House of Lords before Lord Reid; Lord Morris of Borth-y-Gest; Lord Wilberforce; Lord Simon of Glaisdale; Lord Kilbrandon; 4th April 1973.

Lord Reid : MY LORDS,

The Appellants are a German company which manufactures machine tools and other engineering products. The Respondents are a selling organisation. On 1st May, 1963, they entered into an elaborate "distributorship agreement" under which the Appellants (whom I shall call Schuler) granted to the Respondents (called Sales in the agreement but whom I shall call Wickman) the sole right to sell Schuler products in territory which included the United Kingdom. These products included " panel presses" defined in clause 2 and general products. The panel presses are large machine tools used by motor manufacturers. Wickman were to act as agents for Schuler in selling the panel presses but were to purchase and re-sell the general products. Wickman's obligation with regard to the promotion of sales of Schuler products is contained in clauses 7 and 12(6) which are in the following terms:

"7. Promotion by Sales

(a) Subject to Clause 17 Sales will use its best endeavours to promote and extend the sale of Schuler products in the Territory.

(b) It shall be a ***condition*** *of this Agreement that: —*

(i) Sales shall send its representatives to visit the six firms whose names are listed in the Schedule hereto at least once in every week for the purpose of soliciting orders for panel presses ;

(ii) that the same representative shall visit each firm on each occasion unless there are unavoidable reasons preventing the visit being made by that representative in which case the visit shall be made by an alternate representative and Sales will ensure that such a visit is always made by the same alternate representative.

Sales agrees to inform Schuler of the names of the representatives and alternate representatives instructed to make the visits required by this Clause." . . .

12 (b) Sales undertakes, at its expense, to look after Schuler's interests carefully and will visit Schuler customers regularly, particularly those customers principally in the motor car and electrical industries whose names are set out on the list attached hereto and initialled by the parties hereto and will give all possible technical advice to customers."

The six firms referred to in clause 7 are six of the largest motor manufacturers in this country. The agreement was to last until the end of 1967 so that clause *7(b)*(i) required Wickman to make a total of some 1,400 visits during the period of the agreement. Wickman failed in their obligation. At first there were fairly extensive failures to make these visits. Then there were negotiations with a view to improving the position and Schuler have been held to have waived any right arising out of those failures. There- after there was an improvement but there were still a considerable number of failures.

After some correspondence Schuler wrote to Wickman in October, 1964. terminating the agreement on the ground that failure to fulfill their obliga- tion for weekly visits to the six firms entitled Schuler to treat that failure as a repudiation of the agreement by Wickman. In accordance with clause 19 of the agreement this question was referred to arbitration. In spite of the apparently simple and limited nature of the question in dispute, proceedings before the Arbitrator were elaborate and protracted. Ultimately the Arbitrator issued his award in the form of a Special Case on 6th October, 1969. He held that Schuler were not entitled to terminate the agreement. This finding was reversed by Mocatta J. but restored by the Court of Appeal.

In order to explain the contention of the parties, I must now set out clause 11 of the agreement.

"11. Duration of Agreement

(a) This Agreement and the rights granted hereunder to Sales shall commence on the First day of May 1963 and shall continue in force (unless previously determined as hereinafter provided) until the 31st day of December 1967 and thereafter unless and until determined by either party upon giving to the other not less than 12 months' notice in writing to that effect expiring on the said 31st day of December 1967 or any subsequent anniversary thereof PROVIDED that Schuler or Sales may by notice in writing to the other determine this Agreement forthwith if: —

(i) the other shall have committed a material breach of its obligations hereunder and shall have failed to remedy the same within 60 days of being required in writing so to do or

(ii) the other shall cease to carry on business or shall enter into liquidation (other than a members' voluntary liquidation for the purposes of reconstruction or amalgamation) or shall suffer the appointment of a Receiver of the whole or a material part of its undertaking;

and PROVIDED FURTHER that Schuler may by notice determine this Agreement forthwith if Sales shall cease to be a wholly-owned subsidiary of Wickman Limited.

(b) The termination of this Agreement shall be without prejudice to any rights or liabilities accrued due prior to the date of termination and the terms contained herein as to discount commission or otherwise will apply to any orders placed by Sales with Schuler and accepted by Schuler before such termination."

Wickman's main contention is that Schuler were only entitled to determine the agreement for the reasons and in the manner provided in clause 11. Schuler, on the other hand, contend that the terms of clause 7 are decisive in their favour: they say that " It shall be a condition of this agreement" in clause *7(b)* means that any breach of clause *7(b)*(i) or *7(b)*(ii) entitles them forthwith to terminate the agreement. So as there were admittedly breaches of clause *7(b)*(i) which were not waived they were entitled to terminate the contract.

I think it right first to consider the meaning of clause 11 because, if Wickman's contention with regard to this is right, then clause 7 must be construed in light of the provisions of clause 11. Clause 11 expressly provides that the agreement " shall continue in force (unless previously determined as " hereinafter provided) until " 31st December, 1967. That appears to imply the corollary that the agreement shall not be determined before that date in any other way than as provided in clause 11. It is argued for Schuler that those words cannot have been intended to have that implication. In the first place Schuler say that anticipatory breach cannot be brought within the scope of clause 11 and the parties cannot have intended to exclude any remedy for an anticipatory breach. And, secondly, they say that clause 11 fails to provide any remedy for an irremediable breach however fundamental such breach might be.

There is much force in this criticism. But on any view the interrelation and consequences of the various provisions of this agreement are so ill-thought out that I am not disposed to discard the natural meaning of the words which I have quoted merely because giving to them their natural meaning implies that the draftsman has forgotten something which a better draftsman would have remembered. If the terms of clause 11 are wide enough to apply to breaches of clause 7 then I am inclined to hold that clause 7 must be read subject to the provisions of clause 11.

It appears to me that clause 11*(a)*(i) is intended to apply to all material breaches of the agreement which are capable of being remedied. The question then is what is meant in this context by the word " remedy ". It could mean obviate or nullify the effect of a breach so that any damage already done is in some way made good. Or it could mean cure so that matters are put right for the future. I think that the latter is the more natural meaning. The word is commonly used in connection with diseases or ailments and they would normally be said to be remedied if they were cured although no cure can remove the past effect or result of the disease before the cure took place. And in general it can only be in a rare case that any remedy of something that has gone wrong in the performance of a continuing positive obligation will, in addition to putting it right for the future, remove or nullify damage already incurred before the remedy was applied. To restrict the meaning of remedy to cases where all damage past and future can be put right would leave hardly any scope at all for this clause. On the other hand, there are cases where it would seem a misuse of language to say that a breach can be remedied. For example, a breach of clause 14 by disclosure of confidential information could not be said to be remedied by a promise not to do it again.

So the question is whether a breach of Wickman's obligation under clause 7*(b)*(i) is capable of being remedied within the meaning of this agreement. On the one hand, failure to make one particular visit might have irremediable consequences, e.g., a valuable order might have been lost when making that visit would have obtained it. But looking at the position broadly I incline to the view that breaches of this obligation should be held to be capable of remedy within the meaning of clause 7. Each firm had to be visited more than 200 times. If one visit is missed I think that one would normally say that making arrangements to prevent a recurrence of that breach would remedy the breach. If that is right and if clause 11 is intended to have general application then clause 7 must be read so that a breach of clause 7*(b)* (i) does not give to Schuler a right to rescind but only to require the breach to be remedied within 60 days under clause 11 *(a)*(i). I do not feel at all confident that this is the true view but I would adopt it unless the provisions of clause 7 point strongly in the opposite direction, so I turn to clause 7.

Clause 7 begins with the general requirement that Wickman shall " *use its best endeavours* " to promote sales of Schuler products. Then there is in clause 7*(b)*(i) specification of those best endeavours with regard to panel presses, and in clause 12*(b)* a much more general statement of what Wickman must do with regard to other Schuler products. This intention to impose a stricter obligation with regard to panel presses is borne out by the use of the word " ***condition*** " in clause 7(*b*). I cannot accept Wickman's argument that conditions here merely means term. It must be intended to emphasise the importance of the obligations in sub-clauses *(b)*(i) and *(b)*(ii). But what is the extent of that emphasis?

Schuler maintains that the word " condition " has now acquired a precise legal meaning ; that, particularly since the enactment of the Sale of Goods Act, 1893, its recognised meaning in English law is a term of a contract any breach of which by one party gives to the other party an immediate right to rescind the whole contract. Undoubtedly the word is frequently used in that sense. There may, indeed, be some presumption that in a formal legal document it has that meaning. But it is frequenly used with a less stringent meaning. One is familiar with printed " Conditions of Sale " incorporated into a contract, and with the words " For conditions see back " printed on the ticket. There it simply means that the " conditions " are terms of the contract.

In the ordinary use of the English language " condition " has many meanings, some of which have nothing to do with agreements. In connection with an agreement it may mean a pre-condition: something which must happen or be done before the agreement can take effect. Or it may mean some state of affairs which must continue to exist if the agreement is to remain in force. The legal meaning on which Schuler relies is, I think, one which would not occur to a layman ; a condition in that sense is not some- thing which has an automatic effect. It is a term the breach of which by one party gives to the other an option either to terminate the contract or to let the contract proceed and, if he so desires, sue for damages for the breach.

Sometimes a breach of a term gives that option to the aggrieved party because it is of a fundamental character going to the root of the contract, sometimes it gives that option because the parties have chosen to stipulate that it shall have that effect. Blackburn J. said in ***Bettini* v. *Gye*** (1875) L.R. 1 Q.B.D. 183: *"Parties may think some matter, apparently of very little importance, essential; and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one."*

In the present case it is not contended that Wickman's failures to make visits amounted in themselves to fundamental breaches. What is contended is that the terms of clause 7 *" sufficiently express an intention* " to make any breach,

however small, of the obligation to make visits a condition so that any such breach shall entitle Schuler to rescind the whole contract if they so desire.

Schuler maintains that the use of the word " condition " is in itself enough to establish this intention. No doubt some words used by lawyers do have a rigid inflexible meaning. But we must remember that we are seeking to discover intention as disclosed by the contract as a whole. Use of the word " condition " is an indication—even a strong indication—of such an intention but it is by no means conclusive.

The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear.

Clause *7(b)* requires that over a long period each of the six firms shall be visited every week by one or other of two named representatives. It makes no provision for Wickman being entitled to substitute others even on the death or retirement of one of the named representatives. Even if one could imply some right to do this, it makes no provision for both representatives being ill during a particular week. And it makes no provision for the possibility that one or other of the firms may tell Wickman that they cannot receive Wickman's representative during a particular week. So if the parties gave any thought to the matter at all they must have realised the probability that in a few cases out of the 1,400 required visits a visit as stipulated would be impossible. But if Schuler's contention is right failure to make even one visit entitle them to terminate the contract however blameless Wickman might be.

This is so unreasonable that it must make me search for some other possible meaning of the contract. If none can be found then Wickman must suffer the consequences. But only if that is the only possible interpretation.

If I have to construe clause *7* standing by itself then I do find difficulty in reaching any other interpretation. But if clause *7* must be read with clause 11 the difficulty disappears. The word " condition " would make any breach of clause *7(b),* however excusable, a material breach. That would then entitle Schuler to give notice under clause 11*(a)*(i) requiring the breach to be remedied. There would be no point in giving such a notice if Wickman were clearly not in fault but if it were given Wickman would have no difficulty in shewing that the breach had been remedied. If Wickman were at fault then on receiving such a notice they would have to amend their system so that they could shew that the breach had been remedied. If they did not do that within the period of the notice then Schuler would be entitled to rescind.

In my view, that is a possible and reasonable construction of the contract and I would therefore adopt it. The contract is so obscure that I can have no confidence that this is its true meaning but for the reasons which I have given I think that it is the preferable construction. It follows that Schuler was not entitled to rescind the contract as it purported to do. So I would dismiss this appeal.

I must add some observations about a matter which was fully argued before your Lordships. The majority of the Court of Appeal were influenced by a consideration of actings subsequent to the making of the contract. In my view, this was inconsistent with the decision of this House in ***Whitworth v. Miller*** [1970] A.C. 583. We were asked by the Respondent to reconsider that decision on this point and I have done so. As a result I see no reason to change the view which I expressed in that case. It was decided in ***Watcham v. A.G. of East Africa Protectorate*** [1919] A.C. 533 that in deciding the scope of an ambiguous title to land it was proper to have regard to subsequent actings and there are other authorities for that view. There may be special reasons for construing a title to land in light of subsequent possession had under it but I find it unnecessary to consider that question. Otherwise I find no substantial support in the authorities for any general principle permitting subsequent actings of the parties to a contract to be used as throwing light on its meaning. I would therefore reserve my opinion with regard to ***Watcham's*** case but repeat my view expressed in *Whitworth* with regard to the general principle.

Lord Morris of Borth-y-Gest MY LORDS,

In his judgment in the Court of Appeal the learned Master of the Rolls said that this is a case which turns on the meaning of the one word " ***condition*** ". I think it does. But it turns upon the meaning of that one word in its context and setting in a Distributorship Agreement made on the 1st May, 1963. The journey which brings to this House what is seemingly so concentrated an issue has been one which has required the ascertainment of facts and one in the course of which certain issues have by now fallen by the wayside. The events of 1963 and 1964 were examined in an arbitration lasting seven days in 1969. The award of the learned Arbitrator raised questions which were debated before the learned Judge for seven days in January and February, 1971. Thereafter the issue which now remains (and which has met with varying fortune) was debated for some five or six days in the Court of Appeal.

The facts as found are all carefully recorded in the award of the learned Arbitrator. I need only briefly refer to the evolution of the point of law which now calls for decision.

The Award of the learned Arbitrator which was stated in the form of a Special Case recorded that the agreed formulated question was as follows: -

" Whether on the facts found and the true construction of the documents Schuler were entitled by reason of breach by Wick man of their obligations under clause 7(b) of the distributorship agreement (a) to terminate that agreement under clause 11 (a) (i) (b) to repudiate that agreement in or about early November 1964". The learned Arbitrator answered the question in the negative. Clause 7 of the agreement is in the following terms:-

"7. Promotion by Sales

(a) Subject to clause 17 Sales will use its best endeavours to promote and extend the sale of Schuler products in the Territory.

(b) It shall be a condition of this Agreement that: -

(i) Sales shall send its representatives to visit the six firms whose names are listed in the Schedule hereto at least once in every week for the purpose of soliciting orders for panel presses ;

(ii) that the same representative shall visit each firm on each occasion unless there are unavoidable reasons preventing the visit being made by that representative in which case the visit shall be made by an alternate representative and Sales will ensure that such a visit is always made by the same alternate representative. Sales agrees to inform Schuler of the names of the representatives and alternate representatives instructed to make the visits required by this Clause."

Clause 11 of the agreement is in the following terms: -

'11. Duration of Agreement

(a) This Agreement and the rights granted hereunder to Sales shall commence on the First day of May 1963 and shall continue in force (unless previously determined as hereinafter provided) until the 31st day of December 1967 and thereafter unless and until determined by either party upon giving to the other not less than 12 months' notice in writing to that effect expiring on the said 31st day of December 1967 or any subsequent anniversary thereof PROVIDED that Schuler or Sales may by notice in writing to the other determine this Agreement forthwith if: —

(i) the other shall have committed a material breach of its obligations hereunder and shall have failed to remedy the same within 60 days of being required in writing so to do or

(ii) the other shall cease to carry on business or shall enter into liquidation (other than a members' voluntary liquidation for the purposes of reconstruction or amalgamation) or shall suffer the appointment of a Receiver of the whole or a material part of its undertaking; and PROVIDED FURTHER that Schuler may by notice determine this Agreement forthwith if Sales shall cease to be a wholly-owned subsidiary of Wickman Limited.

(b) The termination of this Agreement shall be without prepudice to any rights or liabilities accrued due prior to the date of termination and the terms contained herein as to discount commission or otherwise will apply to any orders placed by Sales with Schuler and accepted by Schuler before such termination."

As will have been seen Wickman are called " Sales " the Distributorship Agreement.

The question so formulated reflects the events which occurred. Schuler wrote a letter to Wickman on the 27th October, 1964 (for convenience I so refer to the parties). In the course of the letter Schuler wrote: —

" Furthermore, we have within the last few days received information which clearly indicates that you have also failed to fulfil your obligations under the Agreement to send the named representatives to visit each week the six scheduled companies. You are, of course, fully aware that this requirement was one to which fundamental importance was attached when the Agreement was entered into, and your failure to send the representatives on these visits was the subject of our complaint earlier this year. This obligation on your part is a condition of the Agreement and your failure to fulfil its terms (quite apart from any other grounds) entitled us to treat your failure as a repudiation of the Agreement on your part.

Accordingly, we advise you that we regard the Distributorship Agreement between us of May 1, 1963 as now at an end and this letter is to give you notice to this effect."

Wickman replied (on the 2nd November, 1964) that they did not accept that they had failed to fulfil their obligations or were in breach of the agreement of the 1st May, 1963, and that they regarded Schuler's letter as a wrongful repudiation of the agreement. Pursuant to a clause in the agreement arbitration proceedings followed. Wickman were Claimants. By their Points of Claim (delivered on the 2nd July, 1965) they asserted that Schuler had by letters (including that of the 27th October) and by conduct repudiated the agreement and that they (Wickman) had accepted the repudiation. By their Defence (served on the 1st January, 1966), Schuler admitted that by their letter of the 27th October, 1964, they had summarily terminated the agreement but they claimed that they had been entitled to do so under the provisions of clause 11 (a) (i) by reason of certain material breaches of the agreement which they alleged had been committed by Wickman and which were pleaded: they were (1) breaches of clause 7(a) and (2) breaches of Clause 7(b), the latter being certain failures to send representatives to visit. By the Reply (served the 20th September, 1966), it was pleaded that if there had been breaches there had been no proper notice under clause 11 (a) (i) and further that breaches had been waived.

So the parties proceeded to a hearing before the learned Arbitrator in July, 1969. It lasted seven days. Before it began Schuler gave notice that they would ask the leave of the learned Arbitrator to amend their Defence.

Leave was given and to the Defence there was added the contention: " Further or alternatively the Claimants having broken the express condition contained in the said clause *7(b)* of the said Agreement, the Respondents were entitled to repudiate the said Agreement forthwith as they in fact did ". It is solely this contention that now remains. As I have stated, the learned arbitrator answered the agreed question as to both limbs of it, *(a)* and *(b)* in the negative. The learned Judge decided in agreement with the learned Arbitrator that Schuler were not entitled to terminate the agreement under clause II*(a)*(i). That conclusion was not challenged in this House. The learned Judge held, however, that, by reason of breach by Wickman of obligations under clause *7(b),* Schuler were entitled to repudiate the agreement in or about early November, 1964. By a majority the Court of Appeal in agreement with the learned Arbitrator held that Schuler were not so entitled. So the question which arises is whether, quite independently of clause 11, Schuler were entitled to treat the Agreement as at an end if Wickman committed any breach of clause *7(b)*.

That there were certain breaches by Wickman of their obligations under clause *7(b)* has been found as a fact. Visits were not made to the extent laid down by clause *7(b)*. It has been found that the failures prior to the 13th January, 1964, were waived. Thereafter there were certain failures to visit which were not waived. It was held that those failures were not " material " breaches within the meaning of clause 11 *(a)*. That finding of fact of the learned Arbitrator has not been and I think could not have been assailed. But there were some breaches. Between the 13th January, 1964, and the 29th June, 1964, visits should in total have been 144: the visits made were in total 125. Because of the Exhibition at Olympia no visits were made between the 29th June, 1964, and the 13th July, 1964. The learned Arbitrator held that there was no implication that visits in that period were excused. From the 13th July to the 27th October the visits should in total have been 96. The visits made were 87 in number.

The exact details of the failures to make the total requisite visits are not, however, of special consequence inasmuch as Schuler say that had there been but one failure to make one visit and indeed had such failure only become known to them at a subsequent date they (Schuler) would have had an absolute right to treat the contract as at an end. The word "condition " they say was used and so they say that the contract gave them a right to " repudiate " it (though they prefer the word rescind) if at any time they discovered that one single visit had been missed.

The contemplated first period of the agreement was from the beginning of May, 1963, to the end of the year 1967: thereafter it was to continue unless either party gave a year's notice (which had to expire at the end of a calendar year) to determine it. So the agreement might have continued in operation for very many years but always, so Schuler say, with the power in them to end it if they found that at any time one visit had not taken place. Thus, in the contemplated first period there would have to be over 1,400 separate visits. If the agreement had continued and if, say in 1970, Schuler had for some reason wished to terminate it without waiting to give the contractual period of notice, the word " condition " would have come to their aid if they had found out that, either in a recent or an earlier period, one visit to one firm had not taken place or had been made by an alternate representative when it could and should have been made by a named representative.

Subject to any legal requirements business-men are free to make what contracts they choose but unless the terms of their agreement are clear a court will not be disposed to accept that they have agreed something utterly fantastic. If it is clear what they have agreed a court will not be influenced by any suggestion that they would have been wiser to have made a different agreement. If a word employed by the parties in a contract can have only one possible meaning then, unless any question of rectification arises, there will be no problem. If a word either by reason of general acceptance or by reason of judicial construction has come to have a particular meaning then, if used in a business or technical document, it will often be reasonable to suppose that the parties intended to use the word in its accepted sense. But if a word in a contract may have more than one meaning then, in interpreting the contract, a court will have to decide what was the intention of the parties as revealed by or deduced from the terms and subject-matter of their contract

Words are but the instruments by which meanings or intentions are expressed. Often the same word has in differing contexts to do service to convey differing meanings. In contracts of insurance an insurer will often wish to stipulate that his acceptance of a risk is strictly contingent upon the complete accuracy of some statement or representation that has been made to him. The word " warranty " if used by a proposer or an insured person in reference to such a statement or representation may denote much more than a promise for the breach of which (if the statement or representation is inaccurate) damages might be sought. So the word " warranty" may be used to denote one of the meanings that can be given to the word " condition". An insurer may provide that he will only be liable if his insured does this or that: even if "this or that" is not of special importance a court may decide that it was clearly the intention of the parties that there should only be liability if this or that had been done. If in the contract it is stated that such performance is a condition precedent to a right to recover the intention of the parties may be clearly revealed. (See ***London Guarantie Company v. Fearnley*** 5 App. Cas. 911).

If it is correct to say, as I think it is, that where there are problems of the construction of an agreement the intention of the parties to it may be collected from the terms of their agreement and from the subject-matter to which it relates, then I doubt whether, save in so far as guidance on principle is found, it is of much value (although it may be of much interest) to consider how courts have interpreted various differing words in various differing contracts. Nor is it of value to express either agreement or disagreement with the conclusions reached in particular cases.

Just as the word " warranty " may have differing meanings according to the context so may the word " condition ". The words " condition precedent" may have a specific meaning. But the " conditions " of a contract may be no more than its terms or provisions. A condition of a contract may according to the context be a term of it or it may denote something to be satisfied before the contract comes into operation or it may denote something basic to its continuing operation. The case of ***Glaholm v. Hays***, 2 Man. and G. 257 related to a charter party one term of which provided that the vessel was to sail from England on or before the 4th of February. The question which there arose was whether that term was a condition precedent upon the non-compliance wherewith the freighters were at liberty to throw up the charter. In giving judgment Tindal C.J. said—" *Whether a particular clause in a charter-party shall be held to be a condition, upon the non-performance of which by the one party, the other is at liberty to abandon the contract and consider it at an end; or whether it amounts to an agreement only, the breach whereof is to be recompensed by an action for damages, must depend upon the intention of the parties to be collected, in each particular case, from the terms of the agreement itself, and from the subject matter to which it relates ". ' It cannot depend,'* as Lord Ellenborough observes, ' *on any formal arrangement of the words, but (must depend) on the reason and sense of the thing as it is to be collected from the whole contract'*: See ***Ritchie v. Anderson*** (10 East, 295.)" Looking at the language of the charter and the variation of language in the term in question in that case the Court considered that a distinction was intended and that while one set of terms sounded in agreement the

one in question sounded in condition. Looking also at the subject-matter the Court considered that construing the term as a condition precedent carried into effect the intention of the parties.

When Mr. Bettini and Mr. Gye made an agreement providing that Mr. Bettini should sing in concerts and operas, the engagement to begin on the 30th March, 1875. and to terminate on the 13th July, 1875, they included a term under which Mr. Bettini agreed to be in London " without fall" at least six days before the 30th March for the purpose of rehearsals. He did not arrive until the 28th March. It was held that the term was not a condition precedent: it was an agreement a breach of which would not justify a repudiation of the contract but would only be a cause of action for compensation in damages. (See ***Bettini* v. *Gye***, [1875] 1 Q.B.D. 183). Resisting the temptation to examine numerous decisions concerned with the interpretation of various clauses in their setting in various contracts I pass to consider the meaning of clause *7(b)* of the contract now under review. Having regard to the scope and purpose of the Distributorship Agreement and having regard to the words used and their context in the agreement— how should the subclause be interpreted? Clause *7* is headed " Promotion " by Sales". There is a considerable over-lap with clause 12 which is headed " Sales Obligations ".

Clause 12 is in the following terms: —

12. Sales' Obligations

(a) Sales will be responsible for importing, establishing prices, preparing quotations, issuing invoices, and giving after sales service to customers in respect of the general products.

(b) Sales undertakes, at its expense, to look after Sender's interests carefully and will visit Schuler customers regularly, particularly those customers principally in the motor car and electrical industries whose names are set out on the list attached hereto and initialled by the parties hereto and will give all possible technical advice to customers.

(c) Sales will carefully examine complaints from customers immediately to see whether they are justified and, as far as possible, will remove the cause of the complaints or at least clarify them. In all cases of complaints Sales will report to Schuler without delay and arrange with Schuler for a quick remedy."

The central purpose of the agreement is I think set out in clause *7(a)*. Wickman are to use their best endeavours to promote and extend the sale of Schuler products in the Territory. That is a general and positive and all- embracing obligation. Then in clause *7(b)* is a more special or particularized obligation. It relates to one part of the way in which Wickman must use their *" best endeavours "* to promote sales (clause *7(a)*) or *" look after Schuler's interests carefully "* (clause 12*(b)*). It relates to panel presses. Under clause 12*(b)* Wickman must visit Schuler customers " regularly " and particularly " those named on a list. Clause *7(b)* is even more specific. Those on another list (the six in the Schedule) are to be visited at least once a week and (unless there are unavoidable reasons) by the same named representatives. But clause *7(b)* unlike clause 12*(b)* has these words of introduction—" It shall be a condition of this Agreement that ". The words are there and clearly cannot be ignored. It is argued for Schuler that the obligations which they introduce should be regarded as basic to the contract or to its continuance from time to time or as having been elevated by the parties to the status of being basic or fundamental. So much so that if, for example, one of the six firms requested Wickman not to pay a visit in a particular week and if Wickman would be using their best endeavours to promote Schuler's interests if they observed the customer's wish it is said that a failure to visit would nevertheless entitle Schuler to end the contract unless Wickman had sought and secured prior absolution.

What, then, in the context is the meaning of the words—" It shall be " condition ". Unless the words are recast and altered there must be some addition. It is pointed out that the word " condition " is nowhere else to be found in the agreement. The contrast is drawn with such words as " undertakes " or " agrees to ". It is not suggested that the omitted word should be " the ". Had the draftsman used some such words as " This agreement is conditional upon " then it would seem likely that the provision would have had higher pride of place than that of a second subclause: furthermore, the wording that follows in *7(b)* would have been different. It is said that the indefinite article " a " should be added in clause *7(b)*. If it is then clause*7(b)* reads to me like a provision or stiplation in detail as to what Wickman in general were undertaking by clause *7(a)* to do. The general and over-riding obligation of doing all they could to promote Sales as set out in clause *7(a)* was particularised and made specific in the case of panel presses (by clause *7(b)*) by laying down the details as to how the promotion of sales of panel presses was to be undertaken. In the event of Wickman being remiss in their duties proof of this would be easy and doubts would be removed if (in the case of panel presses) a precise programme of operations had been agreed upon. I regard clause *7(b)* as being collateral to clause *7(a)* and as prescribing the specific way in which Wickman agreed that, as regards panel presses, their obligations under clause *7(a)* were to be performed. In the context the word " condition " denoted a term or stipulation or provision which, being prescribed in detail, was made specially prominent and significant. I do not take the view that before the word " condition " can be construed in the technical sense of denoting something fundamental to the continued operation of an agreement there must in every case be found words expressly spelling out the consequences of a breach, but I am left strongly with the impression that the agreement now in question would have been differently worded had it been the intention that one missed visit out of hundreds or thousands contracted for would place the one party at the mercy of the other.

I conclude, therefore, that it was not the intention of the parties to give to the word " condition " in clause *7(b)* the meaning contended for by the Appellants, viz.—" a stipulation such that any breach of it however slight " would give the promisee a right to be quit of his future obligations and " sue for damages ". The word denoted a stipulation which by reason of its detail had special significance. I agree with the decision of the learned Arbitrator whose finding was that— " It is an expression which indicates the importance attached by the parties to that stipulation when you come to consider

under clause 11(a)(i) whether a party has committed a material breach of its obligations, such obligations including the obligation in clause *7(b)* ". This view is, I think, re-inforced on a reading of clause 11.

The agreement was to continue in force for an initial period of over 4 ½ years and thereafter unless and until determined by either party upon giving to the other not less than a year's notice in writing which had to expire either on the 31st December, 1967, or on the 31st December in any later year. That was so " unless " the contract was previously determined in one of certain specified ways. Wickman could assert that Schuler had committed " a " material breach " of one of its obligation and could in writing require Schuler to remedy such breach within 60 days and if there was a failure so to do Wickman could by notice in writing to Schuler forthwith " determine " the agreement. Schuler could take corresponding action against Wickman. As I have indicated Schuler asserted that Wickman committed various material breaches of their obligations both under clause *7(a)* and under clause *7(b)*. So far as concerns the breaches under clause *7(b)* subsequent to the 13th January, 1964, it has been held (1) that none of the breaches was material and (2) that no notice in respect of them was given under clause 11. These findings of fact are not challenged. As it has been found that there were no " material " breaches the question does not arise whether, had the breaches been material, a notice in writing would have been necessary on the basis that the breaches were remediable or whether no such notice would have been necessary on the basis that the breaches were not remediable.

Other specific ways in which, under clause 11, either party might by notice in writing determine the agreement were (1) if the other ceased to carry on business or (2) if the other entered into liquidation (subject to an exception) or (3) if the other suffered the appointment of a Receiver of the whole or a material part of its undertaking. But in addition to all these ways —Schuler could determine if Wickman ceased to be a wholly owned subsidiary of another company. Finding provisions of such detail in both clauses 7 and 11 I would have expected a specific mention in clause 11 of a right in Schiller to determine the agreement on notice alone for any breach by Wickman of their clause *7(b)* obligations had it been the intention of the parties that Schuler would have such a right. It follows that I cannot accept the view that clause 11 has no application to clause 7. The parties to the contract provided by clause 11 that there would be certain rights of repudiation in the event of there being " material" breaches of contract. If it had been the intention of the parties to provide by clause *7(b)* that any breach of it (by any failure to visit) was to be so basic to the further continuance of the contract as to entitle Schuler at once to treat the contract as ended, then, such a breach would automatically and inevitably be a " material " breach and one which Schuler need give Wickman no opportunity to remedy. The fact that the detailed provisions of clause 11 do not preserve what (on Schuler's submissions) would have been Schuler's undoubted rights under clause *7(b)* is a pointer which confirms my view as to the meaning of clause *7(b)*.

For the reasons which I have given I would dismiss the appeal. I would, however, not base or support my conclusion by having regard to the way in which Schuler at certain times expressed themselves in reference to the agreement. Nor is it of any moment that the issue in the litigation which now survives was not at first pleaded. If the point taken on behalf of Schuler is a valid one it cannot matter that for a period neither its existence nor its strength was appreciated. It is said, however, that the way in which the meaning of clause *7(b)* was interpreted by Schuler during the currency of the agreement made it plain that they did not consider themselves entitled to end the agreement if there were breaches of the clause. It is said that as the result of a meeting in November, 1963, Schuler proceeded on the basis that there had been failures by Wickman to make weekly visits and that that put them " in breach of contract which, under the terms of the " agreement must be righted in 60 days from notice thereof ". It is said that in December 1963, Schuler were advised that if Wickman had failed to fulfil their contractual obligations as to visits to the six companies they (Wickman) were entitled under the contract to have 60 days within which to remedy their breach. So it is said that it is shown that (from November, 1963) the parties understood or interpreted their contract in the sense that a breach by Wickman of clause *7(b)* would not entitle Schuler to rescind as Schuler now contend that they were so entitled. But assuming that the parties did so reveal their understanding of the matter, there being no suggestion of a new agreement or of an estoppel, I do not think that the task of the Court in interpreting the contract is assisted or is in any way altered. There may or may not be special considerations in cases where there have been operations in regard to land which have taken place pursuant to or subsequent to some document of title or contract concerning the land. That need not now be considered. But in a case such as the present I see no reason to doubt the applicability or the authority of what was said in ***Whitworth Street Estates (Manchester) Ltd. v. James Miller and Partners Ltd.*** [1970] A.C. 583. If on the true construction of a contract a right is given to a party, that right is not diminished because during some period either the existence of the right or its full extent was not appreciated.

For the reasons which I have given I would dismiss the appeal.

Lord Wilberforce MY LORDS,

With two qualifications, this case is one of interpretation of the written agency or distributorship agreement between the Appellants and the Respondents dated 1st May, 1963, in particular of clause *7(b)* of that agreement.

The first qualification involves the legal question whether this agreement may be construed in the light of certain allegedly relevant subsequent actions by the parties. Consideration of such actions undoubtedly influenced the majority of the Court of Appeal to decide, as they did, in the Respondent's favour: and it is suggested, with much force, that, but for this, Edmund Davies LJ. would have decided the case the other way. In my opinion, subsequent actions ought not to have been taken into account. The general rule is that extrinsic evidence is not admissible for the construction of a written contract; the parties' intentions must be ascertained, on legal principles of construction, from the words they have used. It is one and the same principle which excludes evidence of statements, or actions, during negotiations, at the time of the contract, or subsequent to the contract, any of which to the lay mind might at first sight seem to be proper to receive. As to statements during negotiations this House has affirmed the rule of exclusion in ***Prenn v. Simmonds*** ([1971] 3 All E.R. p.

237) as to subsequent actions (unless evidencing a new agreement or as the basis of an estoppel) in *Whitworth Street Estates (Manchester) Ltd. v. James Miller and Partners Ltd.* [1970] A.C. 583.

There are of course exceptions. I attempt no exhaustive list of them. In the case of ancient documents, contemporaneous or subsequent action may be adduced in order to explain words whose contemporary meaning may have become obscure. And evidence may be admitted of surrounding circumstances or in order to explain technical expressions or to identify the subject-matter of an agreement: or (an overlapping exception), to resolve a latent ambiguity. But ambiguity in this context is not to be equated with difficulty of construction, even difficulty to a point where judicial opinion as to meaning has differed. This is, I venture to think, elementary law. On this test there is certainly no ambiguity here.

The arguments used in order to induce us to depart from these settled rules and to admit evidence of subsequent conduct generally in aid of construction, were fragile. They were based first on the Privy Council judgment in ***Watcham v. Attorney-General of East Africa Protectorate*** [1919] A.C. 533 not, it was pointed out, cited in ***Whitworth's*** case. But there was no negligence by Counsel or *incuria* by their Lordships in omitting to refer to a precedent which I had thought had long been recognized to be nothing but the refuge of the desperate. Whether, in its own field, namely, that of interpretation of deeds relating to real property by reference to acts of possession, it retains any credibility in the face of powerful judicial criticism is not before us. But in relation to the interpretation of contracts or written documents generally I must deprecate its future citation in English Courts as an authority. It should be unnecessary to add that the well-known words of Lord St. Leonards (***Attorney-General v. Drummond*** 1 Dr. & War. 353, 368) " *Tell me what you have done under such a deed and I will tell you what that deed means* " relate to ancient instruments and it is an abuse of them to cite them in other applications. Secondly, there were other authorities cited, ***Hillas v. Arcos*** 43 Ll. L.R. 359 and ***Foley v. Classique Coaches, Ltd.*** [1934] 2 K.B. 1. But, with respect, these are not in any way relevant to the present discussion, and the judgment of Lawrence J. in *Radio Pictures* v. C.*I.R.* 22 T.C. 106, so far as it bears on this point was disapproved in the Court of Appeal and in my opinion was not correct in law.

In my opinion, therefore, the subsequent actings relied upon should have been left entirely out of account: in saying this I must not be taken to agree that the particular actings relied on are of any assistance whatever towards one or other construction of the contract. Indeed if one were to pursue the matter, the facts of the present case would be found to illustrate, rather vividly, the dangers inherent in entertaining this class of evidence at all.

The second legal issue which arises I would state in this way: whether it is open to the parties to a contract, not being a contract for the sale of goods, to use the word "condition" to introduce a term, breach of which *ipso facto* entitles the other party to treat the contract at an end.

The proposition that this may be done has not been uncriticised. It is said that this is contrary to modern trends which focus interest rather upon the nature of the breach, allowing the innocent party to rescind or repudiate whenever the breach is fundamental, whether the clause breached is called a condition or not: that the affixing of the label "condition" cannot pre-empt the right of the Court to estimate for itself the character of the breach. Alternatively it is said that the result contended for can only be achieved if the consequences of a breach of a " condition " (sc., that the other party may rescind) are spelt out in the contract. In support of this line of argument reliance is placed on the judgment of the Court of Appeal in ***Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Waisha Ltd.*** [1962] 2 Q.B. 26.

My Lords, this approach has something to commend it: it has academic support. The use as a promissory term of " condition " is artificial, as is that of " warranty " in some contexts. But in my opinion this use is now too deeply embedded in English law to be uprooted by anything less than a complete revision. I shall not trace the development of the term through 19th century cases, many of them decisions of Lord Blackburn, to the present time: this has been well done by academic writers. I would only add that the ***Hong Kong Fir*** case even if it could, did not reverse the trend. What it did decide, and I do not think that this was anything new, was that though a term (there a " seaworthiness" term) was not a " condition" in the technical sense, it might still be a term breach of which if sufficiently serious could go to the root of the contract. Nothing in the judgments as I read them cast any doubt upon the meaning or effect of " condition " where that word is technically used.

The alternative argument, in; my opinion, is equally precluded by authority. It is not necessary for parties to a contract, when stipulating a condition, to spell out the consequences of breach: these are inherent in the " assumedly deliberate) use of the word. (***Suisse Atlantique v. Rotter- damche Kolen Centrale*** [1967] A.C. 361, 422 (per Lord Upjohn)).

It is upon this legal basis, as to which I venture to think that your Lordships are agreed, that this contract must be construed. Does Clause *7(b)* amount to a " condition " or a " term "? (to call it an important or material term adds, with all respect, nothing but some intellectual assuagement). My Lords, I am clear in my own mind that it is a condition, but your Lordships take the contrary view. On a matter of construction of a particular document, to develop the reasons for a minority opinion serves no purpose. I am all the more happy to refrain from so doing because the judgments of Mocatta J., Stephenson L.J., and indeed of Edmund Davies L.J., on construction, give me complete satisfaction and I could in any case add little of value to their reasons. I would only add that, for my part, to call the clause arbitrary, capricious or fantastic, or to introduce as a test of its validity the ubiquitous reasonable man (I do not know whether he is English or German) is to assume, contrary to the evidence, that both parties to this contract adopted a standard of easygoing tolerance rather than one of aggressive, insistent punctuality and efficiency. This is not an assumption I am prepared to make, nor do I think myself entitled to impose the former standard upon the parties if their words indicate, as they plainly do, the latter. I note finally, that the result of treating the clause, so careful and specific in its requirements as a term is, in effect, to deprive the Appellants of any remedy in respect of admitted and by no means minimal breaches. The Arbitrator's finding that these breaches were not " material " was not, in my opinion, justified in law in the face of the

parties' own characterisation of them in their document: indeed the fact that he was able to do so, and so leave the Appellants without remedy, argues strongly that the legal basis of his finding— that clause *7(b)* was merely a term—is unsound. I would allow this appeal.

Lord Simon of Glaisdale MY LORDS,

The decision in this appeal depends on the answer to two questions: first, can " subsequent conduct " of the parties be relied on for the construction of the Distributorship Agreement of 1st May, 1932? ; and, secondly, with or without assistance from " subsequent conduct " (dependent on the answer to the first question), was Wickmans' breach of clause *7(b)* of the agreement on its proper construction such as to entitle Schulers to rely on it so as to amount to a rescission of the agreement in November, 1964?

There is one general principle of law which is relevant to both questions. This has been frequently stated, but it is most pungently expressed in ***Norton on Deeds***, 1906, p. 43, though it applies to all written instruments: *" The question to be answered always is ' What is the meaning of what the parties have said? ' not ' What did the parties mean to say? ' ... it being a presumption juris et de jure . . . that the parties intended to say what they have said."*

It is, of course, always open to a party to claim rectification of an agreement which has failed to express the common intention of the parties ; but, so long as the agreement remains unrectified, the rule of construction is as stated by *Norton*. It is, indeed, the only workable rule. In the instant case no question of rectification arises.

Although, logically, the first question should be answered first, in the circumstances of the present case it is more convenient to consider the second question first (i.e., whether the agreement can be construed adequately without reference to subsequent conduct), and then to consider the first question (i.e., whether subsequent conduct is available either to control, or to supply inadequacies in, the primary tools of construction).

Construction independently of subsequent conduct

On this part of the case I agree so completely with what has been said by my noble and learned friend, Lord Reid, that I do not attempt to cover any ground which he has traversed.

The case finally turns on the meaning to be attached to the word " condition " in clause *7(b)* read in the light of all the rest of the contract. Various meanings of this word, both in popular usage and as a legal term of art, have been debated before your Lordships. The agreement was intended to have legal effect and was drawn up by lawyers. This raises a presumption that the words in the contract are used in a sense that they bear as legal terms of art, if they are reasonably capable of bearing such meaning in their context (see ***Sydall v. Castings Ltd***. [1967] 1 Q.B. 302). But this presumption is rebuttable ; so that, even in a document drawn up by lawyers and intended to have legal effect, a word capable of bearing meaning as a legal term of art will be construed in a popular sense if the instrument shows that the parties intended to use it in that sense. Most words in English are capable of a number of meanings, either in popular usage or as legal terms of art or both. In either category, *prima facie* they will be read in their most usual and natural (or primary) sense. But this again is a rebuttable presumption ; so that a word will be construed in a less usual or natural (or secondary) sense if the instrument shows that it is intended in such sense. In the Distributorship Agreement there is nothing to suggest that the word " condition " was used in any of its popular senses or to displace the presumption that it was used as a legal term of art in one or other of its senses.

The primary legal sense of " condition " appears from the judgment of Fletcher Moulton L.J. (approved by your Lordships' House [1911] A.C. 394) in ***Wallis v. Pratt*** [1910] 2 K.B. 1003 at p. 1012: *" There are some [obligations] which go so directly to the substance of the contract or, in other words, are so essential to its very nature that their non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all. On the other hand there are other obligations which, though they must be performed, are not so vital that a failure to perform them goes to the substance of the contract . . . later usage has consecrated the term ' condition' to describe an obligation of the former class and ' warranty ' to describe an obligation of the latter class."*

It was argued on behalf of the respondents (e.g., *Hong Kong Fir* Co. v. *Kawasaki* [1962] 2 Q.B. 26), bear this primary meaning in the law of contract. But the fact that it has now been made explicit that there lies intermediate between conditions and warranties a large " innominate " class of contractual terms *(any* breach of which does not give rise to a right in the other party to terminate the contract, but only a material breach, immaterial breaches merely giving rise, like breaches of warranty, to a right to claim damages) does not involve in any way that " condition" is no longer the appropriate word to describe a contractual term any breach of which (by express stipulation or by its innate nature in its context) gives rise to a right in the other party to terminate the contract. The sense designated by Fletcher Moulton L.J. is still, in my view, the primary meaning of " condition " as a legal term of art. It is therefore, *prima facie,* in this sense that the word is used in clause *7(b)*. This *prima facie* sense is reinforced by the fact that the stipulation in clause *7(b)* is the only one which starts *" It shall be a condition . . .".* This is a further indication that " condition " here means something more than " contractual term ", which is unquestionably one of the senses which it can bear as a legal term of art.

On the other hand, to read " condition " in clause *7(b)* in what I regard as its primary sense as a term of art produces, as my noble and learned friend, Lord Reid, has shown, such absurd results that this cannot be the meaning to be ascribed to it, provided that it is reasonably capable of some other meaning. A secondary meaning of " condition" as a term of art is " contractual term ". But it must mean more than merely this in clause *7(b),* since this stipulation is singled out from all the other contractual terms to be dubbed a " condition ". I agree with my noble and learned friend that, in the light of the rest of the contract, it means a contractual term breach of which if unremedied (i.e., unrectified for the future, if capable of rectification) gives Schulers the right to terminate the contract in accordance with clause 11. It follows that I agree with

the decision of the learned arbitrator and with the conclusion of the majority of the Court of Appeal and would therefore dismiss the appeal.

Construction by subsequent conduct

The majority of the Court of Appeal came to their conclusion in favour of Wickmans by construing the agreement by reference to the subsequent conduct of the parties thereunder. They recognised that it had been stated by four of their Lordships who decided ***Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd.*** [1970] A.C. 583, that the conduct of the parties under a contract is not available as an aid to construction ; but held that this rule only applied when the instrument to be construed is unambiguous, and that ***Watcham v. Attorney-General of The East Africa Protectorate*** [1919] A.C. 533 (which was not cited in the ***Whitworth Street Estates*** case) was authority entitling the court to have recourse to subsequent conduct of the parties under this contract to resolve the ambiguity that they descried therein. The Distribution Agreement is not drafted with entire felicity, and therefore presents difficulties in construction. But this is not the same as embodying an ambiguity. Agreeing as I do with the interpretation of my noble and learned friend, Lord Reid, I cannot on final resolution find that there is any ambiguity in the agreement. Nevertheless, the question of the availability of subsequent conduct as an aid to interpretation is an important one which ought not if possible to be left in its present state of uncertainty ; and, since it was fully and carefully argued before your Lordships, I do not feel that I would be justified in remaining silent on it.

The ***Whitworth Street Estates*** case was concerned with a contract (containing an arbitration clause) between an English and a Scots Company which was to be performed in Scotland, but was silent as to whether the contract (and the arbitration thereunder) was to be governed by English or by Scots law. Disputes having arisen, an arbitration took place in Scotland. The issue before the Court of Appeal and your Lordships' House was whether the arbiter could be required to state a case for the opinion of the English High Court, which in turn depended on what was the curial law of the arbitration. If the contract was to be governed by Scots law, that too would be the curial law of the arbitration ; but it was argued that even if the law of the contract were English the curial law of the arbitration was Scottish. In the Court of Appeal ([1969] 1 W.L.R. 377) Lord Denning M.R. held that the crucial question in determining what was the law governing the contract was to ask: *" what is the system of law with which the transaction has the closest and most real connection? "* (p. 380 E). He concluded that that was English law (p. 381 C/D). He went on (p. 381 D): *"I am confirmed in this view by the subsequent conduct of the parties. This is always available to aid the interpretation of a contract and to find out its closest connections. On two occasions the parties seem to have assumed that the transaction was governed by English law "*. Davies L.J. agreed (see especially p. 383 H). Widgery L.J., who also agreed that English was the proper law of the contract, said: (pp. 383-384 D): *" To solve a problem such as arises in this case one looks first at the express terms of the contract to see whether that intention is there to be found. If it is not, then in my judgment the next step is to consider the conduct of the parties to see whether that conduct shows that a decision in regard to the proper law of the contract can be inferred from it. If the parties' conduct shows that they have adopted a particular view with regard to the proper law, then it may be inferred that they have agreed that that law shall govern the contract accordingly."*

When the ***Whitworth Street Estates*** case came to your Lordships' House it was argued that the subsequent conduct of the parties could not be looked at to determine what was the proper law of the contract (p. 590 F; contra p. 594 C and F). Four of the five members of the Appellate Committee dealt expressly with this matter, My noble and learned friend, Lord Reid, said (p. 603 B/C—E/F): *" It has been assumed in the course of this case that it is proper, in determining what was the proper law, to have regard to actings of the parties after their contract had been made. Of course the actings of the parties (including any words which they used) may be sufficient to show that they made a new contract. If they made no agreement originally as to the proper law, such actings may show that they made an agreement about that at a later stage. Or if they did make such an agreement originally such actings may show that they later agreed to alter it. But with regard to actings of the parties between the date of the original contract and the date of Mr. Underwood's appointment I did not understand it to be argued that they were sufficient to establish any new contract, and I think they clearly were not. As I understood him, counsel sought to use those actings to show that there was an agreement when the original contract was made that the proper law of that contract was to be the law of England. I must say that I had thought that it is now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later."*

My noble and learned friend, Lord Hodson, said: *" I should add that I cannot assent to the view which seems to have found favour in the eyes of the Master of the Rolls and Widgery LJ. that as a matter of construction the contract can be construed not only in its surrounding circumstances but also by reference to the subsequent conduct of the parties "*.

My noble and learned friend, Viscount Dilhorne, said (p. 611 D) *" I do not consider that one can properly have regard to the parties' conduct after the contract has been entered into when considering whether an inference can be drawn as to their intention when they entered into the contract, though subsequent conduct by one party may give rise to an estoppel."*

My noble and learned friend. Lord Wilberforce, said (pp. 614 H) *"... once it was seen that the parties had made no express choice of law, the correct course was to ascertain from all relevant contemporary circumstances including, but not limited to, what the parties said or did at the time, what intention ought to be imputed to them on the formation of the contract. Unless it were to found an estoppel or a subsequent agreement, I do not think that subsequent conduct can be relevant to this question "*.

It will be noticed that, except perhaps for Widgery L.J.'s, all these pronouncements (both in the Court of Appeal in favour of there being a rule whereby subsequent conduct is available as an aid to interpretation and contra in your Lordships'

House) are perfectly general, none drawing the distinction which was drawn by the majority of the Court of Appeal in the instant case between ambiguous and unambiguous instruments. It must therefore be determined, first, whether or not the *Whitworth Street Estates* case was one where the instrument was ambiguous; secondly, if not, whether the situation there was so closely analogous to an ambiguity that it would be wrong to draw a distinction ; thirdly, whether what was said on the matter in the ***Whitworth Street Estates*** case was part of the *ratio decidendi* or *obiter;* and, fourthly, if the latter, whether it should nonetheless be regarded as settling the law. It is convenient to consider together the first and second and the third and fourth points respectively.

The problem posed by the *Whitworth Street Estates* case was that the contract made no express provision on a matter which turned out to be crucial, namely, whether English or Scots law governed the contract and the arbitration. The only way of distinguishing such a situation from an ambiguity would be to say that in a situation such as *Whitworth* the difficulty facing the Court was that the contract was silent on a crucial point, whereas in a case such as *Watcham* a patent ambiguity appeared on the face of the instrument—i.e., to regard the former as a case where the Court was invited to take account of subsequent conduct to add an absent term, the latter as one where the Court was invited to take account of subsequent conduct to determine which of two present but inconsistent terms was to be preferred. But such a distinction would, in my view, merely be to complicate the law and to introduce intolerable refinements. There was, it is true, considerable older authority which suggested that, although extrinsic evidence could be adduced to resolve ambiguity (though never direct evidence of intention in the case of a patent ambiguity), it could not be adduced to influence the interpretation of an unambiguous instrument (see *Norton* p. 56 and ch. VI). The justification for the adduction of extrinsic evidence to resolve an ambiguity must be that it might be the last resort to save an instrument from being void for uncertainty. This type of practical consideration is characteristically potent in shaping our law ; but in this field its practical recommendation is, in my judgment, outweighed by the inconveniences and anomalies involved. In particular, the distinction between the admissibility of direct and circumstantial evidence of intention seems to me to be quite unjustifiable in these days. And the distinctions between patent ambiguities, latent ambiguities and equivocations as regards admissibility of extrinsic evidence are based on outmoded and highly technical and artificial rules and introduce absurd refinements. What was said in *Whitworth* should therefore, in my judgment, be taken to apply generally to documentary construction, even when an ambiguity can be spelt out.

This brings me to consider how far what was said about this matter in *Whitworth* was part of its *ratio decidendi*. Lord Reid held the contract to be governed by Scots law; and he therefore did not find it necessary to determine whether, if the proper law of contract were English, the arbitration was nevertheless governed by Scots law. In order to arrive at the conclusion that the law of the contract was Scottish, Lord Reid had, in my view, necessarily to determine whether to take into account the subsequent conduct of the parties which had been relied on by the Court of Appeal in holding the law of the contract to be English. In other words, what he said about the availability of subsequent conduct as an aid to interpretation of contract was part of the *ratio decidendi* of his judgment. It is true that, on strict analysis, what was said by Lord Hodson, Viscount Dilhorne and Lord Wilberforce cannot be regarded as a vital step towards their conclusions; but, as I have already ventured to demonstate, the point was directly in issue between the panties in your Lordships' House. I am therefore firmly of opinion that what was said should be regarded as settling the law on this point. I am reinforced in this opinion because, in my view, *Whitworth Street Estates* was a correct decision on the point for reasons additional to those given in the speeches. First, subsequent conduct is of no greater probative value in the interpretation of an instrument than prior negotiations or direct evidence of intention: it might, indeed, be most misleading to let in subsequent conduct without reference to these other matters. But *Prenn* v. *Simmonds* [1971] 3 All E.R. 237 gives convincing reasons why negotiations are not available as an aid to construction; and it does not, and could not consistently with its reasoning, make any exception in the case of ambiguity. As for direct evidence of intention, there is clear authority that this is not available in the case of a patent ambiguity; and I have already ventured to submit to your Lordships the undesirability of distinguishing between direct and circumstantial evidence and between latent and patent ambiguities in this regard. Secondly, subsequent conduct is equally referable to what the parties meant to say as to the meaning of what they said ; and, as the citation from ***Norton*** shows, it is only the latter which is relevant. Sir Edward Sugden's frequently quoted an epigrammatic dictum in ***Attorney General v. Drummond*** (1842) 1 Dr. & War. 353, 368, "... tell me what you have done under such *" a deed, and I will tell you what that deeds means "* really contains a logical flaw: if you tell me what you have done under a deed, I can at best tell you only what you think that deed means. Moreover, Sir Edward Sugden was expressly dealing with *" ancient instruments"*. I would add, thirdly, that the practical difficulties involved in admitting subsequent conduct as an aid to interpretation are only marginally, if at all, less than are involved in admitting evidence of prior negotiations.

In their printed case the respondents invited your Lordships to depart from the decision in ***Whitworth Street Estates*** if it could not be distinguished. But nothing was laid before your Lordships which would bring this case within the Lord Chancellor's statement of the 26th July, 1966, which sets the bounds of your Lordships to depart from a previous decision of your Lordships' House. The fact that even a relevant authority is not cited is no ground in itself for departure from precedent in your Lordships' House.

Watcham's case was already considerably weakened as a persuasive authority by what was said about it in ***Galsberg v. Storr*** [1950] 1 K.B. 107, 114 and ***Sussex Caravans Park Limited v. Richardson*** [1961] 1 W.L.R. 561, 568. In the light of the *Whitworth Street Estates* case it can no longer be regarded as authority for the proposition for which it was cited in the Court of Appeal in the instant case. It is possible that the actual decision can be justified, as can certainly many of the authorities on which it purports to found, by well recognised exceptions to the rule against adduction of extrinsic evidence to interpret an instrument. These are authoritatively stated by Parke B. in ***Shore v. Wilson*** (1842) 9 Cl. & Fin. 355 at pp. 555, 556: *" In the first place, there is no doubt that not only where the language of the instrument is such as the*

Court does not understand, it is competent to receive evidence of the proper meaning of that language, as when it is written in a foreign tongue; but it is also competent, where technical words or peculiar terms, or indeed any expressions are used, which at the time the instrument was written had acquired an appropriate meaning, either generally or by local usage, or amongst particular classes. . . . This description of evidence is admissible, in order to enable the Court to understand the meaning of the words contained in the instrument itself, by themselves, and without reference to the extrinsic facts on which the instrument is intended to operate. For the purpose of applying the instrument to the facts, and determining what passes by it, and who take an interest under it, a second description of evidence is admissible, viz. every material fact that will enable the Court to identify the person or tiling mentioned in the instrument, and to place the Court, whose province it is to declare the meaning of the words of the instrument, as near as may be in the situation of the parties to it."

I would add that Parke B. continued: *" From the context of the instrument, and from these two descriptions of evidence, with such circumstances as by law the Court, without evidence, may of itself notice, it is its duty to construe and apply the words of that instrument; and no extrinsic evidence of the intention of the party to the deed, from his declarations, whether at the time of his executing the instrument, or before or after that time, is admissible; the duty of the Court being to declare the meaning of what is written in the instrument, not of what was intended to have been written."*

To which I would also add, once more from ***Norton*** (p. 138): *" The subsequent admission as to the true meaning of a deed by, or subsequent conduct of, a party to ... a deed, cannot be received to aid the construction of the deed " though (p. 139): " This rule does not apply to ancient documents."*

Lord Kilbrandon MY LORDS,

The Appellants (Schuler) who are machine tool manufacturers in Germany, entered into an agreement with the Respondents (Sales), who sell machine tools in Britain and elsewhere, providing *inter alia* that the Respondents should sell as agents for the Appellants, on a commission basis to six named motor manufacturers, panel presses made by them. This is a commercial relationship of a commonplace character, and it seems extraordinary that the contract embodying it should have been drafted in terms which have given rise to such acute differences of judicial opinion. There was only one feature of the agreement which called for what may be an unusual stipulation in contracts of this nature ; clause 7, after providing, in the ordinary way, that *"(a)* subject to Clause 17 Sales will use its best endeavours to " promote and extend the sale of Schuler products in the Territory ", goes on as follows:—" *(b)* It shall be condition of this Agreement that:-

" (i) Sales shall send its representatives to visit the six firms whose names are listed in the Schedule hereto at least once in every week for the purpose of soliciting orders for panel presses;

" (ii) that the same representative shall visit each firm on each occasion unless there are unavoidable reasons preventing the visit being made by that representative in which case the visit shall be made by an alternate representative and Sales will ensure that such a visit is always made by the same alternate representative. Sales agrees to inform Schuler of the names of the representatives and alternate representatives instructed to make the visits required by this Clause."

The question in this appeal is, whether when they used the word " ***condition*** " in *7(b)* the parties meant to constitute a fundamental condition of the contract. " going to the root of the contract so that it is clear that the " parties contemplated *any* breach of it entitles the other party at once " to treat the contract as at an end ": ***Hong Kong Fir Shipping Co. Ltd. v.Kawasaki Kisen Kaisha Ltd.*** [1962] 2 Q.B. 26 per Upjohn L.J. at 63. It is undoubted that parties may, if they so desire, make any term whatever, unimportant as it might seem to be to an observer relying upon *a priori* reasoning of his own, a condition giving entitlement, on its breach, to rescission at the instance of the party aggrieved. The judgments in ***Bettini v. Gye*** (1875) 1 Q.B.D. 183, are commonly cited as authority for a pro-position which no one now challenges. Whether the words which the parties have used in setting out their agreement do indeed exhibit a particular intention, as regards any particular stipulation, is a question of law. But one would have hoped that by this time it would be been possible to select words, in the context of the agreement as a whole, which would have made clear what the parties intended mutually to agree upon. Such has not, evidently, been achieved in the instant case.

If, as the Appellants submit, the use of the word "condition" in *7(b)* marks the intention of parties to provide, in the event of breach, a ground for rescission, one is immediately struck by the fact that special provision for a right to rescind, in certain other circumstances, has been made under the heading "Duration of Agreement" in clause 11. Those circumstances, again, are of a very mixed character. While the effect of clause 11 is to give a right to rescind if a party " shall have committed a material breach " *of its obligations hereunder and shall have failed to remedy the same* " within 60 days of being required in writing so to do", many of the obligations referred to are, in the strict sense, irremediable. For example, once the Respondents have communicated the Appellant's trade secrets in breach of clause 14, or once the Appellants have published advertising matter not containing the Respondent's name, in breach of clause 17, the damage is done, and nothing can be done within 60 days, or over, by way of remedy. It is possible that " remedy " means " satisfy the other party " that it won't happen again ". It is also possible that, in the case of a truly irremediable material breach, which goes to the root of the contractual relationship, as would presumably a breach of clause 14, you simply write the provision for remedying in 60 days out of the document as a term incapable of being fulfilled. And your Lordships have already noticed the difficulties, under this clause, to which an anticipatory breach will give rise.

On the whole, though without a great deal of confidence, I come to the conclusion that the use of the word " condition " in *7(b)* was not intended by the parties to isolate an individual fundamental term, and to provide for rescission, on any breach, in addition to the other more general provisions for rescission set out in clause 11, without the opportunity being given to the party at fault by clause 11 to put things right for the future, where the nature of the breach made that possible. Thus, when the Appellants first had reason to complain in January, 1963, of material breaches of clause 7(6),

they could have called upon the Respondent to make better arrangements within 60 days, upon pain of rescission. It is only in this way that I can give any meaning to the remedial provision.

But when one comes to October, 1964, and the situation as to visiting obtaining at the time the Appellants claimed to rescind, considerable amendment had been made; as the learned Arbitrator finds, the irregularities did not amount to a material breach, and the provisions of clause 11 were therefore of no effect. Unless, therefore, contrary to my view, there is an independent right to rescind under clause 7, to be deduced from the fact that the parties selected the word " condition " in order to express their intention, the Appellants cannot succeed.

I respectfully agree with the learned Master of the Rolls that one is not constrained, by analogies from the Sale of Goods Act, 1893, or by authorities such as the insurance cases, ***Thomson v. Weems*** 9 App. Cas. 671 and ***Dawson v. Bonnin*** [1922] 2 A.C. 413, or by ***Wallis v. Pratt*** [1911] A.C. 400, so to hold. One must, above all other considerations as I think in a case where the agreement is in obscure terms, see whether an interpretation proposed is likely to lead to unreasonable results, and if it is, be reluctant to accept it. The grotesque consequences of an insistence on a right to rescind on *any* breach of clause 7(b) do not require emphasis. It was suggested that one must concede to the Appellants the right to inflict severe terms, since they will have known their own interests better than we can do. Be that so, I am not prepared to accept that if, instead of using the equivocal word " condition " in clause 7, the Appellant's draftsman had spelled out the consequences he intended should follow upon the slightest breach, the Respondents would have been prepared to sign the agreement presented to them. I understand the view of the learned Arbitrator to be that they would not.

While I agree that this appeal should be dismissed, I would not be prepared to do so upon a consideration of the actings of the parties, subsequent to the agreement, as permitting me to infer their contractual intentions therefrom. I think this would be contrary to the principle of ***Whitworth v.James Miller*** [1970] A.C. 583. The *decision in* ***Watcham v. A.G. of East Africa Protectorate*** [1919] A.C. 533, which was referred to by the learned Master of the Rolls, does not, I believe, command universal confidence, though I would not question it so far as it merely lays down that, where the extent of a grant of land is stated in an ambiguous manner in a conveyance, it is legitimate to interpret the deed by the extent of the possession which proceeded upon it. And I am not sure that I see any reason to confine such a rule to ancient deeds. It is, however, a dubious expedient to attempt to make out what parties meant by what they did; in the ordinary way one is limited to deciding what they meant by what they said in the agreement under construction. Of the cases concerning commercial contracts to which we were referred. I understand ***Hillas and Co. Ltd. v. Areas Ltd.*** 43 Ll.L. 366 to hold that in what I will call an extension to a contract of sale, in the absence of necessary stipulations literally provided therein, the necessary stipulations contained in the original contract may be therein implied, in order to prevent the sterile result of avoidance for uncertainty. In ***Radio Pictures v. Inland Revenue*** 22 T.C. 106, the problem was whether a particular document could properly be included among the batch of documents which as a whole formed the contract, so that the stipulations therein were them- selves contractual. I can see that these cases are in some degree analogous to ***Watcham,*** in as much as they concern the ambit or extent of the contract rather than the interpretating of particular mutual obligations. That distinction may not be easily expressed in words, but at any rate I would be reluctant to apply the ***Watcham*** doctrine to the construction of mercantile contracts. In the present case, such application is, in any event, in my view unnecessary.

I would dismiss this appeal.