver a cargo of sperm oil 'or as great a proportion as might be, under all circumstances, within his power to obtain' was not a condition precedent to the defendants' obligation to pay for that cargo. Chief Justice Tindal expressed a desire to ensure compensation for any breach was calibrated 'exactly with the extent of [the defendants'] injury',[269] suggesting the imprecision of the plaintiff's covenant made it undesirable to empower the defendants to withhold performance because of the covenant's alleged breach.

This type of reasoning has been applied to render both procedural and substantive clauses independent obligations. As an example of the former, English

[265] As referred to in Part VI(B), where a contract specifies a particular order for the parties' performance of obligations, courts have sought to preserve that order by treating the later-in-time obligation as dependent upon the earlier-in-time obligation. The Court's reasons in *Kay* (n 5) may also be contrasted with those in *Schulman* (n 250), in which Sackar J construed the parties' payment obligations under a share sale agreement. Justice Sackar held that a purchaser's entitlement to receive a final payment from the vendor (calculated on the basis of a complex formula specified in the agreement) was dependent on the purchaser having performed its obligation to make earlier quarterly payments: at [56].

[266] *Kay* (n 5) 40041 [6]–[7] (Brereton JA).

[267] Ibid 40054 [81].

[268] *Stavers* (n 256) 453.

[269] Ibid.

courts have refused to treat certain notice clauses as conditions precedent to promisees' obligations to grant force majeure relief because those clauses prescribed indefinite notice obligations.[270] As an example of the latter,[271] the High Court of England and Wales has held that, in an agreement providing for the promotion of an internet provider, the internet provider's obligation to pay the service provider — a nightclub — was independent of the nightclub's performance of one of its promised services — the packaging of CDs. This was because the nightclub committed to perform several services of varying importance over the agreement period, without specifying the dates for those services to be performed.[272] The Court could not accept that the parties intended that '*any*' breach by the nightclub of this obligation would deprive it of a right to payment.[273]

Again, these authorities are continuous with those discussed above in Part VII(A)(1). They reflect a concern that, where a promisor's obligation is imprecise, any breach of it may be trifling and, accordingly, permitting the promisee to withhold valuable performance on the basis of the promisor's breach would impose potentially disproportionate harm on the promisor.

B *Intersection with the Anti-Opportunism Norm*

The long history of the above authorities suggests that the concern to defend against a promisee's opportunistic withholding of performance is a deeply embedded feature of the Dependency Doctrine. However, given the breadth of authorities described in Part VI classifying obligations as dependent, the authorities catalogued in this Part can only be described as evincing a counterbalancing judicial impulse to mitigate the risks that arise from treating terms as conditions precedent in non-simultaneous transactions. There is, therefore, a similar competition of norms shaping the outer edges of the Dependency Doctrine's case law as was observed in the authorities applying the Dependency

[270] See, eg, *Bremer* (n 121) 113 (Lord Wilberforce), 128 (Lord Salmon), quoted in *Scottish Power UK plc v BP Exploration Operating Co Ltd* [2016] 1 All ER (Comm) 536, 587 [210] ('*Scottish Power*'). See also *Scottish Power* (n 270) 587–8 [211], 590 [223] (Leggatt J).

[271] In addition to *Ministry of Sound (Ireland) Ltd v World Online Ltd* [2003] 2 All ER (Comm) 823 ('*Ministry of Sound*'), see also *Gibson* (n 141) 1068–9 (Turner LJ); *Leiston Gas Co v Leiston-cum-Sizewell Urban District Council* [1916] 2 KB 428, 433–4 (Lord Reading CJ); *Ram Media Ltd (in admin) v Ministry of Culture of the Hellenic Republic (Secretariat General of Sport)* [2008] EWHC 1835 (QB), [173]–[174] (Tugendhat J). See also *Aalders* (n 46) [77] (Ward J).

[272] *Ministry of Sound* (n 271) 825–6 [4]–[8] (Nicholas Strauss QC).

[273] Ibid 842 [55] (emphasis in original).

Doctrine to more archetypal transactions involving non-simultaneous exchange.[274]

The starting proposition, then, is that, in addition to expressly conditional obligations and the historical archetypes of dependent obligations, a potentially expansive range of promisor obligations may constitute conditions precedent to a promisee's performance. In these cases, the promisee may suspend performance to coerce a defaulting promisor to offer curative performance. This not only secures the promisor's performance, it supplies the promisee a self-help remedy of suspension that better reflects, and may better preserve, the parties' enveloping relationship. However, the remedy carries a risk of exploitation by the promisee, which increases as the remedy reaches its 'greatest efficiency'[275] — that is, when the promisor's incentive to offer curative performance is at its height because: (a) on the face of the contract, the promisee's performance is inordinately more valuable than the promisor's; (b) due to the promisor's performance, the promisee's performance is now inordinately more valuable than the promisor's performance; or (c) the promisee's performance is *potentially* inordinately more valuable because of the imprecision of the promisor's obligation. In these extreme cases, not only will the promisee be able to extract oppressive terms of performance from the promisor in a negotiation, the promisee will often have no interest in negotiating with the promisee because of the disparity in value between its and the promisor's performance. Each case is therefore a useful proxy for a promisee's opportunistic attempt to use the Dependency Doctrine to secure 'an unbargained for advantage'.[276] It is unsurprising that the authorities determining obligations to be independent cluster around these proxies.

It follows that, in the absence of clear textual indicia, English and Australian jurisprudence reflects the sentiment expressed in the US *Restatement of Contracts* that parties 'ordinarily bargain for performance rather than for a lawsuit',[277] and the courts therefore favour treating promises as dependent upon one another in a wide variety of circumstances. However, English and Australian courts have resisted a wholehearted embrace of a presumption that promisors' obligations are conditions precedent. There is good reason for them not to

[274] See above Part V(B).

[275] Patterson (n 53) 926.

[276] Juliet P Kostritsky, 'Plain Meaning vs Broad Interpretation: How the Risk of Opportunism Defeats a Unitary Default Rule for Interpretation' (2007) 96(1) *Kentucky Law Journal* 43, 48.

[277] *Restatement of Contracts* (n 54) ch 10 (Introductory Note).

do so; if they did, they would announce a bright line for exploitation by opportunistic promisees.[278] Instead, the courts describe themselves as merely inquiring into the parties' intentions, which acoustically masks their weighing of competing objectives.[279] The result is an elaborately structured jurisprudence that evades synthesis into a single explanatory theory. Indeed, this opacity may be a feature, not a bug.

VIII Conclusion

The Dependency Doctrine's contested status may be a function of its location on the border of the parties' agreement, sometimes a product of the parties' terms and sometimes just outside of them. This feature, when supplemented by the interstitial development of principles across many centuries, with adjacent doctrines diverting judicial and academic attention, has left the Dependency Doctrine both unsystematised and unconceptualised. Yet, remarkably, an analysis of the guideposts applied by courts in shaping the Dependency Doctrine suggests that they are interlinked in a complex, but nevertheless coherent, web.[280] Crucial to an accurate description of the Dependency Doctrine is recognition that it involves more than the application of techniques of contractual construction and that its boundaries have been forged over time by the dynamic exchange between forces favouring security of performance, consistency with relational contracting norms, and curtailing opportunism. The interplay between the Dependency Doctrine's competing norms undeniably produces precarious categories of dependent and independent obligations. However, as has

[278] In the US, Smith has observed that equity has long utilised *ex post* standards, on the premise that the common law's *ex ante* rules, while having the advantage of announcing bright lines of legality, are too readily manipulated by the unscrupulous. At the same time, to avoid the chilling effect of an entirely *ex post* private law, equity utilises proxies for opportunism, such as substantial hardship, to narrow the circumstances in which it is triggered: Smith, 'The Equitable Dimension of Contract' (n 117) 904–5; Henry E Smith, 'Equity as Second-Order Law: The Problem of Opportunism' (Working Paper No 15-13, Harvard Public Law, 15 January 2015) 32. Juliet P Kostritsky has also defended the opacity of the courts' method for selecting general approaches to contractual interpretation as a means of resisting opportunism: Kostritsky (n 276) 45–8. Although such analyses may be particular to US jurisprudence, they supply important insights for understanding the functional justification for the Dependency Doctrine.

[279] For an explanation of the technique of 'acoustic separation', see above n 74.

[280] See the account of complex coherence in John CP Goldberg, 'Introduction: Pragmatism and Private Law' (2012) 125(7) *Harvard Law Review* 1640, 1653–5.

been observed of the initial case law applying the Dependency Doctrine, uncertainty 'has a way of being fertile',[281] and the Dependency Doctrine's experimentations supply it with a continuing vitality that makes it worthy of serious academic engagement.

[281] Stoljar, 'Dependent and Independent Promises' (n 3) 251.