A shown on the evidence before us to have been contrary to justice. Therefore, the court has no power to interfere with that decision.

I should like to make some observations about *Chalgray Ltd.* v. *Secretary of State for the Environment,* 33 P. & C.R. 10, which was relied on by Mr. Ground for the applicants. In the headnote of that case, the second part of the decision is stated in this way:

B

> " . . . That the words in section 242 (3) (*b*) ' any decision of the Secretary of State on an appeal under section 36 of the Act ' were not necessarily limited to the decision or orders or final result specified in section 36 (3); and that the Secretary of State's declining to consider the appeal was a decision on an appeal under section 36."

Even if that decision made by Slynn J. is correct, it does not assist the C applicants on the facts of this case because there has not been any refusal to consider the appeal. I am bound to say, however, that I have doubts about the correctness of that decision on the law by Slynn J. It seems to me very arguable that the expression " any decision of the Secretary of State on an appeal under section 36," as used in section 242 (3) (*b*), is limited to decisions or orders or final results arrived at under section 36 (3). I further think that, where there is a refusal to consider an appeal, D the case might well come within section 242 (4) of the Act. It is not, however, necessary to decide that question in this case. I only wish to express my doubts about this because the case has been relied on and I would not like it thought that I regard it as necessarily correct.

Appeal dismissed with costs.
Leave to appeal refused.

E

Solicitors: *Bower, Cotton & Bower for Bury & Walkers, Barnsley; Treasury Solicitor; Last Suddards & Co.*

[Reported by MISS HENRIETTA STEINBERG, Barrister-at-Law]

F

[HOUSE OF LORDS]

* WOODAR INVESTMENT DEVELOPMENT LTD. . . . . RESPONDENTS

G AND

WIMPEY CONSTRUCTION U.K. LTD. . . . . APPELLANTS

1979 Nov. 19, 20, 21, 22;
1980 Feb. 14

Lord Wilberforce, Lord Salmon, Lord Russell of Killowen Lord Keith of Kinkel and Lord Scarman

H

Contract — Repudiation — Right to rescind reserved — Purported exercise—Held bad in law—Whether contract repudiated
Damages—Contract—Breach—Condition for payment to third party —Whether sum recoverable in action by party to contract

On February 21, 1973, the purchasers, W.C. Ltd. entered into a contract to buy certain land from the vendors, W.I.D. Ltd. The purchase price was £850,000 of which £150,000 was to be paid on completion to T.T. Ltd. There was a prospect

of planning permission for development being granted. By a special condition E (a) (iii) the purchasers reserved the right to rescind

> " if prior to the date of completion . . . (iii) any authority having a statutory power of compulsory purchase shall have commenced to negotiate for the acquisition by agreement or shall have commenced the procedure required by law for the compulsory acquisition of the property or any part thereof."

On March 20, 1973, the purchasers sent the vendors a notice purporting to rescind the contract under that provision on the ground that the Secretary of State for the Environment had commenced the procedure for compulsory acquisition of part of the land.

At the date of the contract both parties knew that in 1970 the minister had given the then owner notice of a draft compulsory purchase order. On November 8, 1973, a compulsory purchase order was made.

The vendors brought an action against the purchasers for a declaration that the condition gave them no right to rescind. By their defence the purchasers contended that on the true construction of the condition the notice of rescision was valid. In a second action the vendors claimed damages for breach of contract by the purchasers in serving the notice and delivering their defence.

Fox J. held that the purchasers were not entitled to invoke the condition and by doing so had wrongfully repudiated the contract and that they were accordingly liable for damages including £150,000 for the use and benefit of T.T. Ltd. The Court of Appeal affirmed his decision but varied the amount of the damages.

On appeal by the vendors:—

Held, allowing the appeal (Lord Salmon and Lord Russell of Killowen dissenting), that a party who took action relying simply on the terms of the contract in question and not manifesting by his conduct an ulterior intention to abandon it was not to be treated as repudiating it; that the whole circumstances must be looked at and, since it had been assumed in those proceedings that both sides would abide by the decision of the court, the evidence of the purchasers' conduct was insufficient to support a case for repudiation (post, pp. 280F–G, 282C–D, 283A, D–E, 296E, 297A–C, 298A–C, 299D–F).

Federal Commerce & Navigation Co. Ltd. v. *Molena Alpha Inc.* [1979] A.C. 757, H.L.(E.) considered.

Per curiam. If vendors made a contract that a sum of money was to be paid to a third party they could not, without showing that they had themselves suffered loss or were agents or trustees for the third party sue for damages for non payment of that sum (post, pp. 284A–B, 291B–D, 293E, 297D–F, 300D–E).

Jackson v. *Horizon Holidays Ltd.* [1975] 1 W.L.R. 1468, C.A. disapproved.

Decision of the Court of Appeal reversed.

The following cases are referred to in their Lordships' opinions:

Beswick v. *Beswick* [1968] A.C. 58; [1967] 3 W.L.R. 932; [1967] 2 All E.R. 1197, H.L.(E.).

Bradley v. *H. Newsom, Sons & Co.* [1919] A.C. 16, H.L.(E.).

Federal Commerce & Navigation Co. Ltd. v. *Molena Alpha Inc.* [1978] Q.B. 927; [1978] 3 W.L.R. 309; [1978] 3 All E.R. 1066, C.A.; [1979] A.C. 757; [1978] 3 W.L.R. 991; [1979] 1 All E.R. 307, H.L.(E.).

Freeth v. *Burr* (1874) L.R. 9 C.P. 208, D.C.

Frost v. *Knight* (1872) L.R. 7 Ex. 111.

Heyman v. *Darwin's Ltd.* [1942] A.C. 356, H.L.(E.).

Jackson v. *Horizon Holidays Ltd.* [1975] 1 W.L.R. 1468; [1975] 3 All E.R. 92, C.A.
Johnstone v. *Milling* (1886) 16 Q.B.D. 460, C.A.
Lloyd's v. *Harper* (1880) 16 Ch.D. 290, C.A.
Mersey Steel and Iron Co. Ltd. v. *Naylor, Benzon & Co.* (1884) 9 App.Cas. 434, H.L.(E.).
New Zealand Shipping Co. Ltd. v. *A. M. Satterthwaite & Co. Ltd.* [1975] A.C. 154; [1974] 2 W.L.R. 865; [1974] 1 All E.R. 1015, P.C.
Radford v. *De Froberville* [1977] 1 W.L.R. 1262; [1978] 1 All E.R. 33.
Shaffer (James) Ltd. v. *Findlay Durham & Brodie* [1953] 1 W.L.R. 106, C.A.
Smyth (Ross T.) and Co. Ltd. v. *T. D. Bailey, and Son and Co.* (1940) 164 L.T. 102; [1940] 3 All E.R. 60, H.L.(E.).
Spettabile Consorzio Veneziano di Armamento e Navigazione v. *Northumberland Shipbuilding Co. Ltd.* (1919) 121 L.T. 628, C.A.
Sweet & Maxwell Ltd. v. *Universal News Services Ltd.* [1964] 2 Q.B. 699; [1964] 3 W.L.R. 356; [1964] 3 All E.R. 30, C.A.
Tweddle v. *Atkinson* (1861) 1 B. & S. 393.

The following additional cases were referred to in argument:

Coulls v. *Bagot's Executor and Trustee Co. Ltd.* (1967) 40 A.L.J.R. 471.
General Billposting Co. Ltd. v. *Atkinson* [1909] A.C. 118, H.L.(E.).
Viles v. *Viles* [1939] S.A.S.R. 164.
West v. *Houghton* (1879) 4 C.P.D. 197.

APPEAL from the Court of Appeal.

This was an appeal by the defendants, Wimpey Construction U.K. Ltd., formerly George Wimpey & Co. Ltd. (the appellants), by leave of the Court of Appeal, from an order of the Court of Appeal (Buckley, Lawton and Goff L.JJ.) made on October 26, 1978, varying an order made by Fox J. on December 21, 1976. By his order Fox J. awarded the plaintiffs, Woodar Investment Development Ltd. (the respondents), damages for breach of contract in the sum of £462,000 with interest, that sum being expressed by the order to include the sum of £150,000 for the use and benefit of Transworld Trade Ltd. By its order the Court of Appeal (Buckley L.J. dissenting on the issue of liability) reduced those damages to the sum of £272,943 with interest, including therein the sum of £135,000 for the use and benefit of Transworld.

The facts are stated in their Lordships' opinions.

Jonathan Parker Q.C. and *Stephen Acton* for the appellant company.

A. Leolin Price Q.C. and *Nicholas Stewart* for the respondent company.

Their Lordships took time for consideration.

February 14, 1980. LORD WILBERFORCE. My Lords, the appellants ("Wimpey") are defendants in this action brought by the respondents ("Woodar") upon a contract of sale dated February 21, 1973. This contract related to 14·41 acres of land of Cobham, Surrey, near to the site later occupied by the Esher by-pass. There was the prospect of planning permission being granted for development. The purchase price was £850,000 and there was a special condition (condition I) that upon completion the purchasers should pay £150,000 to a company called

Transworld Trade Ltd. Completion was fixed for the earliest of three dates namely (i) two months from the granting of outline planning permission for the development of the property, (ii) February 21, 1980, (iii) such date as the purchaser should specify by not less than 14 days' notice in writing.

The contract contained a special condition E under which there was reserved to the purchasers power to rescind the contract in either of three events. The first related to failure to obtain outline planning permission, the second to failure to obtain an easement giving access to the property, the third (E (a) (iii)) was in the following terms:

> ". . . if prior to the date of completion . . . (iii) Any authority having a statutory power of compulsory acquisition shall have commenced to negotiate for the acquisition by agreement or shall have commenced the procedure required by law for the compulsory acquisition of the property or any part thereof."

On March 20, 1974, the appellants sent to the respondents a notice in writing purporting to rescind the contract under this provision. The notice stated that the ground relied on was that the Secretary of State for the Environment had commenced the procedure required by law for the compulsory acquisition of 2·3 acres of the property.

It was in fact known to both parties at the date of the contract that certain steps had already been taken in relation to these 2·3 acres. In 1970 the Minister had given notice to the then owner of a draft compulsory purchase order, and this fact had been published in the local press. Notice had been given of the appointment of an inspector to hold a public inquiry, and this was held. A compulsory purchase order was made on November 8, 1973. On these facts, the respondents contended that special condition E (a) (iii) could not be invoked by the appellants because the relevant procedure for compulsory purchase had started before the date of the contract, and so did not come within the words " shall have commenced." This contention was upheld by Fox J. at the trial and was not the subject of appeal, so that the appellants' claim to invoke the condition has failed.

This gives rise to the first issue in this appeal: whether, by invoking special condition E (a) (iii), and in the circumstances, the appellants are to be taken as having repudiated the contract. The respondents so claim, and assert that they have accepted the repudiation and are entitled to sue the appellants for damages.

My Lords, I have used the words " in the circumstances " to indicate, as I think both sides accept, that in considering whether there has been a repudiation by one party, it is necessary to look at his conduct as a whole. Does this indicate an intention to abandon and to refuse performance of the contract? In the present case, without taking the appellants' conduct generally into account, the respondents' contention, that the appellants had repudiated, would be a difficult one. So far from repudiating the contract, the appellants were relying on it and invoking one of its provisions, to which both parties had given their consent. And unless the invocation of that provision were totally abusive, or lacking in good faith, (neither of which is contended for), the fact that it has proved to be wrong in law cannot turn it into a repudiation. At the lowest, the notice of rescission was a neutral document consistent either with an intention to preserve or with an intention to abandon the contract, and I will deal with it on this basis—more favourable to

A the respondents. In order to decide which is correct the appellants' conduct has to be examined.

One point can, in my opinion, be disposed of at once. The respondents, in March 1974 started proceedings against the appellants: this is one of the actions consolidated in the litigation before us. They claimed a declaration that the appellants' notice of rescission was not valid, and
B the appellants, by their defence, asserted the contrary and they counterclaimed for a declaration to that effect. The respondents now contend that if the original notice did not amount to a repudiation, the defence and counterclaim did. I regard this contention as hopeless. The appellants' pleading carried the matter no further: it simply rested the matter on the contract. It showed no intention to abandon the contract whatever the result of the action might be. If the action were to
C succeed (i.e. if the appellants lost) there was no indication that the appellants would not abide by the result and implement the contract.

The facts indicative of the appellants' intention must now be summarised. It is clear in the first place that, subjectively, the appellants, in 1974, wanted to get out of the contract. Land prices had fallen, and they thought that if the contract were dissolved, they could probably
D acquire it at a much lower price. But subjective intention is not decisive: it supplied the motive for serving the notice of rescission: there remains the question whether, objectively regarded, their conduct showed an intention to abandon the contract.

In early 1974, there was a possibility that some planning permission might be granted. If it were, and unless the purchasers could take valid objection to it, completion would (under the conditions) have to follow
E in two months. Therefore, if a notice of rescission were to be given, it had to be served without delay, i.e. before the planning permission arrived. In this situation, the appellants' advisers arranged a meeting with a Mr. Cornwell, who was acting for the vendors, or as an intermediary with power to commit the vendors, to discuss the matter. This took place on March 7, 1974, and is recorded as a disclosed aide mémoire
F dated the next day. This document was prepared by the appellants, and we have not the benefit of Mr. Cornwell's evidence upon it: he had died before the trial. But the rest of the correspondence is fully in line with it and I see no reason to doubt its general accuracy. After recording each side's statement of position, the document contained (inter alia) these passages:

G > "He [Mr. Cornwell] stated that if we attempted to rescind the contract, then he would take us to court and let the judge decide whether the contract could be rescinded on the point we were making."

This "point" was undoubtedly that relating to the compulsory purchase of the 2·5 acres.

H > "I told him that our legal department would be serving the notice to rescind the contract within a short while—this would ensure that the company was fully protected and was prudent. He assured me that he would accept it on that basis and not regard it as a hostile act."

The notice was then served on March 20, 1974. On March 22 the respondents' solicitors wrote that they did not accept its validity. On

May 30, 1974, Mr. Cornwell wrote a long letter to Sir Godfrey Mitchell, president of Wimpey. I refer to one passage: A

> "... within a few days of the original meeting, a notice of rescission was served upon the vendor company by your organisation that the contract was to be rescinded. Simultaneously with that notice or rescission, proceedings were instituted and there the matter remains so far as the legal situation is concerned and both parties, from the legal point of view, must now await the decision of the court as to the validity of the claim made by Messrs. George Wimpey & Co. Ltd. that they are entitled to rescind this contract upon the grounds which they have so stated." B

On June 4, 1974, Mr. Cornwell wrote again:

> "... all I need say now is that we will retire to our battle stations and it goes without saying I am sure that you will abide by the result as I will." C

My Lords, I cannot find anything which carries the matter one inch beyond, on Wimpey's part, an expressed reliance on the contract (condition E (a) (iii)), on Woodar's side an intention to take the issue of the validity of the notice (nothing else) to the courts, and an assumption, not disputed by Wimpey, that both sides would abide by the decision of the court. This is quite insufficient to support the case for repudiation. There is only one other matter relied on. At the date of the contract (February 21, 1973) there were arrangements made for a loan of £165,000 to be made to the respondents by the National Westminster Bank. The appellants guaranteed—subject to three months' notice of termination— the respondents' indebtedness to the bank up to £165,000 and agreed with the bank to meet interest and other charges. As between the appellants and the respondents it was agreed that the appellants should indemnify the respondents against all interest on the loan for seven years or until the contract should be "fulfilled or discharged." These arrangements did not form part of the contract of sale but were collateral to it. D E F

When the notice of rescission was served on March 20, 1974, it was accompanied by a covering letter, of the same date, referring to the loan arrangements. It stated:

> "The undertaking was limited to seven years from the date of exchange or until the contract was fulfilled or discharged. As the contract is now discharged by the enclosed notice, [Woodar] will now be liable for the charges incurred in respect of this loan." G

The appellants also gave three months' notice to the bank terminating the guarantee. Again, in my opinion, this carried the matter no further. It simply drew the attention of Woodar to the consequences which would follow from rescission of the contract, nothing more. Woodar, in fact understood it as such, for they wrote to the bank on April 8, 1974, stating that proceedings had been instituted against Wimpey for a declaration "which, if successful, will reinstate the arrangements which you now give notice you intend to bring to an end." H

My Lords, in my opinion, it follows, as a clear conclusion of fact, that the appellants manifested no intention to abandon, or to refuse future performance of or to repudiate the contract. And the issue being one of fact, citation of other decided cases on the other facts is hardly

A necessary. I shall simply state that the proposition that a party who takes action relying simply on the terms of the contract, and not manifesting by his conduct an ulterior intention to abandon it, is not to be treated as repudiating it is supported by *James Shaffer Ltd.* v. *Findlay Durham & Brodie* [1953] 1 W.L.R. 106 and *Sweet & Maxwell Ltd.* v. *Universal News Services Ltd.* [1964] 2 Q.B. 699.

B In contrast to these is the case in this House of *Federal Commerce & Navigation Co. Ltd.* v. *Molena Alpha Inc.* [1979] A.C. 757 which fell on the other side of the line. Of that I said at p. 780:

> "The two cases relied on by the appellants (*James Shaffer Ltd.* v. *Findlay Durham & Brodie* [1953] 1 W.L.R. 106 and *Sweet & Maxwell Ltd.* v. *Universal News Services Ltd.* [1964] 2 Q.B. 699) . . . would only be relevant here if the owners' action had been confined to asserting their own view—possibly erroneous—as to the effect of the contract. They went, in fact, far beyond this when they threatened a breach of the contract with serious consequences."

C

The case of *Spettabile Consorzio Veneziano di Armamento e Navigazione* v. *Northumberland Shipbuilding Co. Ltd.* (1919) 121 L.T. 628 though in some factual respects distinguishable from the present, is nevertheless, in D my opinion, clear support for the appellants.

In my opinion therefore the appellants are entitled to succeed on the repudiation issue, and I would only add that it would be a regrettable development of the law of contract to hold that a party who bona fide relies upon an express stipulation in a contract in order to rescind or terminate a contract should, by that fact alone, be treated as having repudiated his contractual obligations if he turns out to be mistaken as E to his rights. Repudiation is a drastic conclusion which should only be held to arise in clear cases of a refusal, in a matter going to the root of the contract, to perform contractual obligations. To uphold the respondents' contentions in this case would represent an undesirable extension of the doctrine.

The second issue in this appeal is one of damages. Both courts below F have allowed Woodar to recover substantial damages in respect of condition I under which £150,000 was payable by Wimpey to Transworld Trade Ltd. on completion. On the view which I take of the repudiation issue, this question does not require decision, but in view of the unsatisfactory state in which the law would be if the Court of Appeal's decision were to stand I must add three observations:

G 1. The majority of the Court of Appeal followed, in the case of Goff L.J. with expressed reluctance, its previous decision in *Jackson* v. *Horizon Holidays Ltd.* [1975] 1 W.L.R. 1468. I am not prepared to dissent from the actual decision in that case. It may be supported either as a broad decision on the measure of damages (per James L.J.) or possibly as an example of a type of contract—examples of which are persons contracting for family holidays, ordering meals in restaurants H for a party, hiring a taxi for a group—calling for special treatment. As I suggested in *New Zealand Shipping Co. Ltd.* v. *A. M. Satterthwaite & Co. Ltd.* [1975] A.C. 154, 167, there are many situations of daily life which do not fit neatly into conceptual analysis, but which require some flexibility in the law of contract. *Jackson's* case may well be one.

I cannot however agree with the basis on which Lord Denning M.R. put his decision in that case. The extract on which he relied from the judgment of Lush L.J. in *Lloyd's* v. *Harper* (1880) 16 Ch.D. 290, 321

was part of a passage in which the Lord Justice was stating as an "established rule of law" that an agent (sc. an insurance broker) may sue on a contract made by him on behalf of the principal (sc. the assured) if the contract gives him such a right, and is no authority for the proposition required in *Jackson's* case, still less for the proposition, required here, that, if Woodar made a contract for a sum of money to be paid to Transworld, Woodar can, without showing that it has itself suffered loss or that Woodar was agent or trustee for Transworld, sue for damages for non-payment of that sum. That would certainly not be an established rule of law, nor was it quoted as such authority by Lord Pearce in *Beswick* v. *Beswick* [1968] A.C. 58.

2. Assuming that *Jackson's* case was correctly decided (as above), it does not carry the present case, where the factual situation is quite different. I respectfully think therefore that the Court of Appeal need not, and should not have followed it.

3. Whether in a situation such as the present—viz. where it is not shown that Woodar was agent or trustee for Transworld, or that Woodar itself sustained any loss, Woodar can recover any damages at all, or any but nominal damages, against Wimpey, and on what principle, is, in my opinion, a question of great doubt and difficulty—no doubt open in this House—but one on which I prefer to reserve my opinion.

I would allow the appeal.

LORD SALMON. My Lords, this case raises a point of law of considerable importance in relation to the repudiation of contracts.

Between July 1969 and February 1973 prolonged negotiations took place between Mr. Ronald Cornwell and the appellants (Wimpey) for the purchase by Wimpey of 14·41 acres of freehold land known as Mizen's Nurseries at Cobham. In January 1973 Wimpey learnt from Mr. Cornwell that the vendors were to be the respondents (Woodar). By February 1973 the purchase price had been agreed at £1m. In that month Mr. Cornwell proposed that part of the purchase price should be paid to him as European agent for the Transworld Trade Ltd. (Transworld), and a few days later it was agreed that that part of the purchase price should amount to £150,000 and be paid to Transworld direct.

It was also arranged that the contract should provide for a loan of £165,000, secured by a charge on the land (the subject matter of the contract) to be made to Woodar by Wimpey through their bank and that Wimpey should be responsible for servicing the loan. Wimpey were, however, advised that the loan should be treated separately from the contract, otherwise the contract might be void as constituting a clog on the equity of redemption under the charge. Accordingly, on February 21, 1973, Wimpey's bank lent Woodar £165,000 and Woodar executed a legal charge on the land in respect of the loan. Wimpey gave a written undertaking to the bank to meet all interest and other charges in respect of the loan until February 21, 1980, "or until the contract should be fulfilled or discharged." (The underlining is mine.) The facts which I have related are all taken out of Wimpey's printed case.

The written contract for the purchase of the land by Wimpey from Woodar was also executed on February 21, 1973. It specified the purchase price as £850,000 and laid down at the end of the contract in special condition I that upon the completion of the purchase of the whole or any part of this land, Wimpey should pay Transworld £150,000.

A I will now turn to the material clauses in the contract. Special conditions E (a) so far as relevant reads:

> " This contract shall be absolutely binding on both parties . . . for a period of seven years from the date hereof but there shall be reserved to the purchaser only the power to rescind this contract if prior to the date of completion: . . . (iii) any authority having a statutory
B power of compulsory acquisition shall have commenced to negotiate for the acquisition by agreement or shall have commenced the procedure required by law for the compulsory acquisition of the property or any part thereof."

This clause, quite obviously, refers only to any such negotiation or procedure commenced after the execution of the contract and prior to
C completion but not to any negotiation or procedure which had commenced and of which both parties were well aware before they executed the contract.

Special condition E (c), so far as relevant, reads:

> " The power to rescind reserved to the purchaser by subclause (a) . . . shall be exerciseable by the service of a notice in writing to
D that effect upon the vendor . . . and the purchaser's liability under . . . this contract shall from the date of service of such notice cease."

Special condition E (g) provides that completion shall take place on the earliest of the three dates it mentions, namely, (i) two months after the date on which outline planning permission for the development of the property is granted; (ii) February 21, 1980, (iii) such date as the purchaser shall
E specify but not by less than 14 days' written notice.

Returning to special condition E (a) (iii) of the contract, it is common ground that Wimpey and Woodar both knew, well before the contract between them was executed, (1) that in 1970 the Minister of Transport had given notice of a draft compulsory purchase order in respect of 2·3 acres of the 14·41 acres covered by the contract, (2) that this fact had been published in the local press, and (3) that notice had also been
F given of the appointment of an inspector to hold a public inquiry which he had duly held.

Indeed, there is a provision in the contract under special condition G, which, so far as relevant, reads:

> " It is hereby agreed that the vendor shall not require the purchaser to include in the transfer to the purchaser any part . . . of the land
G hereby agreed to be sold which shall be required by the Surrey County Council . . . or any statutory authority . . . and the purchase price shall be abated at the rate of £70,000 per acre . . . for any part . . . of the land hereby agreed to be sold which shall not be included in the transfer to the purchaser."

H It is to be observed that if the land is priced in the contract at £70,000 an acre, the 14·41 acres sold under the contract would, in fact, be priced at about £1m.

By March of 1974 there had been a very alarming slump in the value of land. It is quite clear from one of Wimpey's internal memoranda, written at the beginning of that month, that Wimpey had no intention of honouring their contract by paying the agreed price of £70,000 an acre for the land: that they intended to repudiate the contract but would

gladly enter into a new contract with Woodar to buy the land at £48,000 an acre, on otherwise the same terms as those of the existing contract. The relevant part of the memorandum reads as follows:

> "Revised broadsheets have been prepared taking account of the reduced selling price of houses and increased building costs and these indicate that currently to show 20% profit we can offer £48,000 per acre, to show 15% profit £53,000 per acre. The indications are that this piece of land could obtain outline planning permission within the next four months, in which case we as a company would be obliged to perform in accordance with the obligations of our contract to purchase subject to the various conditions. We propose arranging a meeting with Mr. Cornwell to discuss formally with him: (a) Our intention to rescind the contract so that he is obliged to pay the interest on the loan thereafter from that date. (b) To make him a proposal that we are prepared to proceed with the purchase of the land at the reduced figure of £48,000 per developable acre subject, of course, to the same terms and conditions."

On March 20, 1974, a notice was sent to Woodar by Wimpey in the following terms:

> "Pursuant to clause E (c) of a contract dated February 21, 1973, and made between Woodar Investment Development Ltd. of the one part and George Wimpey & Co. Ltd. of the other part the said George Wimpey & Co. Ltd. hereby rescinds the said contract on the ground that within the meaning of clause E (a) (iii) of the said contract the Secretary of State for the Environment has commenced the procedure required by law for the compulsory acquisition of part of the property (a compulsory purchase order relating to the land edged red on the plan annexed hereto having been made)."

I am afraid that I am entirely unable to agree with the proposition that this notice of rescission was a neutral averment consistent either with the intention to preserve or with an intention to abandon the contract. To my mind it was served with the clearly expressed intention of bringing the contract to an end. This notice was accompanied by a letter of the same date, the last paragraph of which reads as follows:

> "When contracts for the sale and purchase of the above land were exchanged, an undertaking was given by the company indemnifying Woodar Investment Development Ltd. against all interest charges payable to the National Westminster Bank Ltd. as a result of a loan by them to you of a sum of £165,000. The undertaking was limited to seven years from the date of exchange or until the contract was fulfilled or discharged. As the contract is now discharged by the enclosed notice, Woodar Investment Development Ltd. will now be liable for the charges incurred in respect of this loan." (The underlining is mine.)

My Lords, it was conceded in this House on behalf of Wimpey that they had no right to rescind, discharge or repudiate the contract. In my respectful opinion, Wimpey had made it crystal clear by their notice and letter of March 20 that they purported to bring their liability under the contract to an end by rescinding and discharging it; and that they had no intention of paying the contract price for the land in question. If this does not go to the root of the contract and evince an unequivocal

A intention no longer to be bound by it, and therefore amounts to a repudiation of the contract, I confess that I cannot imagine what would.

In the court of first instance, Wimpey sought to justify their notice and letter of March 20, 1974, on the ground that prior to the execution of the contract of February 21, 1973, steps had been taken for the compulsory acquisition of 2·3 acres out of the 14·41 acres the subject matter of the contract. I have already described these steps and I B shall not repeat them. It is common ground that all these steps were well known both to Wimpey and to Woodar at the time they were taken. The point was nevertheless argued on behalf of Wimpey before the trial judge that because of these steps having been taken when they were, Wimpey were entitled under special condition E (a) (iii) of the contract to rescind the contract and refuse to perform it. The learned trial C judge made short work of that point and decided that it was untenable. The point was so obviously bad that it was wisely decided by counsel on behalf of Wimpey not to be worth taking in the Court of Appeal. It was however accepted by Woodar that on March 20, 1974, Wimpey honestly believed in the point which they later abandoned. I do not understand how Wimpey's honest belief in a bad point of law can in any way avail them. In *Federal Commerce & Navigation Co. Ltd.* v. D *Molena Alpha Inc.* [1978] Q.B. 927, 979, Lord Denning M.R. said:

> "I have yet to learn that a party who breaks a contract can excuse himself by saying that he did it on the advice of his lawyers: or that he was under an honest misapprehension. Nor can he excuse himself on those grounds from the consequences of a repudiation."

E I gratefully adopt that passage which seems to me to be particularly apt in the present case. It certainly was never questioned in your Lordships' House when the appeal from the decision of the Court of Appeal in the *Federal Commerce* case [1979] A.C. 757 was dismissed.

In *Freeth* v. *Burr* (1874) L.R. 9 C.P. 208, 213 Lord Coleridge C.J. said:

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> ". . . where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract."

In *Mersey Steel and Iron Co. Ltd.* v. *Naylor, Benzon & Co.* (1884) G 9 App.Cas 434 Lord Selborne L.C., after approving of what Lord Coleridge said in *Freeth* v. *Burr* went on to say, at p. 439:

> ". . . you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part; "

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In the *Spettabile* case, 121 L.T. 628, 634–635 Atkin L.J. said:

> "A repudiation has been defined in different terms—by Lord Selborne as an absolute refusal to perform a contract; by Lord Esher as a total refusal to perform it; by Bowen L.J. in *Johnston* v. *Milling* (1886) 16 Q.B.D. 460 as a declaration of an intention not to carry out a contract when the time arrives, and by Lord Haldane in *Bradley* v. *H. Newsom Sons & Co.* [1919] A.C. 16 as an inten-

tion to treat the obligation as altogether at an end. They all come to the same thing, and they all amount at any rate to this, that it must be shown that the party to the contract made quite plain his own intention not to perform the contract." A

In *Heyman* v. *Darwins Ltd.* [1942] A.C. 356, 378–379, Lord Wright said:

"There is, however, a form of repudiation where the party who repudiates does not deny that a contract was intended between the parties, but claims that it is not binding because of the failure of some condition or the infringement of some duty fundamental to the enforceability of the contract, it being expressly provided by the contract that the failure of condition or the breach of duty should invalidate the contract . . . But perhaps the commonest application of the word 'repudiation' is to what is often called the anticipatory breach of a contract where the party by words or conduct evinces an intention no longer to be bound and the other party accepts the repudiation and rescinds the contract. In such a case, if the repudiation is wrongful and the rescission is rightful, the contract is ended by the rescission but only as far as concerns future performance. It remains alive for the awarding of damages . . . for the breach which constitutes the repudiation." B C D

In my opinion, the repudiation in the present case exactly fits the repudiation which Lord Wright explains in the passages which I have just cited.

I do not recall that any of these definitions of a repudiation of a contract have ever until now, been questioned. The fact that a party to a contract mistakenly believes that he has the right to refuse to perform it cannot avail him. Nor is there any authority for the proposition that if a party to a contract totally refuses to perform it, this refusal is any the less a repudiation of the contract because he honestly but mistakenly believes that he is entitled by a condition of the contract to refuse to perform it. E

It would indeed be unfortunate if the law were otherwise. A mistake in the construction of a contractual condition, even such a glaringly obvious mistake as the present can apparently easily be made especially perhaps when the market price has fallen far below the contract price. It is acknowledged in this case that the mistake was an honest one. If, however, a case arose in which a mistake of this kind was alleged to be an honest mistake, but not acknowledged to be so, it would be extremely difficult, if not impossible to prove the contrary. F G

James Shaffer Ltd. v. *Findlay Durham & Brodie* [1953] 1 W.L.R. 106 and *Sweet & Maxwell Ltd.* v. *Universal News Services Ltd.* [1964] 2 Q.B. 699 were strongly relied upon on behalf of Wimpey. Those two cases were very different from each other and even more different from the present case; in my opinion they certainly lend no more support to Wimpey than they did to the appellants in the *Federal Commerce* case [1979] A.C. 757. Indeed, if anything, they are of some help to Woodar. In the former case, Singleton L.J. said at p. 121: ". . . is it possible to say that the defendants . . . showed an intention to abandon and altogether to refuse the performance of the contract? . . . I think not." Morris L.J. said at p. 124: "I have no doubt that [the defendants] wanted to go on with the contract." In the latter case [1964] 2 Q.B. 699, 729 Harman L.J. said: H

A "... repudiation really is not in the picture here at all, because if the defendants were not wholly justified in the attitude they took up, [on the construction of the agreement] the plaintiffs were not wholly justified in their attitude either, and they could only treat the defendants' refusal to comply with their demands as repudiation if their demands were wholly right. Therefore ... repudiation does not really arise: but as it was the ground of the judgment of the B judge below I think I ought to say something about it ... there was not that absolute refusal to go on which is necessary ... to arrive at a conclusion that an agreement ... has been entirely repudiated."

Pearson L.J. said much the same.

C The present case is, however, quite different from the *James Shaffer* case [1953] 1 W.L.R. 106 and the *Sweet & Maxwell* case [1964] 2 Q.B. 699 because Wimpey made it very plain by their notice and letter of March 20, 1974, that they had no intention to go on with the contract and buy the land at the contract price.

Spettabile Consorzio Veneziano di Armamento e Navigazione v. *Northumberland Shipbuilding Co. Ltd.*, 121 L.T. 628 was also strongly D relied upon on behalf of Wimpey. The facts of that case were very strange and clearly distinguishable from the present. Goff L.J. made a long and masterly analysis of that case with which I agree and gratefully adopt. I do not consider that that case is, in reality, of any help to Wimpey.

I cannot accept that the majority of the Court of Appeal concentrated too much attention on Wimpey's rescission notice of March 20, E 1974, and not enough upon its surrounding circumstances. In any event, it seems to me that those surrounding circumstances supported Woodar's case rather than Wimpey's. I think that it is obvious from the surrounding circumstances that Wimpey had made up their mind at the beginning of March 1974 (and never changed it) that, in no circumstances would they comply with their contractual obligation to buy the land in question F at the price of £70,000 per acre. This is made clear by the language of their memorandum which I have already cited and which appears to have been written a day or two before Wimpey's aide mémoire of March 8, 1974, upon which Wimpey rely. I do not understand how that document can be evidence against Woodar, even if Mr. Cornwell were still alive. Nor do I think that even if the document were admissible in evidence it could be accepted as being accurate in every detail. G Looking at the document as a whole, however, it seems to support Woodar's case rather than Wimpey's. It indicates (1) that Wimpey made plain to Mr. Cornwell what was recorded in the memorandum which I have cited; (2) that Mr. Cornwell was anxious to effect a compromise and suggested that "the money could be paid to him over a period of up to say five years, or that the price could be lowered or H a combination of both"; (3) that Wimpey replied "the mere extension of five years would not be attractive to us, but that if the land value was vastly reduced we would still like to remain with the deal"; (4) that Mr. Cornwell then said "that he would go away and consider the lowest price that he could afford to sell it to us and that below that price he would fight us through the courts." (The underlining is mine).

On March 22, 1974, two days after the notice of rescission was served by Wimpey, Woodar's solicitor wrote that they did not accept

its validity. By a writ of summons endorsed with a statement of claim served on March 29, 1974, Woodar, amongst other things, claimed against Wimpey a declaration that their notice of March 20, 1974, did not rescind the contract. It may well be that Woodar considered that once they commenced legal proceedings, Wimpey would throw in their hand. If so, they were mistaken, for Wimpey served a defence and counterclaim on May 18, 1974, alleging that the notice of rescission of March 20, 1974, was valid and counterclaimed a declaration that the contract had been rescinded by that notice.

Mr. Cornwell, who seems to have done all the negotiations on behalf of Woodar, was obviously anxious if possible to settle rather than embark on lengthy and expensive litigation. He was no doubt disappointed when Wimpey made it clear by their defence and counterclaim that they intended to fight. He probably, I think, wrote his lengthy letter of May 30, 1974, in one last effort to effect a settlement. Wimpey have sought to make much of this letter which in my view helps Woodar rather than Wimpey. It seems to make it very plain that Mr. Cornwell had consulted counsel on the notice of rescission and had been advised that it constituted a wrongful repudiation of the contract. I cite one brief passage from it: ". . . unless some compromise is reached and quickly, then I shall feel obliged to sell immediately in the best possible circumstances with a certain knowledge, so far as counsel's advice is concerned, that we have a complete redress against" Wimpey. Of course there was nothing to stop the parties waiting and doing nothing until the litigation constituted by the first action was over as Mr. Cornwell said earlier in his letter. But there was nothing to prevent Woodar from selling immediately and bringing another action claiming damages, once they had accepted the repudiation to which I have already referred.

At the time when Mr. Cornwell's letter of June 4, 1974, was written, upon which my noble and learned friend, Lord Scarman, places considerable reliance, Woodar had not accepted the repudiation: and a repudiation, however wrongful is nugatory until accepted by the other contracting party.

The result of the first action must have been in Woodar's favour. They could have waited until completion was due under the contract, which could not have been later than February 21, 1980. Wimpey might then perhaps have completed the contract or they might have failed to complete it, in which event they would have had no defence to an action for specific performance or damages. There was, however, nothing to compel Woodar to confine themselves to the first action. They had a free choice to do so or to accept the wrongful repudiation which would enable Woodar to bring the second action claiming damages for an anticipatory breach of the contract.

I entirely agree with my noble and learned friend, Lord Wilberforce, that Wimpey's counterclaim in the first action did not amount to a repudiation of the contract. For the reasons I have given, however, their repudiation of the contract had, in my view, been effected by the notice of rescission dated March 20, 1974, and supported by the letter of the same date.

Although I cannot agree with Buckley L.J. that the contract was not wrongfully repudiated, I do agree with his view that if Wimpey's notice of the March 20, 1974, did constitute a wrongful repudiation of the contract of February 21, 1973, the proceedings launched by Woodar

against Wimpey on March 29, 1974, could not preclude them from accepting that repudiation and bringing another action against Wimpey claiming damages for an anticipatory breach of contract. And this is what Woodar did. On July 10, 1974, through their solicitors, they accepted the wrongful repudiation of March 20, 1974, and then launched their action for damages for an anticipatory breach of contract. The two actions were consolidated and duly tried by Fox J. who found that Wimpey had wrongfully repudiated the contract of February 21, 1973, and gave judgment in favour of Woodar for, in all, £462,000 damages.

The Court of Appeal by a majority affirmed Fox J's decision on liability but reduced the damages to £272,943.

My Lords, for the reasons I have stated, I would dismiss the appeal on the issue of liability. Since, as I understand, the majority of your Lordships are for allowing the appeal on liability, the interesting question in relation to damages in respect of the claim for £150,000 does not now arise. I do, however, agree with what my noble and learned friend, Lord Wilberforce, has said about the finding of the majority of the Court of Appeal (Goff L.J. with reluctance) on this topic. I would add that, in my opinion, the law as it stands at present in relation to damages of this kind is most unsatisfactory; and I can only hope that your Lordships' House will soon have an opportunity of reconsidering it unless in the meantime it is altered by statute.

LORD RUSSELL OF KILLOWEN. My Lords, the contention advanced by the purchaser ("Wimpey") was that it was entitled to rescind the contract by notice of rescission under special condition E (a) (iii) of the contract, because the relevant authority had "commenced the procedure" required by law for compulsory acquisition not earlier than the making of the compulsory purchase order on November 8, 1973, subsequent to the contract. Fox J. held that this was incorrect; and that even if it were a correct construction of the contract there should be rectification to make it clear that steps taken by authority in that connection prior to the contract constituted commencement of the relevant procedure and were not intended to afford a ground for rescission under the special condition. From that holding there was and is no appeal.

Consequently there was no justification in law for the notice of rescission, and the first question in this appeal is whether the notice of rescission was capable of being accepted by Woodar as a renunciation or repudiation of the contract by Wimpey. An affirmative answer to that question was assumed, or not disputed, before Fox J., and was given by the majority in the Court of Appeal (Buckley L.J. dissenting).

The difference of opinion on this point in the Court of Appeal and in your Lordships' House turns upon a question which can be shortly stated. If a party to a contract has a power thereunder totally to rescind and renounce all liability to perform any part of its obligations under a contract, and in terms purports absolutely so to rescind and renounce on grounds that in law are not justified, can there ever be circumstances which enable the rescinder to dispute the renunciatory and repudiatory quality of his action?

My Lords, in my opinion the answer to that question is in the negative.

I do not of course dispute that a mistaken concept of the rights of a party under the contract, and action (or inaction) on the basis of

that mistaken concept, need not constitute such a renunciation of the contract as to be capable of being accepted as repudiation of the contract. Nor do I dispute that repudiation is a serious matter not lightly to be found. Nor do I dispute that in most cases repudiation or non-repudiation falls to be decided having regard to all the circumstances of a case. But I deny that a clear case of the purported exercise of a power of rescission, a total renunciation of all future obligation to perform any part of the contract, such as now concerns your Lordships, can by any circumstances be watered down or deprived of its repudiatory quality. I further assert that it is fallacious to deny that totally renunciatory and repudiatory quality on the ground that because the action is purportedly taken under a clause in the contract it is somehow affirming rather than repudiating the contract. The notice of rescission given in this case by Wimpey was wholly unequivocal, in effect saying that Wimpey would not in any circumstances fulfil the contract: and that flat statement is not to be regarded as otherwise than renunciatory of the contract because Wimpey genuinely thought that it was entitled in law to take that attitude.

It is of course true that in previous discussion with Mr. Cornwell (for Woodar) it was indicated that Wimpey's right to rescind on the ground suggested would be challenged by Woodar in proceedings. But I see no ground in that for watering down the absolute nature (or colour) of the notice of rescission as being somehow conditional upon the rectitude in law of Wimpey's stance. Indeed I do not accept a view that the notice of rescission could have been (a) expressed to be conditional upon its justification in law but (b) then operative to terminate all liability of Wimpey under the contract, as it was manifestly intended to be because it was feared that shortly a planning permission would be forthcoming (though it did not) which would trap Wimpey irrevocably into an unprofitable bargain.

I can, my Lords, envisage a situation in which a party in the position of Woodar might state unequivocally in advance that if Wimpey were to serve the notice which it did serve, Woodar would not, when it was shown in proceedings that the notice was unjustified, treat it as repudiatory. But that would achieve a position in which Woodar would be debarred from asserting repudiation, rather than constitute a circumstance qualifying the fundamental renunciatory character of the purported exercise by Wimpey of the power. But it cannot be said that such a position was achieved by anything said by Cornwell in this case.

I am, my Lords, not led to a contrary view by the circumstances of the *Spettabile* case, 121 L.T. 628 at first instance. There the view was taken that if originally a communication would have indicated a repudiatory attitude, subsequent approach to the court by the "repudiator" for a decision upon the rights of the case should be taken as withdrawal of the original repudiation. That is not this case. The resort to the court was not by Wimpey, and Wimpey never withdrew its notice of rescission to abide the outcome of the litigation.

It was suggested that the proceedings by Woodar for a declaration and/or rectification somehow constituted an election not to accept the rescission as a repudiation, so that Woodar's later purported acceptance of it as such was ineffective. In common with, I believe, all your Lordships I cannot accept that. Woodar was obliged to take steps that

A it did in order to establish that the notice was unjustified in law and therefore an unjustified repudiation.

Accordingly in my opinion Wimpey wrongfully repudiated the contract by its notice of rescission, and Woodar accepted that repudiation so as to entitle it to damages for total breach.

In arriving at my conclusion I do not rely upon the reference to interest B payments in the covering letter enclosing the rescission notice: nor upon the defence or counterclaim of Wimpey. These seem to me to add nothing to the repudiatory nature of the notice itself.

In conclusion upon this point I cannot agree that, if my opinion were correct, it would be an unfortunate step in the law. If a party takes such a bold step he risks disaster. If he plunges in without first testing the temperature by a construction summons asking whether the rescission C remedy is available to him he runs the risk of catching a severe cold.

There is no question on this appeal as to quantum of damage save under the heading of damages for breach of special condition I, under which Wimpey agreed on completion of the sale to pay £150,000 to Transworld, a Hong Kong company. Transworld was in some way connected with Mr. Cornwell, who died before action. No evidence connects Trans- D world with Woodar, the party to the contract. No evidence suggests that Woodar could suffer any damage from a failure by Wimpey to pay £150,000 to Transworld. It is clear on the authority of *Beswick* v. *Beswick* [1968] A.C. 58, that Woodar on completion could have secured an order for specific peformance of the agreement to pay £150,000 to Transworld, which the latter could have enforced. That would not have been an order for payment to Woodar, nor (contrary to the form of E order below) to Woodar for the use and benefit of Transworld. There was no suggestion of trust or agency of Woodar for Transworld. If it were necessary to decide the point, which in the light of the views of the majority of your Lordships on the first point it is not, I would have concluded that no more than nominal damages had been established by Woodar as a consequence of the refusal by Wimpey to pay Transworld in the F light of the law of England as it now stands. I would not have thought that the reasoning of Oliver J. in *Radford* v. *De Froberville* [1977] 1 W.L.R. 1262 supported Woodar's case for substantial damages. Nor do I think that on this point the Court of Appeal was correct in thinking it was constrained by *Jackson* v. *Horizon Holidays Ltd.* [1975] 1 W.L.R. 1468 to award substantial damages. I do not criticize the outcome of that case: the plaintiff had bought and paid for a high class family holiday: G he did not get it, and therefore he was entitled to substantial damages for the failure to supply him with one. It is to be observed that the order of the Court of Appeal as drawn up did not suggest that any part of the damages awarded to him were " for the use and benefit of " any member of his family. It was a special case quite different from the instant case on the Transworld point. H

I would not, my Lords, wish to leave the *Jackson* case without adverting with respectful disapproval to the reliance there placed by Lord Denning M.R.—not for the first time—on an extract taken from the judgment of Lush L.J. in *Lloyd's* v. *Harper*, 16 Ch.D. 290. That case was plainly a case in which a trustee or agent was enforcing the rights of a beneficiary or principal, there being therefore a fiduciary relationship. Lord Denning in *Jackson's* case said, at p. 1473:

> "The case comes within the principle stated by Lush L.J. in *Lloyd's* v. *Harper* (1880) 16 Ch.D. 290, 321: 'I consider it to be an established rule of law that where a contract is made with *A.* for the benefit of *B.*, *A.* can sue on the contract for the benefit of *B.* and recover all that *B.* could have recovered if the contract had been made with *B.* himself'."

Lord Denning continued: "It has been suggested that Lush L.J. was thinking of a contract in which A was trustee for B. But I do not think so. He was a common lawyer speaking of common law." I have already indicated that in all the other judgments the matter proceeded upon a fiduciary relationship between A and B: and Lush L.J. in the same passage makes it plain that he does also; for he says:

> "It is true that the person [B] who employed him [the broker A] has a right, if he pleases, to take action himself and sue upon the contract made by the broker for him, for he [B] is a principal party to the contract."

To ignore that passage is to divorce the passage quoted by Lord Denning from the fiduciary context in which it was uttered, the context of principal and agent, a field with which it may be assumed Lush L.J. was familiar. I venture to suggest that the brief quotation should not be used again as support for a proposition which Lush L.J. cannot have intended to advance.

In summary therefore, in disagreement with the majority of your Lordships, I would have dismissed this appeal on repudiation. Had I been correct I would, as at present advised, have allowed the appeal on the Transworld point, and awarded only nominal damages on that point to Woodar, and not substantial damages to be paid to Woodar "for the use and benefit of" Transworld, a form of order which I cannot see was justified.

LORD KEITH OF KINKEL. My Lords. In deciding the issue of repudiation which arises in this appeal, the guiding principle is that enunciated by Lord Coleridge, C.J. in *Freeth* v. *Burr*, L.R. 9 C.P. 208, 213:

> ". . . in cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract."

The matter is to be considered objectively:

> "The claim being for wrongful repudiation of the contract it was necessary that the plaintiff's language should amount to a declaration of intention not to carry out the contract, or that it should be such that the defendant was justified in inferring from it such intention. We must construe the language used by the light of the contract and the circumstances of the case in order to see whether there was in this case any such renunciation of the contract." (*Johnstone* v. *Milling* (1886) L.R. 16 Q.B.D. 460, 474, *per* Bowen L.J.).

The importance of looking at the whole circumstances of the case was emphasised by Lord Selborne L.C. in *Mersey Steel and Iron Co. Ltd.* v. *Naylor, Benzon & Co.*, 9 App.Cas. 434, and by Singleton L.J. in *James Shaffer Ltd.* v. *Findlay Durham & Brodie* [1953] 1 W.L.R. 106, 116.

A There is a tract of authority which vouches the proposition that the assertion by one party to the other of a genuinely held but erroneous view as to the validity or effect of a contract does not constitute repudiation. In the *Spettabile* case, 121 L.T. 628, the plaintiffs sent to the defendants a letter claiming that certain contracts were no longer binding upon them and followed it up with a service of a writ seeking declarations to that effect. The Court of Appeal held that the plaintiffs' conduct did B not amount to repudiation of the contracts. Warrington L.J. said at p. 633, with reference to the letter:

> "It seems to me that that is not telling the defendants that whatever happens, whatever is the true state of the case, whether the contracts are binding on the plaintiffs or not, they will not perform them: but that they have instructed their solicitors to take proceedings with the C object of having it determined that the contracts are not binding upon the plaintiffs and are at an end; . . ."

And with reference to the writ:

> ". . . I think that it is desirable to say this, that in my opinion where one party to a contract conceives that he is no longer bound by the contract or has a right to have it rescinded or declared null and void, and D issues a writ for the purpose of obtaining that which he believes to be his right, he does not by that mean to repudiate the performance of the contract in any event. It seems to me that he submits to perform it if the court, as the result of the action, comes to the conclusion that he is bound to perform it, and it cannot be taken to be an absolute repudiation."

E Lord Atkin, at p. 635, after observing that it must be shown that the party to the contract made quite plain his own intention not to be bound by it, said:

> ". . . the substance of [the writ] appears to me to be this: that the plaintiffs in the action are asking the court to declare whether or not they are any longer bound by the contracts. It appears to me that F that is an entirely different state of facts altogether from an intimation by the plaintiffs, apart from the courts of law, that they in any event are not going to perform the contracts. It is something quite different from a repudiation. So far from expressing the intention of the parties not to perform the contracts, it appears to me to leave it to the court to say whether or not the contract is to be performed, G and if the court says it is, then it impliedly states that it will be performed. I think, therefore, there was no repudiation of the contract.'

In two other cases it was held by the Court of Appeal that the expression by one party to a contract of a genuine but erroneous view as to the obligations which on a proper construction of it were thereby H imposed did not infer an intention to repudiate the contract. These cases are *James Shaffer Ltd.* v. *Findlay Durham & Brodie* [1953] 1 W.L.R. 106 and *Sweet & Maxwell Ltd.* v. *Universal News Services Ltd.* [1964] 2 Q.B. 699. Finally, it is worth observing that in *Ross T. Smyth and Co. Ltd.* v. *T. D. Bailey, and Son and Co.* (1940) 164 L.T. 102, 107, Lord Wright said: ". . . a mere honest misapprehension, especially if open to correction, will not justify a charge of repudiation."

So in the present case the question comes to be whether, having regard to all the circumstances, the conduct of the appellants in relation to their invocation of special condition E (a) (iii) of the contract was such that a reasonable person in the position of the respondents would properly infer an intention " in any event," to use the expression employed by Warrington and Atkin L.JJ. in the *Spettabile* case, 121 L.T. 628, to refuse to perform the contract when the time came for performance.

The terms of special condition E (a) (iii) have been quoted by my noble and learned friend Lord Wilberforce. It conferred upon the appellants the right lawfully to rescind the contract in the event there described. The appellants had come to find the contract burdensome in view of the dramatic collapse of the property market. They accordingly desired to be relieved of it and took legal advice as to whether there existed grounds upon which they might lawfully do so. The advice received was to the effect that special condition E (a) (iii) provided such a ground.

The appellants did not, however, at once give notice of rescission under the clause. They sought an interview with Mr. Cornwell, as representing the respondents, which took place on March 7, 1974, and proceeded on the lines described in the aide mémoire which is in evidence. The appellants informed Mr. Cornwell of their position as regards the application of special condition E (a) (iii) and proposed a renegotiation of the contract, failing which they stated their intention to serve notice of rescission in terms of the clause. Mr. Cornwell contested the correctness of their position, and expressed the intention, if the appellants served notice of rescission, of taking the matter to court and obtaining a decision upon their right to do so. The appellants served their notice of rescission about two weeks later, clearly in the expectation, which was duly and promptly realised, that the respondents would initiate legal proceedings in order to test its validity. In my opinion there was nothing in the appellants' conduct up to this point, there being no dispute about the genuineness of their belief that they were entitled to terminate the contract upon the stated ground, which might reasonably be treated as inferring that it was their intention to refuse performance in the event of a judicial determination that that belief was erroneous. The letters written by Mr. Cornwell to Sir Godfrey Mitchell on May 30, and June 6, 1974, the material parts of which have been quoted by my noble and learned friend, clearly indicate that he himself did not draw any such inference. I am unable to regard the appellants' conduct as evincing an intention " altogether to refuse performance of the contract " as Lord Coleridge put it in *Freeth* v. *Burr*, L.R. 9 C.P. 208, 213 or as constituting an absolute " repudiation " in the sense in which Atkin L.J. used that expression in the *Spettabile* case, 121 L.T. 628.

I would accept without hesitation the statement of Lord Denning M.R. in *Federal Commerce & Navigation Co. Ltd.* v. *Molena Alpha Inc.* [1978] 1 Q.B. 927, 979 that a party who breaks a contract cannot excuse himself by saying that he did it on the advice of his lawyers, or that he was under an honest misapprehension. If in the present case the time for performance had passed while the appellants were still maintaining their position based on the erroneous interpretation of special condition E (a) (iii), they would have been in breach of contract and liable in damages accordingly. Lord Denning goes on to say: " Nor can he excuse himself on those grounds from the consequences of a repudiation." That may be so, but it is first necessary to determine whether or not there has been a repudiation.

The doctrine of repudiatory breach is largely founded upon considera-

A tions of convenience and the opportunities which it affords for mitigating loss, as observed by Cockburn C.J. in *Frost* v. *Knight* (1872) L.R. 7 Ex. 111, 114. It enables one party to a contract, when faced with a clear indication by the other that he does not intend to perform his obligations under it when the time for performance arrives, to treat the contract, if he so chooses, as there and then at an end and to claim damages as for actual breach. Where one party, honestly but erroneously, intimates to the other B reliance upon a term of the contract which, if properly applicable, would entitle him lawfully to rescind the contract, in circumstances which do not and are not reasonably understood to infer that he will refuse to perform his obligations even if it should be established that he is not so entitled, legal proceedings to decide that issue being in contemplation, I do not consider it in accordance with ordinary concepts of justice that the other C party should be allowed to treat such conduct as a repudiation. Nor, in my opinion, are there any considerations of convenience which favour that course.

I would add that in my view the lodging by the appellants of their defence and counterclaim in answer to the respondents' first writ did not constitute further conduct on their part which can itself be regarded as having a repudiatory character. They thereby demonstrated nothing D more than an adherence to their position as they had earlier expressed it. Further, the action taken by the appellants in relation to the guarantee arrangements with the National Westminster Bank appear to me to have been no more than a natural consequence of the view taken by the appellants as to their right to terminate the contract.

In the circumstances the issue regarding the respondents' right to E damages in respect of alleged breach of the appellants' obligation under the contract to pay £150,000 to Transworld does not arise for decision. It is desirable, however, that I should express my agreement with my noble and learned friend, Lord Wilberforce, that the decision in favour of the respondents upon this issue, arrived at by the majority of the Court of Appeal, was not capable of being supported by *Jackson* v. *Horizon Holidays Ltd.* [1975] 1 W.L.R. 1468. That case is capable of F being regarded as rightly decided upon a reasonable view of the measure of damages due to the plaintiff as the original contracting party, and not as laying down any rule of law regarding the recovery of damages for the benefit of third parties. There may be a certain class of cases where third parties stand to gain indirectly by virtue of a contract, and where their deprivation of that gain can properly be regarded as no more G than a consequence of the loss suffered by one of the contracting parties. In that situation there may be no question of the third parties having any claim to damages in their own right, but yet it may be proper to take into account in assessing the damages recoverable by the contracting party an element in respect of expense incurred by him in replacing by other means benefits of which the third parties have been H deprived or in mitigating the consequences of that deprivation. The decision in *Jackson* v. *Horizon Holidays Ltd.* is not, however, in my opinion, capable of being supported upon the basis of the true ratio decidendi in *Lloyd's* v. *Harper*, 16 Ch.D. 290, which rested entirely on the principles of agency.

I would also associate myself with the observations of my noble and learned friend, Lord Scarman, as to the desirability of this House having

an opportunity of reviewing, in some appropriate future case, the general attitude of English law towards the topic of jus quaesitum tertio.

My Lords, I would allow the appeal.

LORD SCARMAN. My Lords. For the reasons given by my noble and learned friend, Lord Wilberforce, I would allow the defendants' appeal. In my judgment the defendants did not commit, or threaten to commit, a repudiatory breach of contract. The principle of the modern law is now "perspicuous," as my noble and learned friend observed in *Federal Commerce & Navigation Co. Ltd.* v. *Molena Alpha Inc.* [1979] A.C. 757, 778. To be repudiatory, the breach, or threatened breach, must go to the root of the contract. If an anticipatory breach is relied on, the renunciation must be "an intimation of an intention to abandon and altogether to refuse performance of the contract"; or, put in other but equally clear words, "the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract": Lord Coleridge C.J. in *Freeth* v. *Burr*, L.R. 9 C.P. 208, 213. The emphasis upon communication of the party's intention by his acts and conduct is a recurring theme in the abundant case law. Two well-known cases illustrative of the emphasis are *Mersey Steel and Iron Co. Ltd.* v. *Naylor, Benzon & Co.*, 9 App.Cas. 434 and *Bradley* v. *H. Newsom, Sons & Co.* [1919] A.C. 16 (see in particular the speech of Lord Wrenbury).

Difficulty, however, does arise in the application of the principle to particular facts—as the difference in judicial opinion in the present case shows. The dividing line between what is repudiatory and what is not emerges from three very persuasive dicta to be found in the case law. When the *Federal Commerce* case [1979] A.C. 757 was in the Court of Appeal, Lord Denning M.R. said [1978] Q.B. 927, 979:

> "I have yet to learn that a party who breaks a contract can excuse himself by saying that he did it on the advice of his lawyers: or that he was under an honest misapprehension . . . I would go by the principle . . . that if the party's conduct" "contract" must be a misprint "—objectively considered in its impact on the other party— is such as to evince an intention no longer to be bound by his contractual obligations, then it is open to the other party to accept his repudiation and treat the contract as discharged from that time onwards."

In the *Spettabile* case, 121 L.T. 628, 634–635, Atkin L.J. said of the various definitions of repudiations:

> "They all come to the same thing, and they all amount at any rate to this, that it must be shown that the party to the contract made quite plain [emphasis supplied] his own intention not to perform the contract."

In *James Shaffer Ltd.* v. *Findlay Durham & Brodie* [1953] 1 W.L.R. 106 the Court of Appeal had under consideration a breach of a long-term supply contract where the defendant, who had undertaken to pass on orders of not less than a specified value each year, failed to do so. He honestly believed his failure was not a breach of contract: but the Court of Appeal held that it was, his construction of the contract being erroneous in law. The court held, however, that the breach did not evince an intention not to be bound by the contract. Singleton L.J., who

A referred to *Freeth* v. *Burr*, L.R. 9 C.P. 208 and the *Spettabile* case, 121 L.T. 628 made this comment, at p. 120:

> "Streatfield J. said that this was a very difficult case and near the line. I think that that is a true description. Sometimes when a case is put in one particular way it has great appeal, and, when it is put in the other way, it has an almost equal appeal. I do not think
B that it is right to look at the interview of May 18 alone; as I understand the law, it is our duty to have regard to the circumstances."

Morris L.J. (bottom of p. 124) and Upjohn J. (p. 127) said the same thing.

My Lords, as I see it, the error of the majority of the Court of Appeal in the instant case was, notwithstanding some dicta to the contrary, to concentrate attention on one act, i.e. the notice of rescission
C with its accompanying letter. They failed to give the consideration which the law requires of all the acts and conduct of the defendants in their dealings with Mr. Cornwell—the "alter ego" of the plaintiff company. The law requires that there be assessed not only the party's conduct but also, "objectively considered," its impact on the other party. The error is neatly exposed in Goff L.J.'s terse conclusion: "In my judgment rescission is repudiation, and if it cannot be justified by the terms of
D the contract it is wrongful and a breach." The learned Lord Justice was, with respect, concentrating too much attention on one act isolated from its surrounding circumstances and failing to pay proper regard to the impact of the party's conduct upon the other party.

In this case the contract provided for the possibility of rescission by the defendants. But the notice of rescission, which the defendants gave,
E was not, in the circumstances which existed when it was given, one which the defendants had any contractual right to give. But they honestly believed the contract did give them the right. When one examines the totality of their conduct and its impact upon Mr. Cornwell it is plain, as shown by my noble and learned friend's analysis of the facts, that the defendants, though claiming mistakenly to exercise a power given them
F by the contract to bring it to an end, were not evincing an intention not to be bound by the contract. On the contrary, they believed they were acting pursuant to the contract. And Mr. Cornwell well understood the situation. As he put it in his final letter to Sir Godfrey Mitchell, the president of the defendants,

> ". . . all I need say now it that we will retire to our battle stations
G and it goes without saying I am sure that you will abide by the result as I will."

It never occurred to Mr. Cornwell that the defendants, if held not to have been entitled to give notice of rescission, would refuse to perform the contract. In fact, it would seem that he believed exactly the contrary.
H Such was the impact upon him of the defendants' conduct.

It being the view of the majority of the House that there was no repudiation, the appeal must be allowed, with the result that there is no need to consider the other issues raised. But, because of its importance, I propose to say a few words on the question of damages.

The plaintiff company agreed to sell the land to the defendants for £850,000. They also required the defendants to pay £150,000 to a third party. The covenant for this payment was in the following terms:

> " I. Upon completion of the purchase of the whole or any part of the land the purchaser shall pay to Transworld Trade Ltd. of 25 Jermyn Street, London, S.W.1 a sum of £150,000."

No relationship of trust or agency was proved to exist between the plaintiff company and Transworld Trade Ltd. No doubt, it suited Mr. Cornwell to split up the moneys payable under the contract between the two companies: but it is not known, let alone established by evidence (though an intelligent guess is possible) why he did so, or why the plaintiffs desired this money to be paid to Transworld Trade. It is simply a case of B agreeing with A to pay a sum of money to C.

B, in breach of his contract with A, has failed to pay C. C, it is said, has no remedy, because the English law of contract recognises no " jus quaesitum tertio ": *Tweddle* v. *Atkinson* (1861) 1 B. & S. 393. No doubt, it was for this reason that Transworld Trade is not a party to the suit. A, it is acknowledged, could in certain circumstances obtain specific performance of the promise to pay C: *Beswick* v. *Beswick* [1968] A.C. 58. But, since the contract in the present case is admitted (for reasons which do not fall to be considered by the House) to be no longer in existence, specific performance is not available. A's remedy lies only in an award of damages to himself. It is submitted that, in the absence of any evidence that A has suffered loss by reason of B's failure to pay C, A is only entitled to nominal damages.

I wish to add nothing to what your Lordships have already said about the authorities which the Court of Appeal cited as leading to the conclusion that the plaintiff company is entitled to substantial damages for the defendants' failure to pay Transworld Trade. I agree that they do not support the conclusion. But I regret that this House has not yet found the opportunity to reconsider the two rules which effectually prevent A or C recovering that which B, for value, has agreed to provide.

First, the " jus quaesitum tertio." I respectfully agree with Lord Reid that the denial by English law of a " jus quaesitum tertio " calls for reconsideration. In *Beswick* v. *Beswick* [1968] A.C. 58, 72 Lord Reid, after referring to the Law Revision Committee's recommendation in 1937 (Cmnd. 5449) p. 31 that the third party should be able to enforce a contractual promise taken by another for his benefit, observed:

> " And, if one had to contemplate a further long period of Parliamentary procrastination, this House might find it necessary to deal with this matter."

The committee reported in 1937: *Beswick* v. *Beswick* was decided in 1967. It is now 1979: but nothing has been done. If the opportunity arises, I hope the House will reconsider *Tweddle* v. *Atkinson,* 1 B. & S. 393 and the other cases which stand guard over this unjust rule.

Likewise, I believe it open to the House to declare that, in the absence of evidence to show that he has suffered no loss, A, who has contracted for a payment to be made to C, may rely on the fact that he required the payment to be made as prima facie evidence that the promise for which he contracted was a benefit to him and that the measure of his loss in the event of non-payment is the benefit which he intended for C but which has not been received. Whatever the reason, he must have desired the payment to be made to C and he must have been relying on B to make it. If B fails to make the payment, A must find the money from other funds if he is to confer the benefit which he sought by his contract

A to confer upon C. Without expressing a final opinion on a question which is clearly difficult, I think the point is one which does require consideration by your Lordships' House.

Certainly the crude proposition for which the defendants contend, namely that the state of English law is such that neither C for whom the benefit was intended nor A who contracted for it can recover it, if the contract is terminated by B's refusal to perform, calls for review: and B now, not forty years on.

Appeal allowed.

Solicitors: *P. J. Ward; Sharpe, Pritchard & Co.*

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[FAMILY DIVISION]

* PRACTICE DIRECTION (CHILD: JOINT CUSTODY ORDER)

Husband and Wife—Divorce—Children—Practice—Joint custody D *order—Procedure to secure uniformity of practice in making order—Matrimonial Causes Act* 1973 (*c.* 18), *s.* 41

It sometimes happens that the judge who is considering the arrangements for the children under section 41 of the Matrimonial Causes Act 1973 is invited by one or both parties to make a joint custody order. Such orders are being sought more often now than formerly and E variations of practice have been noticed in different parts of the country. With a view to securing uniformity of approach it is hereby directed as follows:

1. Where a petitioner and a respondent have reached an agreement as to which of them should have care and control of the child, or children, and are further agreed that legal custody should be vested in the two F of them jointly and only one of them appears on the appointment, the court ought not on that appointment to make an order which is inconsistent with the agreement. If the court is unwilling to make the agreed order, it should adjourn the matter to give each party the opportunity to be heard.

2. Where a petition contains a prayer for custody and the respondent has indicated in writing (in the acknowledgment of service or otherwise) G that he (or she) wishes to apply for custody to be vested in the two of them jointly, the court should proceed on the basis that the question of custody is in issue, and should not make an order for custody, or joint custody, except with the agreement of both parties or after giving each of them the opportunity to be heard.

This direction is issued with the concurrence of the Lord Chancellor.

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SIR JOHN ARNOLD P.

February 18, 1980.
