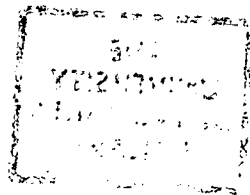


**EXEMPTION CLAUSES  
AND IMPLIED TERMS  
IN CONTRACTS**

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## CONTENTS

PREFACE		i
CHAPTER ONE	Exemption Clauses : The Background	1
CHAPTER TWO	Exemption Clauses : The Legislative Response	37
CHAPTER THREE	The Deficiencies of the Sale of Goods Act	85
CHAPTER FOUR	Statutory Control of Exemption Clauses in Commercial Contracts : Unreasonableness or Unconscionability?	134
CHAPTER FIVE	Problems of Title and Statutory Warranties	212
CHAPTER SIX	Privity of Contract and Exemption Clauses	270
CHAPTER SEVEN	Exemption Clauses in Inter-Business Contracts - The Empirical Work	319
CHAPTER EIGHT	Exemption Clauses - The Need for Further Control	335
CHAPTER NINE	Conclusion	370
POSTSCRIPT		375
APPENDIX A	Exemption Clauses : Examples	i
APPENDIX B	Draft Provisions for a Supply of Goods and Services Bill (Tasmania)	vi

## PREFACE

The current state of the law relating to exemption clauses has been described, fittingly, as "unmanageably complex"<sup>1</sup>. These complexities, in part, have stemmed from the past failure of the courts to recognise that exemption clauses are an integral part of a contract and should not be ignored in assessing the rights and duties of the parties to the agreement.

This thesis has two functions. One is to examine the role and function of exemption clauses in contracts and the choice of controls which can be imposed upon such clauses. The second function is to assess the desirability of reform of the terms implied, chiefly by the Sale of Goods Acts and the Trade Practices Act, in contracts. Since exemption clauses often exclude, restrict or modify implied terms discussion of these terms has been drawn into the body of the thesis.

A postscript has been added to include changes foreshadowed by the Trade Practices Amendment Bill 1985 (Cith.) which are relevant to the main parts of the thesis. The law as stated is that applying on January 1, 1986.

I would like to thank my supervisors Mr Frank Bates, and Mr Donald Chalmers, respectively Reader and Senior Lecturer in Law in the Faculty of Law, University of Tasmania. Their suggestions, chiefly concerning organization of the material, were detailed and very helpful. I would also like to thank Mr Justice Kirby for his interest in the initial research and his encouragement. I am also grateful to members of the Tasmanian Law Reform Commission, particularly Mr Bruce Piggott, its Chairman and Mr Bill

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1. D. Yates Exclusion Clauses in Contracts Sweet and Maxwell 2nd edition (1982), at p.264.

Goudie, its former Executive Director for their comments upon earlier drafts and their dedication to reform of the law generally. I would also wish to record thanks to Associate Professor Derek Roebuck, University of Papua New Guinea, who, when Professor of Law at the University of Tasmania, commenced a research interest in 1978 by offering my name to undertake a reference on the thesis topic for the Tasmanian Law Reform Commission. Lastly, but no means least, I wish to record my warm appreciation to Mrs Karen Hanlon and Mrs Kayleen Cooper who produced a clear manuscript from a multiplicity of amendments.

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## CHAPTER ONE

### EXEMPTION CLAUSES: THE BACKGROUND

#### Introduction

The term "exemption clause" is generally used as meaning a clause in a contract or a term in a notice which appears to exclude or restrict a liability which would otherwise arise.<sup>1</sup> The term "exclusion clause", however, refers to a clause that sets out to exclude liability. Therefore, at the beginning, it must be made clear that throughout this discussion the wider term "exemption clause" has been used in preference to that of "exclusion clause". The reason for this is as follows: if the term exclusion clause were solely used then there could be no discussion of terms in contracts which restrict liability as opposed to excluding it. In relation to the Trade Practices Act 1974 (as amended) s68 refers to "Any term of a contract ... that purports to exclude, restrict or modify" (or has that effect). For that reason the term "exemption clause" is used throughout the ensuing text. The discussion of "indemnity clauses" is similarly justified in that such clauses have the effect of excluding, restricting, and modifying, in terms of s68. It should be noted that the Second Report on Exemption Clauses stated that an indemnity clause effectively operated as a provision restricting a right or remedy and should

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1. See P.K.J. Thompson Unfair Contract Terms Act 1977, Butterworths, (1978) at p.7. See also Second Report on Exemption Clauses, the Law Commission (Law Com. No69) and Scottish Law Commission (Scot. Law Com. No.39) (1975) at paras.161-162. See especially B. Coote Exception Clauses, Sweet and Maxwell, (1964) at p.7 and his classification of exemption clauses in Chapter 1; see also Appendix pp.145 et seq. See Law Commission No.95, Implied Terms in Contracts for the Supply of Goods (1979) following Law Commission Working Paper No.71 (1977). For comment on this report see N.E. Palmer (1980) 43 M.L.R. 193.

be treated as an exemption clause.

One further introductory point needs to be made: an exemption clause may by a contractual provision limit or exclude or modify liability not only in contract but in tort. For example, liability for death or injury to property or persons arising from negligence may be governed by such a clause. Therefore the desirability of extending control of exemption (and indemnity) clauses in contract that have this effect in tort is later considered.

The preliminary analysis of the topic of this discussion proceeds in the following sequence. Firstly, the definition of exemption clauses (including indemnity clauses) is dealt with; secondly, the control of exemption clauses under the common law is reviewed, with particular reference to the historical background and to the origins and development of fundamental breach. Thirdly, the principal common law rules of construction used by the courts in relation to exemption clauses are examined.

### Definition of Exemption Clauses

It is common for parties to written contracts to insert clauses that apparently remove, limit or qualify legal rights, duties, liabilities or remedies which would otherwise apply. Such clauses may be termed "exemption", "exclusion" or "exception" clauses or take the form of specific exclusions of warranties or conditions under the general heading of a "guarantee" or "warranty". Terminology used may also include such phrases as "sold as is" or "with all faults". In other cases such clauses appear to limit or exclude the right to reject, to limit the amount of damages claimable, or place a time limit on claims or their reception. These clauses may additionally attempt to acknowledge that facts which amount to a breach of contract have not occurred.

In the analysis that follows, an exemption clause is generally defined as any term in a contract excluding, restricting or modifying a remedy or

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2. See Chapter Eight.

liability arising out of a breach of a contractual obligation.<sup>3</sup>

### Indemnity Clauses

Indemnity clauses effectively operate as provisions restricting a right or a remedy. Therefore they fall within the general definition of an exemption clause used throughout this discussion.

A contracting party, A, may attempt to avoid the consequences of liability by making the person with whom he contracts, B, bear the loss resulting from his, A's, own breach of duty. For example, a car ferry operator may contract with a car owner on terms that the latter will indemnify the operator against third party claims arising from damage caused to other cars or their occupants on the ferry by the negligent positioning of the car by the operator's employees. A clause may, exceptionally, require A to indemnify B against liability B incurs to A, so that if A sues B, A has to pay back to B what he recovers from B.

Such a situation arose in Smith and Anor v. South Wales Switchgear Co Ltd.<sup>4</sup> Chrysler (Scotland) Ltd contracted with the defendants on the basis of Chrysler's standard form general conditions of contract. Part of this included the following clause:

"In the event of the order involving the carrying out of work by the supplier and its subcontractors on land and/or premises of the purchaser, the supplier will keep the purchaser indemnified against; (a) All losses and costs incurred by reason of the supplier's breach of any statute, by-law or regulation; (b) Any liability, loss, claim or proceedings whatsoever under statute or common law (i) in respect of personal injury to, or death of any person whomsoever, (ii) in respect of any injury or damage whatsoever to any property, real or personal, arising out of this or in the course of or caused by the execution of this order. The supplier will insure against and cause all subcontractors to insure against their liability hereunder".

3. D. Yates Exclusion Clauses in Contracts, Sweet and Maxwell, 2nd edition (1982), at p.1. See also Second Report on Exemption Clauses, n.1 at para.161.

4. [1978] 1 W.L.R. 165.

In carrying out the work at Chrysler's premises an employee of South Wales Switchgear suffered injury due to an accident caused by negligence and breach of statutory duty by Chrysler. Chrysler claimed to be indemnified in respect of the liability by virtue of the indemnity clause quoted above. In allowing that appeal by the supplier, the House of Lords held that the clause, on its true construction, was to be determined on the basis of tests laid down in Canada Steamship Co Ltd v. The King<sup>5</sup> that applied equally to exemption and indemnity clauses. On this basis the clause did not provide indemnity against Chrysler's own negligence. This was so, firstly, because no such express provision was made for such an indemnity. Secondly, the words "any liability ... whatsoever ... under common law ... in respect of personal injury" although wide enough to cover Chrysler's own negligence, did so only in respect of its liability for the acts and omissions of South Wales Switchgear's employees and not for Chrysler's liability for their own employees. Thirdly, the head of damages under common law liability for personal injury might be based on a ground other than Chrysler's own negligence.

#### Control of Exemption Clauses under Common Law

#### Historical background : the Origins of Fundamental Breach

It is a generally accepted proposition that in every contract there are certain obligations, which are fundamental, the breach of which amounts to a non-performance of the contract. Such a breach constitutes a breach of a "fundamental term". As Lord Abinger noted in Chanter v. Hopkins:

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5. [1952] A.C. 192; these tests were unsuccessfully applied to an indemnity clause in a contract in Greenwell v. Matthew Hall Pty Ltd, A.W. Boulderstone Pty Ltd and Cyclone Double Grip Scaffolding Pty Ltd District Court of NSW (5/4/1982) (unreported) where the proferens had not expressly exempted for its own negligence; Smith v. South Wales Switchgear Co Ltd applied.

"If a man offers to buy peas off another, and he sends him beans, he does not perform his contract .. the contract is to sell peas, and if he sends him anything else in their stead, it is a non-performance of it."<sup>6</sup>

It was also early established by the courts that where a seller of goods did not deliver goods under a contract no reliance could be placed by him on an exclusion clause in the contract which benefitted him.<sup>7</sup>

By contrast, in the case of "fundamental breach", the court is concerned with the consequences of a particularly serious breach of condition which is adjudged to have deprived the party not in default of the whole benefit which it was intended that he should obtain from the contract. In the words of Lord Dilhorne in Suisse Atlantique Societe D'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale:-

"In relation to a fundamental breach, one has to have regard to the whole contract so that, if it is not complied with the performance becomes something totally different from that which the contract contemplates"<sup>8</sup>

The doctrine of fundamental breach<sup>9</sup>, prior to the Suisse Atlantique case was a substantive rule of law which held that there were categories of breach and types of contractual term so fundamental that no exception clause, however drafted, could exclude them. The doctrine so defined is attributed in origin to three judgements by Devlin J., (dealt with subsequently) in Chandris v. Isbrandtsen - Moller Co. Inc.<sup>10</sup>, Alexander v. Railway Executive<sup>11</sup>, and Smeaton Hanscomb & Co. Ltd v. Sassoon S. Getty, San & Co.<sup>12</sup>

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6. (1838) 4 M. & W. 399 at p.404.

7. Nicol v. Godts (1854) 10 Excl. 191, Wieler v. Schilizzi (1859) 17 C.B. 619.

8. [1966] 2 All E.R. 61 at p.68.

9. For a detailed treatment of the origins of fundamental breach see B. Coote "The Rise and Fall of Fundamental Breach" (1967) 40 A.L.J 336. See also B. Coote Exception Clauses (1954) particularly Chapters Five, Six and Eight.

10. [1951] 1 K.B. 240.

11. [1951] 2 K.B. 882.

12. [1953] 1 W.L.R. 1468.

The concept of deviation in maritime law, however, has been a major contributor to the evolution of the doctrine of fundamental breach.

(a) Deviation

For example, under common law, in a contract of carriage by sea, a condition is implied that the carrier will not deviate from the usual, customary or prescribed route.<sup>14</sup> Where a vessel deviates from her proper course, the shipowner is not only liable for the delay, but is additionally liable for any loss or damage that occurs to the goods. In Thorley v. Orchis S.S. Co<sup>15</sup> locust beans were shipped from Limassol in Cyprus to London. The vessel had deviated to two ports in Asia Minor en route. On arrival in London the beans were damaged through the negligence of the stevedores. The court held that the shipowners were liable as the deviation had displaced the contract and they could not rely on the provision for exemption of negligence in the contract. In that case it was noted by Fletcher Moulton L.J.:

"A deviation is such a serious matter, and changes the character of the voyage so essentially, that a shipowner who has been guilty of a deviation cannot be considered as having performed his part of the bill of lading contract, but something fundamentally different and therefore he cannot claim the benefit of stipulations in his favour contained in the bill of lading"<sup>16</sup>

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14. See Davis v. Garrett (1830) 6 Bing. 716. On deviation see Carver, Carriage of Goods by Sea, Sweet and Maxwell, (1982) paras 1161-1208.

15. [1907] 1 K.B. 660.

16. Ibid. at p.699. Coote explains the phenomena associated with deviation as lying in the nature of a bailment relationship. Such protection as this gives the bailee lasts only so long as the bailee holds the bailed goods within any limits the bailor has placed on his right to possession. If he steps outside these limits he holds, not as a bailee, but as a mere detainer, and as such becomes absolutely liable for loss or damage to the goods so detained. See B. Coote "The Second Rise and Fall of Fundamental Breach" (1981) 55 A.L.J. 788 at p.789. See also Lord Wright in A/S Rendall v. Arcos Ltd (1937) 43 Com. Cas. 6, at p.15.

In Stag Line v. Foscolo Mango Lord Atkin laid down the test of "reasonable deviation":

"A true test seems to be what departure from the contract voyage might a prudent person controlling the voyage at the time make and maintain having in mind all the relevant circumstances existing at the time, including the terms of the contract and the interests of the parties concerned, but without obligation to consider the interests of any one as conclusive"

However, until settled by the House of Lords in Hain S.S. Co. Ltd v. Tate & Lyle<sup>18</sup>, the exact effect of a breach of obligation under a contract of sea carriage to proceed without deviation was in doubt. In Hain's case it was settled that the obligation not to deviate is a condition of the contract, breach of which entitles the owner of the goods, if he so wishes, to treat the contract as repudiated. Deviation therefore, does not of itself automatically end the contract.<sup>19</sup> The House of Lords in Hain's case were agreed that it is open to the party not in default to either treat the contract as at an end, or waive the breach and treat it as subsisting.<sup>20</sup> As Lord Atkin noted:-

".. the true view is that the departure from the voyage contracted to be made is a breach by the shipowner of his contract, but a breach of such a serious character that however slight the deviation the other party is entitled to treat it as going to the root of the contract, and declare himself no longer bound by any of its terms. I am satisfied that by a long series of decisions adopting in fact commercial usage in this respect any deviation constitutes a breach of contract of this serious nature .. the breach by deviation does not automatically cancel the express contract, otherwise the shipowner by his own wrong can get rid of his own contract. Nor does it affect merely the exceptions clauses. This would make those clauses alone subject to a condition of no deviation,

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17. 1932 2 A.C. 328, at p.343.

18. [1936] 2 All E.R. 597.

19. Shipowners have attempted to extend their rights to call at ports and to deviate by the insertion of a clause or clauses in their agreements which gives the ship express liberty to deviate. Such 'liberty clauses' are usually drafted so as to include every possible deviation.

20. See Asquith J. in Woolf v. Collis Removal Service [1948] K.B. 11 (C.A.).

a construction for which I can find no justification. It is quite inconsistent with the cases which have treated deviation as precluding enforcement of demurrage provisions. The event falls within the ordinary law of contract. The party who is affected by the breach has the right to say, I am not now bound by the contract, whether it is expressed in a charterparty, bill of lading or otherwise."<sup>21</sup>

The charterer in Hain's case had acted in a manner which suggested an affirmation of the contract and a waiver of the shipowner's breach. In these circumstances, the House of Lords held that the shipowner's deviation had not automatically ended the contract, since this would have permitted a party in default the right to determine his own contract and so possibly profit from his wrongdoing. The deviation was treated by their Lordships as any other breach. The deviation constituted a form of repudiation which the charterer could opt to accept and end the contract, or ignore and so waive the right to repudiate, affirm the contract, but at the same time reserve the right to damages. The charterer chose the latter cause.

(b) The Unification of the Doctrine of Fundamental Breach

In the course of their judgements in Hain's case Lords Atkin and Wright respectively made the following statements:

"One of the terms [of the contract] is the performance of an agreed voyage, a deviation from which is a fundamental breach."

"An unjustified deviation is a fundamental breach of a contract of affreightment."<sup>22</sup>

These statements were built on by Devlin J. in Chandris v. Isbrandtsen -

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21. [1936] 2 All E.R. 597, at 601; explained in Hong Kong Fir Shipping Co Ltd v. Kawasaki Kisen Kaisha Ltd. [1961] 2 All E.R. 257. See Photo Productions Ltd v. Securicor [1980] 1 All E.R. 556, at pp.567,568, where Lord Diplock refers to fundamental breach in the context of maritime deviation and also apportionment of risk under the Hague Rules in bills of lading.

22. [1936] 2 All E.R. 597, at pp.603,607.



Moller Co. Inc.<sup>23</sup> The case involved a claim for demurrage where a charterer had loaded a dangerous cargo in breach of contract, with the result that unloading was delayed. In his judgement Devlin J. cited the passages from Hain's case quoted above in support of the concept, of a breach of "... some fundamental or basic condition of the contract, such as involved, for example, in a deviation from the contract voyage."<sup>24</sup> In Alexander v. Railway Executive<sup>25</sup> this proportion was given greater precision. In Alexander's case A went with a friend, C, to deposit luggage at a railway station. C ten days later persuaded one of the railway's clerks to let him open the cases without producing the ticket and remove some of their contents. Over a few weeks C persuaded the clerk to let him take all the cases. C had no authority from A and was later convicted of larceny. The railway authority was found liable to A by the court; it was unable to rely on the exemption clause in the contract relieving them from liability since allowing an authorized third party to have access to goods deposited in the cloakroom meant that the defendants had broken a fundamental term of the agreement. Devlin J. said :

"I think that that must be said to be a fundamental breach of the contract .. The ordinary law of contract .. involves that, where there has been a breach of a fundamental term of a contract giving the other party the right to rescind it, then unless and until, with full knowledge of all the facts, he elects to affirm the contract and not rescind it, the special terms of the contract go and cannot be relied upon by the defaulting party."<sup>26</sup>

The development of a substantive doctrine of fundamental breach was taken further by Devlin J. in Smeaton Hanscomb & Co. Ltd. v. Sasson I.

6 23. [1951] 1 K.B. 240. For commentary on this and the two subsequent decisions of Devlin J. noted see B. Coote Exception Clauses, Sweet and Maxwell (1984), pp.104 et seq.

24. Ibid at p.248.

25. [1951] 2 K.B. 882.

26. [1951] 2 K.B. 882, at pp.889-890. In The Albion [1953] 1 W.L.R. 1026 the Court of Appeal confirmed that the expressions 'fundamental term' and 'fundamental breach' had no special significant outside deviation.

Setty, Son & Co.<sup>27</sup> In this case there had been a sale by description of round mahogany logs of given specifications. The timber did not comply with the specifications but the buyer failed to take action within a contractual fourteen-day time-limit on claims. Devlin J. held that the limitation clause did apply as, although there was a failure to comply with the specifications, the logs delivered were in fact round mahogany logs. Devlin J. attempted to lay down a new and general principle in the following terms:

"It is no doubt a principle of construction that exceptions are to be construed as not being applicable for the protection of those for whose benefit they are inserted if the beneficiary has committed a breach of a fundamental term of the contract ... If, for example, instead of delivering mahogany logs the sellers delivered pine logs and the buyers inadvertently omitted to have them examined for fourteen days, it might be well that the sellers could not rely on the time clause"<sup>28</sup>

Devlin J.'s "principle of construction" which he had applied as a rule of law in the Smeaton Hanscomb's case was subsequently restated as a substantive rule of law by Denning L.J. in Karsales (Harrow) Ltd. v. Wallis<sup>29</sup> as follows:

"Notwithstanding earlier cases which might suggest the contrary it is now settled that exempting clauses of this kind, no matter how widely they are expressed, only avail the party when he is carrying out the contract in its essential respects. He is not allowed to use them as cover for misconduct or indifference or to enable him to turn a blind eye to his obligations. They do not avail him when he is guilty of a breach which goes to the root of the contract. It is necessary to look at the contract apart from the exempting clauses to see what are the terms express or implied which impose an obligation on the party. If he has been guilty of a breach of these obligations in a respect which goes to the very root of the contract he cannot rely on the exempting clauses. ... The principle is sometimes said to be that a party cannot rely on an exempting clause when he delivers something 'different in kind' from that contracted for, or has broken a 'fundamental term' or a 'fundamental contractual obligation'. However, I think they are all comprehended by the general

27. [1953] 1 W.L.R. 1468.

28. Ibid. at p.1470.

29. [1956] 1 W.L.R. 936.

principle that a breach which goes to the root of the contract disentitles the party from relying on the exempting clause."<sup>30</sup>

This new concept of fundamental breach, as enunciated above by Denning L.J. (as he then was), was removed from the narrow area of bailment and extended to the wider field of commercial transactions.

In Lord Denning's terms it was not the condition or fundamental term which was excluded from the contract. It was the liability for its breach which was excused, the exemption clause operating, when the contract was adjudicated, as a defence to accrued rights of action. The criticism of this view, notably advanced by Professor Coote, advances the counter-argument that exemption clauses qualify the promises to which they relate, and so take effect at the formation of the contract rather than acting as mere defences at the point of adjudication.<sup>31</sup> The importance of this critique in respect of fundamental breach and exemption clauses is not only that exemption clauses are regarded as taking effect when the contract is formed but that there is no need, on its premise, for the concept of fundamental breach itself. This is so because, once the exemption clauses have taken effect at the formation of the contract, every subsequent breach of the remaining content of the contract will be actionable.<sup>32</sup>

The essential weaknesses of the substantive doctrine of fundamental

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30. Ibid. at p.940.

31. B. Coote Exception Clauses Chapter One; 'The Second Rise and Fall of Fundamental Breach' (1981) 55 A.L.J. 788, at p.792. See also B. Coote 'The Rise and Fall of Fundamental Breach' (1967) 40 A.L.J. 336 at pp. 337-341; 'The Effect of Discharge by Breach on Exception Clauses' [1970] C.L.J. 221.

32. B. Coote (1981) 55 A.L.J. 788 at p.792. See the judicial application of this analysis by Diplock L.J in Hardwick Game Farm v. Suffolk Agricultural and Poultry Producers Association [1966] 1 W.L.R. 287, at pp.341-343, C.Czarnikow Ltd v. Koufos [1966] 2 Q.B. 695, at pp. 730-731, Moschi v. LEP Air Services Ltd [1973] A.C. 331 at p.350; Photo Productions Ltd v. Securicor Transport Ltd [1980] 1 All E.R. 556, at pp.565-567.

breach have been identified<sup>33</sup> as firstly, it lacked any previous authority as a rule of law and, secondly, it was laid down as a unified principle, despite the fact that the threads of the underlying authority on which it was based were quite distinct. These defects in its basis and structure did not prevent the doctrine of fundamental breach from occupying a position of significance in the law of contract and in relation to exemption clauses in particular both up to, and subsequent to, the House of Lords decision in the Suisse Atlantique<sup>34</sup> case.

### The Suisse Atlantique Case.

The House of Lords in the Suisse Atlantique<sup>35</sup> decided that a demurrage clause in a charterparty was not an exemption clause, but considered obiter what was meant by the term fundamental breach. Their unanimous opinion was that it was not a substantive rule of law.<sup>36</sup> It was a question of construction of the contract in each case as whether or not an exemption clause was wide enough to cover the breach at issue. Their Lordships applied the following statement of Pearson L.J. in U.G.S Finance Ltd v. National Mortgage Bank of Greece and National Bank of Greece S.A.:

"As to the question of 'fundamental breach', I think there is a rule of construction that normally an exception or exclusion clause or similar provision in a contract should be construed as not applying to a situation created by a fundamental breach of contract. This is not an independent rule of law imposed by the court on the parties willy-nilly in disregard of their contractual intention. On the contrary it is a rule of construction based on the presumed intention of the contracting parties. It involves the implication of a term to give to the contract that business efficacy which the parties

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33. See B. Coote 'The Rise and Fall of Fundamental Breach' (1967) 40 A.L.J. 336, at pp.337-341.

34. Suisse Atlantique Societe d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale [1966] 2 All E.R 61.

35. Ibid.

36. [1966] 2 All E.R. 61, at p.67 per Viscount Dilhorne; at pp.71-72 per Lord Reid; at pp. 78-79 per Lord Hodson; at pp.88-89 per Lord Upjohn and at pp.93-94 per Lord Wilberforce.

as reasonable men must have intended it to have. This rule of construction is not new in principle but it has become prominent in recent years in consequence of the tendency to have standard forms of contract containing exceptions clauses drawn in extravagantly wide terms, which would produce absurd results if applied literally."<sup>37</sup>

However, their Lordships left it open for the doctrine of fundamental breach to revive. Firstly, none of the earlier cases was expressly overruled; these were said to be explained on the basis of construction. This left open the likelihood of a continuing "rule of construction" as enunciated by Devlin J. and applied by Denning L.J. in Karsales (Harrow) Ltd v. Wallis<sup>38</sup>. Secondly, the incidents of fundamental breach and fundamental terms were described by their Lordships in words traditionally reserved for discharge for breach and conditions. The retention of the terminology of fundamental breach suggested that the special concepts were still relevant to exemption clauses. Thirdly, their Lordships confused and ran together fundamental breach, discharge for breach and deviation.<sup>39</sup>

### Rejection of the Doctrine of Fundamental Breach in Australia

The High Court of Australia anticipated the rejection of the doctrine of fundamental breach prior in Suisse Atlantique. In Sydney City Council v.

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37. [1964] 1 Lloyd's Rep. 446 at p.453.

38. [1956] 1 W.L.R. 936; see above. See also Mendelssohn v. Normand [1969] 2 All E.R. 1215, at p.1218, where Lord Denning placed the deviation cases as the source of the doctrine of fundamental breach; 'If a man promises to keep a thing in a named place; but instead keeps it in another place, he cannot rely on the exemption clause ... That doctrine has been extended to cases where a man promises to perform his contract in a certain way and instead performs it in an entirely different way. He too cannot rely on an exemption clause : because it is considered as applying only when he is carrying out his contract in the stipulated way and not breaking it in a fundamental respect.'

39. See B. Coote 'The Second Rise and Fall of Fundamental Breach' (1981) 55 A.L.J. 788, at p.793, holding that this third factor was to lead to the decision in Harbutt "Plasticine" Ltd v. Wayne Tank and Pump Co. Ltd. [1970] 1 Q.B. 447.

West<sup>40</sup> the plaintiff parked his car in a car park that was owned and operated by the Sydney City Council. He was presented with a ticket on entry which contained the following condition: "The Council does not accept any responsibility for the loss or damage to any vehicle or for loss or damage to any article or thing in or upon any vehicle or for any injury to any person however such loss, damage or injury may arise or be caused." Beneath the conditions on the ticket was a notice which read "Important : The ticket must be presented for time stamping and payment before taking delivery of the vehicle". An unauthorized person took the plaintiff's car from the car park who gave the attendant at the exit a duplicate parking ticket for another car which he had obtained by falsely representing that he had lost his original ticket. The attendant was under a duty to allow cars out of the car park only when the driver surrendered an appropriate ticket. The High Court held by a majority<sup>41</sup> that, on construction of the exemption clause it did not cover the action of the Council's employee which was not within the terms of the contract of bailment. All the members of the High Court treated the question as one of construction. In their joint judgement Barwick C.J. and Taylor J. expressed the following view:

"There is no doubt, of course, that in the case where a contract of bailment contains an exempting clause such as we have to consider the protection afforded by the clause will be lost if the goods the subject of the bailment are stored in a place or in a manner other than that authorised by the contract or if the bailee consumes or destroys them instead of storing them or if he sells them. But we would deny the application of such a clause in those circumstances simply upon the interpretation of the clause itself. Such a clause contemplates that loss or damage may occur by reason of negligence on the part of the warehouseman or his servants in carrying out the obligations created by the contract. But in our view it has no application to negligence in relation to

40. (1965) 114 C.L.R. 481; see H.H. Glass 'Exception Clauses and Fundamental Breach' (1972) 46 A.L.J. 339; Hon. Mr Justice McGarvie 'Exemption Clauses and Fundamental Breach' (1981) Leo Cussens Institute; H.K. Lucke 'Exclusion Clauses and Freedom of Contract : Judicial and Legislative Reactions', (1977) 51 A.L.J. 532.

41. Kitto and Menzies JJ. dissenting from the view of Barwick C.J. and Taylor J.; Windeyer J. found in favour of the respondent on the ground that the Council was in breach of the express term of the contract requiring presentation of the ticket for time-stamping; (1965) 114 C.L.R. 481, at p.504.

acts done with respect to a bailor's goods which are neither authorised nor permitted by the contract. For instance, if, in the present case, one of the attendants at the parking station had been allowed by the management to use the respondent's car for his own purposes and, in the course of driving it, had caused damage to it by his negligent driving, the clause would afford no protection. Negligence in these circumstances would be right outside the purview of the clause."<sup>42</sup>

In Thomas National Transport (Melbourne) Pty. Ltd. v. May & Baker (Australia) Pty Ltd.<sup>43</sup> the High Court of Australia considered an exemption clause in a contract of carriage. The appellant, an interstate transport company, regularly employed a driver to pick up goods in Melbourne and take them to its central depot in the city for interstate transmission. On a number of occasions previously, because the driver was late in getting to the depot which closed at 5.30 p.m. he was directed by two-way radio to take the goods he had collected to his residence. The respondent's goods were collected and because of delays the driver was too late to reach the depot and, on failing to make contact with the depot, took the loaded truck home and put it in his garage, which was not secured by a door and contained no fire extinguisher. One of the terms of the contract of carried goods stated:

"... the consignor must accept responsibility for any damage to or loss of any goods whilst in the carrier's custody during storage or transit by road, ... due to civil commotions, act of God, ... fire or water and that the carrier may and is hereby expressly authorized by the consignor to carry all goods or to have them carried by any method as he in his absolute discretion thinks fit and notwithstanding any instruction verbal or otherwise of the consignor that the goods are to be carried by another method".

It was held by a majority<sup>44</sup> of the High Court that TNT were in breach of an implied term of the contract that the respondent's goods would be taken to the depot which would be open to receive them when the driver had completed his round. The term of the contract quoted above containing the words "any

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42. (1965) 114 C.L.R. 481, at p.488.

43. (1966) 115 C.L.R. 353.

44. Windeyer J. dissenting.

method" would be construed as meaning "any method of carriage" and did not include storage of the goods in the driver's garage.

In a dissenting judgement Windeyer J. considered the decision of the House of Lords in Suisse Atlantique which he regarded as confirming his view that the effect of an exemption could only be resolved by construing the language that the parties used, read in its context and with any necessary implication based on their presumed intention.<sup>45</sup> Windeyer J. stated:

"The first question in all such cases is therefore what did the party who relies upon the exemption clause contract do. That being ascertained, the next question is was there such a radical breach by him of his obligations under the contract that, upon the true construction of the contract as a whole including the exemption clause, he cannot rely upon the exemption clause."<sup>46</sup>

The High Court has since, in H. and E. Van der Sterren v. Cibernetics (Holding) Pty Ltd<sup>47</sup> construed an exemption clause to relieve a party from liability for what would otherwise be fundamental breach. In this case, a manufacturer of plastic coating sold the product to the plaintiff under a sale agreement which included the following terms: "The company shall not be liable ... in any way whatsoever in relation to the product unless such claim is notified to the company within fourteen days of delivery of the product". It was agreed between the parties that the coating would lose none of its distinctive property when correctly mixed and applied if it was stored at room temperature and away from sources of heat and light before being used. When, in complying with these measures, the material failed to harden, the plaintiffs failed to notify the manufacturers of their claim and subsequently sued them for breach of contract. The High Court unanimously held that the manufacturers were not liable, as on construction of the exemption clause, failure to notify the claim left the clause, which was definite and clear, intact. As Walsh J. put it:

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45. (1966) 115 C.L.R. 353, at p.375.

46. *Ibid.* at p.379.

47. (1970) 44 A.L.J.R. 157.



"In the circumstances of the case I do not think that there is sufficient reason to conclude that the parties ought not to be taken to have intended to include in the contract a limitation of the defendant's liability in such stringent terms as are contained in cl.7. The defendant was the Australian manufacturer of an American product. Its properties and its expected performance were described in "literature" made available to the defendant and through it to the plaintiff. He had himself acquired some practical knowledge of it. Both parties, no doubt, expected that its use would give satisfactory results. But these could be affected by many factors. I do not think it can be regarded as absurd or as incredible that the defendant should wish to define and to limit its liability in a stringent way in order to protect itself from the uncertainties which could arise, by reason of the statements in the literature and of the difficulties of ascertaining the causes of any failure that occurred in the performance of the product, or that the plaintiff should be content to accept such a stipulation, in a bargain by which he obtained a commercial benefit of the exclusive use of the product in the Australian Capital Territory. ... The terms of exception clauses must sometimes be read down if they cannot be applied literally without creating an absurdity or defeating the main object of the contract ... But such a modification by implication of the language which the parties have used in an exception clause is not to be made unless it is necessary to give effect<sup>48</sup> to what the parties must be understood to have intended."

Consistent with the above pronouncement, in Metrotex Pty Ltd v. Freight Investments Pty Ltd<sup>49</sup> the Victorian Supreme Court was prepared to extend the shelter of an exemption for total loss of goods carried. The defendant agreed to carry three parcels of goods of the plaintiffs from Sydney to Melbourne. The goods were delivered to the defendant in Sydney but did not arrive in Melbourne and could not be subsequently found and their disappearance was unexplained. The contract of carriage included the following clause :-

"The carrier accepts no responsibility for any damage, including injury, delay, or loss of any nature, arising out of or incidental to the carriage or any services ancillary thereto or which may occur at any time after the goods have been delivered to the carrier and before the goods have been delivered to the consignee whether due or alleged to be due to misconduct or negligence on the part of the carrier or not and whether the cause of the damage is known or unknown to the carrier."

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48. Ibid. at p.158, with whom Barwick C.J. and Kitto J. agreed.

49. [1969] V.R. 9 (Supreme Court (Full Court)).

In an action against the defendant the Court held that, on the evidence, the only reasonable explanation open was that the exemption clause exempted the defendant for damages for the loss. This would have been so even if the loss had been due to theft by the carriers' servants (unless such action could be treated as that of the carrier itself). The wording of the exemption clause was regarded by the court as of pre-eminent importance:

"It is now established doctrine that the language of such an exempting clause is to be construed strictly and its ambiguities resolved against the party seeking its protection. It is also to be read, if its language so requires and its language so permits, as subject to an implied limitation which would not allow that party to disregard performance of the main obligation of the contract ... The proper approach ... appears to be to endeavour to ascertain the intention of the parties by applying the language used as understood in its ordinary sense to the subject-matter and preferring a narrower operation to a wider operation where both are open ..."<sup>50</sup>

The Australian courts were clearly willing to extend exemptions in contracts to quite severe or aggravated forms of breach. In Hall v. Queensland Truck Centre Pty. Ltd. it was judicially observed: "The principle of fundamental breach ... must now be regarded as substantially demolished."<sup>51</sup> In such an environment fundamental breach had (and has) little part to play as an effective rule of law.<sup>52</sup>

### The Securicor Case

As outlined earlier, it was open to the courts after the Suisse Atlantique case to apply the doctrine of fundamental breach to exemption clauses as a substantive rule of law. In Harbutts "Plasticine" Ltd v. Wayne Pump and Tank Co. Ltd<sup>53</sup> the English Court of Appeal held that, even when

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50. Ibid. per Winneke C.J. and Gourans J. at pp.12-13.

51. [1970] Qd. R.231 at p.235 per Hoare J. The case involved a supply of goods totally different from the contract description. It was held, applying Andrews Bros (Bournemouth) Ltd v. Singer & Co Ltd [1934] 1 K.B. 17, that the defendants clauses did not on their construction apply to such an event.

52. See N.E. Palmer, Bailment Law Book Co., (1979) at pp.943-944.

53. [1970] 1 Q.B. 447.

the words did, on a proper construction, cover the event which had occurred, a limitation clause could not protect the proferens once the contract had been discharged for breach. Lord Denning held that the position would be the same where the defendant was guilty of such a fundamental breach that the contract was automatically at an end without the innocent party having an election.<sup>54</sup> This ignored Lord Wilberforce's argument in the Suisse Atlantique case that an act which might be a breach sufficiently serious to justify refusal of further performance might be reduced in effect, or not made a breach at all, by the terms of the exemption clause.<sup>55</sup> The decision in the Harbutts "Plasticine" case also confused termination with rescission. An election to terminate operates prospectively without prejudice to rights accrued and obligations incurred prior to termination. It is only in so far as a contract is executory that a contract is discharged by the innocent party's election. The primary obligations of the parties come to an end and are replaced by secondary obligations, the extent of which must, as a matter of construction, be determined by the contract including any exemption clause.<sup>56</sup>

The application of Harbutt's "Plasticine" in the following decade became increasingly extreme. In Wathes (Western) Ltd v. Austin (Menswear) Ltd<sup>57</sup> the Court of Appeal held that the principle applied, not only where the contract had been discharged for breach, but also where it had been affirmed by the injured party.

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54. For criticism of Harbutts "Plasticine" Ltd see B. Coote 'The Effect of Discharge by Breach on Exemption Clauses' [1970] C.L.J. 189; J.H. Baker (1970) 33 M.L.R. 441; P.N. Leigh-Jones and M. Pickering. 'Harbutts "Plasticine" Ltd. v. Wayne Tank and Pump Co. Ltd.': 'Fundamental Breach and Exemption Clauses, Damages and Interest' (1970) 87 L.Q.R. 515; J.F. Wilson 'Fundamental Breach : The Plot Thickens' (1971) 4 N.Z.U.L.R. 254; A.M. Shea 'Discharge from Performance of Contracts by Failure of Condition' (1979) 42 M.L.R. 623.

55. [1966] 2 All E.R. 61, at p. 92.

56. See S.W. Cavanagh and C.S. Phegan, Product Liability in Australia, Butterworths, (1983) paras 302 and 313.

57. [1976] 1 Lloyd's Rep. 14, the Court purporting to follow Charterhouse Co. Ltd v. Tolly [1963] 2 Q.B. 683 on the basis that it had not been overruled in the Suisse Atlantique case.

It is now clearly established by the landmark House of Lords decision, Photo Production Ltd v. Securicor Transport Ltd<sup>58</sup> that there is no rule of law by which exemption clauses can be eliminated, or deprived of their effect, whatever their terms may be. This decision firmly rejected the argument, advanced primarily by Lord Denning in previous cases that the doctrine of fundamental breach is a rule of law. The House of Lords in the Securicor case overturned the earlier decision of the Court of Appeal and expressly overruled Harbutt's "Plasticine" Ltd v. Wayne Tank and Pump Co Ltd<sup>59</sup> and Wathes (Western) Ltd v. Austin (Menswear) Ltd.<sup>60</sup> In doing so, their Lordships approached the question of whether a fundamental breach prevented the proferens from relying on an exemption clause as turning on the construction of the whole contract.

The facts of the Securicor case were that Photo Production Ltd owned a factory and contracted with Securicor to provide security at the factory, including patrols at night. While carrying out a night patrol at the factory, a Securicor patrolman deliberately lit a fire which got out of control and completely destroyed the factory and the stock which was valued at £615,000. Securicor were sued for damages by the plaintiffs on the ground that they were liable for the act of their employee. Securicor pleaded, amongst other defences, that an exemption clause in the contract absolved them from any liability for any injurious act or default by any employee unless such act or default could have been foreseen or avoided by due care on the part of Securicor. Securicor, under this clause, disclaimed liability for any loss suffered by the plaintiffs through fire and any other cause except where this

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58. [1980] 1 All E.R. 556; noted L.S. Sealey (1980) 39 C.L.J. 252; D.Plunkett (1980) 4 Auckland L. Rev 114; N.C. Seddon (1980) 54 A.L.J. 289; L.W. Melville (1980) 130 New Law Journal 646; see B. Coote "The Second Rise and Fall of Fundamental Breach" (1981) 55 A.L.J. 788.

59. [1970] 1 All E.R. 225.

60. [1976] 1 Lloyd's Rep 14.

was attributable to negligence of Securicor's employees acting in the course of their employment.

Securicor were held not to have failed to exercise care or diligence in employing the patrolman and the trial judge held that Securicor could rely on the exemption clause. On appeal by the factory owners, the Court of Appeal reversed the lower court's decision, holding that Securicor were in fundamental breach of the contract which, thereby, prevented them from relying on the exemption clause. The factory owners, then, appealed to the House of Lords.

The House of Lords held that there was no rule of law by which an exemption clause could be disregarded in considering the parties' position when there was a breach of contract (whether fundamental or not) or by which an exemption clause could be deprived of effect regardless of the contract's terms. This was the case because the parties were free to choose to exclude or modify their contractual obligations. Whether an exemption clause applied when there was a fundamental breach, breach of a fundamental term or any other breach, turned on the construction of the whole contract, including any exemption clause. Although Securicor were in breach of their implied obligation to operate their service with due and proper regard to the safety and security of the plaintiff's factory and premises, Securicor were protected from liability by a clear and unambiguous exemption clause.

The House of Lords expressed the view that in commercial matters generally, when parties were not of unequal bargaining power and risks were normally covered by insurance, the parties should be left to apportion risks as they saw fit. In Lord Diplock's words:

"In commercial contracts negotiated between businessmen capable of looking after their own interests and deciding how risks inherent in the performance of various kinds of contract can be most economically borne (generally by insurance) it is, in my view, wrong to place a strained construction on words in an exclusion clause which are clear

and fairly susceptible of one meaning only even after due allowance has been made for the presumption in favour of the implied primary and secondary obligations".<sup>61</sup>

Lord Diplock, in the Securicor case, provided an analysis of the situation arising on a breach of what he termed a "primary" contractual obligation compared with a resultant and consequent "secondary" obligation then owed by the party in default. A primary contractual obligation, for example, would be that property in, and possession of goods, are transferred. A secondary contractual obligation would be the liability for payment of damages in the event of a breach of the primary contractual obligation. Both parties' primary obligations remain unchanged, so far as they have not yet been fully carried out, unless the innocent party is entitled to, and elects to, treat himself as discharged from his obligations because of the guilty party's breach. This will also occur where the event resulting from the failure of one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit which it intended by the parties he should obtain from the contract. Another instance is where the contracting parties have agreed, expressly or by implication of law, that any failure by one party to perform a particular primary obligation, irrespective of the gravity of the event that has in fact resulted from the breach, entitles the other party to elect to put an end to all primary obligations remaining unperformed.

If a party makes such a lawful election, a secondary obligation to pay monetary compensation to the innocent party for the loss sustained in consequence of the future non-performance of the primary obligations of the innocent party is discharged. Reference to a contract being terminated, rescinded, repudiated, discharged or brought to an end by the innocent party's election should be understood in the sense of ending primary

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61. [1980] 1 All E.R. 556, at p.568.

obligation only.<sup>62</sup>

The limitation clause was held to be valid by the House of Lords essentially as a reasonable way of apportioning risks as between insurers on either side. In the words of Lord Wilberforce:

"Securicor undertook to provide a service of periodical visits for a very modest charge which works out at 26p per visit. It did not agree to provide equipment. It would have no knowledge of the value of the plaintiffs' factory: that, and efficacy of their fire precautions, would be known to the respondents. In these circumstances nobody would consider it unreasonable, that as between these two equal parties the risk assumed by Securicor should be a modest one, and that the respondents should carry the substantial risk of damage or destruction".<sup>63</sup>

Lord Diplock gave similar emphasis:

"For the reasons given by Lord Wilberforce it seems to me that this apportionment of the risk of the factory being damaged or destroyed by the injurious act of an employee of Securicor while carrying out a visit to the factory is one which reasonable businessmen in the position of Securicor and the factory owners might well think was most economical. An analogous apportionment of risk is provided for by the Hague Rules in the case of goods carried by sea under bills of lading".<sup>64</sup>

The Securicor case was followed in Ailsa Craig Fishing Co Ltd v. Malvern Fishing Co Ltd and Securicor (Scotland Ltd.)<sup>65</sup> In this case, the House of Lords on appeal from Scotland had to consider the following facts. The Aberdeen Fishing Vessel Owner's Association Ltd (termed the

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62. Lord Denning in the Court of Appeal decision Geo. Mitchell v. Finney Lock Seeds Ltd [1982] 3 W.L.R. 1036 expressed the hope that the analysis of contractual obligations into 'primary', 'secondary', 'general secondary' and 'anticipatory secondary' obligations would not have to be considered often by the courts: 'No doubt it is logical enough but it is too esoteric all together. It is fit only for the rarified atmosphere of the House of Lords. Not at all for the chambers of the practitioner. Let alone for the student at the university' (at p.1046). Clearly a parting shot. By contrast Oliver L.J. observed that, with deference to Lord Denning he found the analysis adopted by Lord Diplock helpful '... so long as it is borne in mind that the purpose of a contract is performance and not the grant of an option to pay damages'. (at p.1049).

63. Photo Production Ltd v. Securicor Transport Ltd [1980] 1 All E.R. 556 at p.564.

64. Ibid. at pp.564, 568. pp.564, 568.

65. 1982 S.L.T. 377 H.L. (Sc.).

Association) contracted on behalf of its members with Securicor (Scotland) Ltd to supervise vessels in Aberdeen harbour.

During the evening of 31 December (a date not without significance in Scottish ritual) 1971, two vessels were berthed side by side in the harbour. As the tide rose the bow of one slid under the deck of the quay at which she was berthed and became caught (or "snubbed"). There was a special risk of this occurrence due to the open structure of the quay. As the tide rose further, she took an increasing list to starboard and then fouled the adjoining vessel. Both vessels subsequently sank and became total losses. Securicor did not provide, as contracted, continuous security cover for the vessels since the designated patrolman left to take part in New Year's Eve celebrations. The ship's owners were members of the Association. The contract between the Association and Securicor excluded the latter's liability in certain circumstances and a clause limited liability for any loss or damage arising out of the services provided to £1,000. After the owners of each vessel had brought actions against each other in negligence and against Securicor in negligence and for breach of contract, Securicor was then brought in by one owner as third parties. Securicor pleaded, inter alia, that if they were liable in damages their liability was contractually limited to

1,000 for any claim in any event, and to £10,000 in respect of all and any incidents arising within any consecutive period of twelve months. Securicor further argued that their liability was entirely excluded by the contract.

In the Court of Session their Lordships<sup>66</sup> found that the condition purporting to exclude liability was not effective but that the clause limiting liability to £1,000 was clear and free from ambiguity and had the effect of limiting Securicor's liability to that sum.

66. 1981 S.L.T. 130 (First Division), Lord President Emslie, Lords Cameron and Dunpark.



In dismissing the appeal the House of Lords affirmed the decision of the Court of Session. It held that, although the limitation clause fell to be construed contra proferentem, its terms were clear and unambiguous and that the limitation clause was undoubtedly wide enough to cover relevant liability including the negligence of Securicor itself. Lord Fraser made a distinction between the application of the strict principles of construction applicable when considering the effect of clauses of exclusion or indemnity<sup>67</sup> and when considering the effect of clauses merely limiting liability. In his view although the latter clauses would be read contra proferentem there was no reason why they should be judged by the specially exacting standards applied to exclusion and indemnity clauses. Such standards were applied to exclusion and indemnity clauses for the reason of the inherent improbability that the other party to a contract including such a clause intended to release the party seeking to impose it (proferens) from a liability which would otherwise fall on him. However, he would be more likely to agree to a limitation of the liability of the proferens especially, as under provision in the contract with Securicor, the potential losses which might be caused by Securicor's negligence (or that of its servants) were so great in proportion to the sums that could be reasonably charged for the services contracted for.<sup>68</sup>

Both Securicor cases were considered in George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd.<sup>69</sup> The facts of this case were essentially as follows. Farmers had agreed to buy cabbage seed from merchants with whom

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67. Canada Steamship Lines Ltd v. The King [1952] A.C. 192 applied by the Scottish House of Lords in Smith v. UMB Chrysler (Scotland) Ltd [1978] 1 All E.R. 18. See Chapter Four.

68. 1982 S.L.T. 377 H.L. (Sc.), at p.382. It should be noted that the shipowners of the vessels sunk were covered in respect of hull insurance. See Lord Denning's comparison of the insurance cover in both the Securicor and Ailsa cases in George Mitchell (Chesterhall) Ltd v. Finney Lock Seeds Ltd [1982] 3 W.L.R. 1036, at p.1045.

69. [1981] 1 Lloyd's Rep. 476. See note [1981] J.B.L. 412.

they had dealt with for some years. The sale was subject to the merchants' standard terms and conditions. One of these stated: "In the event of any seeds sold by us not complying with the express terms of the contract of sale or any seeds proving defective in varietal purity we will refund all payments made to us by the buyer in respect of the seeds and this shall be the limit of our obligation. We hereby exclude all liability for any loss or damage arising out of such use or of any defects in any seeds supplied by us or from any other loss or damage whatsoever save for refund as aforesaid." Both parties knew that the seeds sold were for winter white cabbage and the merchants knew the farmers normally sowed the cabbage in seed beds in March and transplanted in June and July. The merchants also knew that the cabbage was for human consumption. The farmers planted about sixty acres and the seeds germinated. In September it was noticed that the cabbages were of lush growth with loose fluffy hearts. The merchants agreed, after discussions with the farmers, that what had been grown was not suitable for either human or animal consumption and that they, the merchants, had sold seed wholly different in kind by description and commercially. In response to a claim by the farmers for damages the merchants held that they were protected by the exemption clause and liable only for 192, which was the cost of the seeds. The farmers claimed for damages, total failure to perform, breach and fundamental breach of contract. They also claimed that the defendants' reliance on the conditions of sale were void and unenforceable as those had not been negotiated and, thus it would not be fair and reasonable to rely on the conditions.<sup>70</sup>

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70. By virtue of s55(4) and para.11 of Schedule 1 of the Sale of Goods Act 1979 (UK). As the contract had been concluded before February 1, 1978 the Unfair Contract Terms Act 1977 (UK) Schedule 2, containing the reasonable test, was inapplicable. This test is dealt with in detail in Chapter Four.

In the lower court, the judge, relying essentially on fundamental breach, held that, on the facts the seed supplied was in no sense vegetable seed and the clause could not be construed to cover that situation.<sup>71</sup> Delivery was of something wholly different in kind from that which was ordered and which the merchant had agreed to supply. It was making commercial nonsense of the contract to suggest that either party could have intended that the clause was to operate in the circumstances of the case. In looking at a commercial contract, the terms had to be construed in a commercial sense. What was delivered was not vegetable seed at all and the merchants could not rely on the conditions which they had imposed.

In the Court of Appeal one judge, Oliver L.J. followed Parker J. in the lower court by relying on fundamental breach as the basis for dismissing the appeal. Oliver L.J. said:

"What was delivered to the farmers was not a fulfilment of the contract, even a defective fulfilment, any more than a delivery of a motor bicycle would be a fulfilment of a contract for the sale of a car".<sup>72</sup>

The two other judges, Lord Denning M.R. and Kerr L.J., did not rely on fundamental breach but held that the clause under review was unreasonable.<sup>73</sup> It is important to note that although all of the judges dismissed the appeal they did so on distinctly different arguments. This new emphasis on the reasonable test is discussed in detail later.<sup>74</sup> It should finally be noted that the distinction made in the Ailsa<sup>75</sup> case regarding exemption clauses which provide for limitation, as opposed to total exclusion, of liability, was categorised by Kerr L.J. as "... no more than a guide to construction"<sup>76</sup>. He did adopt it on the basis that limitation clauses

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71. [1981] 1 Lloyd's Rep 476, Parker J., at p.480.

72. George Mitchell (Chesterhall) Ltd v. Finney Lock Seeds Ltd [1982] 3 W.L.R. 1036, at p.1050. See note C.M. Schmitthoff [1982] J.B.L. 447-448.

73. See note 69 supra.

74. See note 70 supra; see also Chapter Four.

75. See note 65 supra.

76. [1982] 3 W.L.R. 1036, at p.1055.

A warranty, on the other hand has been defined by the same Act as "an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages but not a right to reject the goods and treat the contract as repudiated".<sup>80</sup> In practice, however, it may be difficult to distinguish between a condition and a warranty in all save the simplest contracts. The problem of categorisation is made more difficult by parties using the word "condition" in circumstances in which the courts would not necessarily treat it as such in law. Essentially, conditions are major, and warranties minor, terms of a contract and the court will look to the intention of the parties in giving due weight to particular terms.<sup>81</sup>

The distinction between conditions and warranties was once believed to be the main criterion for determining the effects of breach of contract in general. This supposition, however, was rejected by the Court of Appeal in Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha.<sup>82</sup> In this case

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80. Respectively s.16 and s.5; ACT : Sale of Goods Ordinance 1954 ss16(2),(3); 5(1); Victoria : Goods Act 1958 ss 3(1), 16(2); Queensland : Sale of Goods Act 1896 ss 3(1), 14(2); South Australia : Sale of Goods Act 1895-1972 ss 11(2), 60; Tasmania Sale of Goods Act 1896 ss 3(1), 16(2).

81. See Schuler AG v. Wickman Machine Tool Sales Ltd [1973] All E.R. 683. See Cheshire and Fifoot Law of Contract, Butterworths (4th Australian edition, 1981) at paras 420-430; Chitty on Contracts Sweet & Maxwell 25th edition, 1983 paras 746, 1625; Benjamin Sale of Goods, Sweet and Maxwell, 2nd edition, 1982 paras 744-760; Ansons Law of Contract, Sweet and Maxwell, Oxford University Press, 25th edition 1979 pp.129-137; G.H. Treitel The Law of Contract 5th edition, Stevens, 1979, at pp.608-610. See also Jackson v. Rotax Motor and Cycle Co [1910] 2 K.B. 937; Arcos v. Ronaasen [1933] A.C.470; Re Moore and Landauer and Co. [1921] 2 K.B.519; Associated Newspapers Ltd v. Banks (1951) C.L.R. 322; Decro-Wall International S.A. v. Practitioners in Marketing Ltd [1971] 2 All E.R. 215, at p.227; The Mihalis Angelos [1971] 1 Q.B. 164; see the comments of Upjohn L.J. in Hong Kong Fir Shipping Co. Ltd v. Kawasaki Kisen Kaisha [1962] 1 All E.R. 474, at p. 484 and Lord Denning M.R. in Cehave N.V. Bremer [1975] 3 All E.R.739, at pp.746-747, See Lord Devlin 'The Treatment of Breach of Contract' [1966] C.L.J. 192 D.W. Greig 'Condition - or Warranty' (1973) 89 L.Q.R. 93 (comment on Mihalis Angelos); Hon. Mr Justice McGarvie 'Contractual Concept of the Credit Bills' (1979) 53 A.L.J. 687, at pp.690-693.

82. [1962] 1 All E.R. 474.

it was held that a stipulation as to seaworthiness in a charterparty was neither a condition nor a warranty but an intermediate or innominate term. The court held that as such a term could be broken in many different ways, from the trivial to the most serious, the innocent party's right to treat the contract as at an end depended on the nature and effect of the breach in question. This right to treat the contract as at an end depended on whether he had been deprived "of substantially the whole benefit which it was intended he should obtain from the contract."<sup>83</sup> The House of Lords in Bunge Corporation v. Tradax S.A.<sup>84</sup> made it clear that the statutory classification of terms in the Sale of Goods Act as conditions and warranties is not to be treated as an indication that the law knows no terms other than conditions and warranties.<sup>85</sup> Whether a term is a condition or a warranty or an innominate term depends on the intention of the parties, as ascertained from the construction of the contract.<sup>86</sup>

In applying the rule of strict construction to an exemption clause the courts will construe ambiguities against the party inserting the term. This approach was illustrated in Alex Kay Pty Ltd v. General Motors Acceptance Corporation & Hartford Fire Insurance Co.<sup>87</sup> The plaintiffs, a car hire firm, entered into a contract of insurance with the second defendants on a car acquired for use in the business. The insurance policy contained a clause exempting the insurers from "any breach of contract, agreement or obligation". Over eighteen months after the contract with the insurance company was made the car was hired to a client who disappeared with it, both

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83. Ibid., per Diplock L.J., at p.489.

84. [1981] 2 All E.R. 513.

85. Ibid., per Lord Scarman at p.543. See also Cehave v. Bremer [1975] 3 All E.R. 739.

86. The Law Commissions' in their recent Working Paper (No. 85 Law Com; Consultative Memorandum No. 58, Sale and Supply of Goods. Scot. Law Com. 1983) concluded that in both English and Scottish Law "... the classification of the statutory implied terms as conditions or warranties is inappropriate and liable to produce unreasonable results", para 2.37. It should be noted that Scots law makes no distinction between conditions and warranties. The Working Paper is discussed, in the context of the statutory implied terms, subsequently in Chapters Three and Five.

87. [1963] V.R. 548.

being untraceable. The words quoted above were held to be capable of three separate meanings; (a) any breach by the plaintiff of a contract with a hirer; (b) any breach of a contract by the hirer; (c) any breach of contract. The least favourable interpretation to the insurance company, (a) was adopted by the court.

It has been held that unless liability in tort, such as negligence, is clearly and expressly excluded, such liability may arise from a transaction which otherwise contains limiting and exempting terms. In White v. John Warwick & Co Ltd<sup>88</sup> the plaintiff hired a tradesman's cycle to deliver newspapers on terms that provided "... nothing in this agreement shall render the owners liable for any personal injuries to the riders of the machine hired". The defendants on their part contracted "to maintain the machine in working order". A rider was injured due to defects in the cycle's maintenance. The court held that the clause would protect the defendants from breach of contractual obligation to maintain the cycle, but would not exclude liability in tort if negligence could be established.

#### Requirement of Notice (Signed Documents)

The general rule relating to the construction of contracts is that notice of the conditions must be available at the time of making the contract. However, it is important to make a distinction between signed and unsigned documents. Where a document is used as a contractual document, a person signing it will be bound even though he has not read its contents, in the absence of fraud, and/or misrepresentation and the question of notice is irrelevant. The court will look into the circumstances of the case to determine whether a signed document is to be treated as a contractual document as opposed to a receipt. In D.H. Hill & Co Pty Ltd v. Walter H. Wright Pty Ltd<sup>89</sup> a carrying company, made a contract by "phone to carry

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88. [1953] 1 W.L.R. 1285.

89. [1971] V.R. 749.

Wright's machinery from their Doncaster plant to one at Clayton. Owing to the appellant's negligence this machinery was damaged. At the Clayton plant an employee of the carrying company presented a carriage document for signature by an employee of Wrights, who signed it. The document on its face was addressed to the carrying company requesting carriage of the machinery "subject to the terms and conditions endorsed on the back thereof". One of the conditions on the back provided that "All goods are handled, lifted and/or carried entirely at the owner's risk. The carrier shall not be liable for any loss or damage of whatsoever kind, howsoever occasioned at any time and whether caused by any acts, default or negligence of the carrier or otherwise howsoever". The carriers relied on this clause to exclude their liability in a claim for damages. There was evidence to show that this document had been used regularly in similar transactions between the two parties. The Victorian Supreme Court held, on appeal by the carriers, that, although the respondents knew of the form's existence, they had no knowledge of the content of the terms and conditions on the reverse and regarded it as an acknowledgement of receipt of goods delivered. There was no evidence, in the court's view, "... of any course of prior dealing in which the parties mutually regarded the terms and conditions on the back of the form as part of the contract between them".<sup>90</sup> The situation in the D.H. Hill case was distinguished from that which arose in the landmark case of Hardwick Game Farm v. Suffolk Agricultural Poultry Producers Association<sup>91</sup>. In Hardwick Game Farm A sold to B an extraction to be used in compound feedstuffs which were then sold by B to C. Owing to the toxic nature of the extract, game birds died when the compound was fed to them. Over three years A and B had entered into similar contracts at the rate of three or four a month; the contracts were oral but a contract note containing conditions was sent on or after the time of sale. These notes included, on their reverse

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90. Ibid., at p.753.

91. [1966] 1 All E.R. 309.

side, one condition which read: "The buyer under this contract takes the responsibility of any latent defects". The House of Lords held that the exempting clause was incorporated in the contract. It could be assumed, on the basis of dealings between A and B, that when B placed his order he did so on the basis and with the knowledge that A's acceptance of the order and their agreement to sell would be on the terms and conditions set out in the contract notes.

It should be noted that, in Hill's case, the Victorian Supreme Court was strongly influenced by the arguments put forward in McCutcheon v. David MacBrayne Ltd.<sup>92</sup> In McCutcheon's there was an oral contract for the carriage of a car on a sea ferry which was lost when the ferry sank while being negligently navigated. There had been a course of dealing between the parties, but the transaction on the occasion of the vehicle's loss differed from these in that a risk note (which included a clause excluding liability for negligence) was not signed. The House of Lords found for the plaintiff on the basis that the excluding term was not part of the contract and could not be incorporated by a previous course of dealings as there was no proof by them of knowledge of the actual terms and agreement to those terms.

The question of previous dealings between the parties and their relative bargaining positions were considered by the English Court of Appeal in British Crane Hire Corporation Ltd. v. Ipswich Plant Hire Ltd.<sup>93</sup> In this case a crane was urgently needed by the defendants to do some work on a marshy site. The defendants site-manager telephoned the plaintiffs and an agreement was reached on delivery and rental charges, but nothing was said about other conditions of hire. The crane arrived with a driver employed by the plaintiffs and who was to operate the crane during the period of hire. On the first day the driver drove the crane over the ground without first

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92. [1964] 1 All E.R. 430.

93. [1974] 1 All E.R. 1059; for a commentary on this case see N.E. Palmer [1974] 25(3) N.I.L.Q. 338.



laying timber baulks (navimats) and as a result the crane sank in the mud. The plaintiffs expended considerable cost (which they bore) in recovering the machine. The next day, after the navimats had been put in place the driver attempted to move the machine sideways and it sank again, almost completely, with resultant expense incurred to pull it out. The plaintiffs claimed the defendants should bear this expense. They relied on their normal conditions of hire and, in particular, a clause which stated "The Hirer shall be responsible for an indemnify the owner against ... All ... expenses in connection with and hiring out of the use of the plant." An additional clause required the hirer to take all reasonable precautions to keep the plant safe while on site, to make the ground safe and, if necessary, to lay suitable material for it to travel on; and to "be responsible for the recovery of the crane from soft ground". These conditions were not seen by the defendants until after the oral contract had been made, but were sent to them soon after the crane arrived. The second sinking occurred before the conditions were signed and returned. Thus the defendants argued that, since the conditions were not drawn to their attention at the time of contracting, they should not be bound by them.

The Court of Appeal unanimously decided that the only reasonable inference to be drawn was that the defendants should be taken to have agreed to abide by the conditions of hire with which they were substantially familiar and which, it was admitted, were the sort of conditions they would expect to be sent after the making of the oral contract. On two previous occasions, approximately sixteen and eight months earlier, the defendants had engaged in similar transactions with the plaintiffs, in which the same printed form of conditions had been signed and returned. Lord Denning was not prepared to accept that this justified (as the plaintiffs had claimed) imputing knowledge of these conditions to the defendants by virtue of a course of dealing. The two earlier occasions were not known to the current site manager, and, in any case, they were too few and the intervening periods

too great, to bring a course of dealing into operation.<sup>94</sup> Instead he preferred to base his decision on the "common understanding" of the parties, as reflected in their general business relationship, familiarity with trade practice and equal bargaining position.

#### Requirement of Notice (Unsigned Documents)

In the case of unsigned documents containing exemption clauses, the courts will determine whether or not reasonable notice of them has been given to the party sought to be bound by their terms. The cases illustrating this basic principle are numerous: the principle of notice also raises the issue as to whether the document in question was a contractual one. The problems raised in applying both the first and second canons of construction are aptly illustrated by the case of Thornton v. Shoe Lane Parking Co Ltd<sup>95</sup> where the leading English cases were reviewed. In Thornton's case the plaintiff drove his car into an automatic carpark in London for the first time. A notice outside stated that all cars were parked at owner's risk. The ticket which the plaintiff took, but did not read, was produced from an automatic machine. The ticket contained a notice to the effect that it was issued subject to the conditions of issue displayed on the premises. On a pillar opposite the ticket machine were a set of detailed conditions which included one which, in effect,

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94. [1974] 1 All E.R., at p.1061. Sir Eric Sachs was of a similar opinion, *ibid* at p.1065. Lord Denning distinguished Hollier v. Rambler Motors (AMC) Ltd [1972] All E.R., 399 on the ground that the plaintiff in that case was not of equal bargaining power with the garage company.

95. [1971] 2 W.L.R. 585. For a recent Australian decision on notice of exempting provisions in which the "ticket cases" were reviewed see Watt v. Transview Pty Ltd Supreme Court of NSW (15/6/1983) - (unreported). In this case the Supreme Court held that a notice displayed at a ticket box which was not seen by the purchaser of the ticket or referred to on the ticket itself was not effective to impose a term exempting for loss, damage or injury in a contract or carriage, in this case a ride in a cable car at the Royal Agricultural Grounds, Sydney. The plaintiff was injured whilst a passenger in the cable car and was subsequently awarded damages by the Supreme Court, reversing the decision of first instance.

sought to exclude the carpark proprietors from liability not only for damage to the car, but also for injury to the customer, howsoever caused. The plaintiff was injured by the negligence of the defendant's employee while bringing the car to him. The Court of Appeal held that the ticket was not a contractual document but a receipt, so that none of its terms were part of the contract and that the notice displayed in the carpark itself was not brought to the attention of the plaintiff so that its terms were not part of the contract. Therefore the defendants were liable in negligence to the plaintiff for his personal injuries.<sup>96</sup>

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96. Under present English law such a clause would be void, see Unfair Contract Terms Act 1977 s2(1)(U.K.); See also D. Yates Exclusion Clauses in Contracts Sweet and Maxwell, Second edition (1982), at p.59.

## CHAPTER TWO

### EXEMPTION CLAUSES: THE LEGISLATIVE RESPONSE

#### Control of Exemption Clauses by Statute: A Perspective

Over the last one hundred years the standard form contract has been increasingly used, often containing the types of clauses noted above. In the words of one authority:

"The idea of an agreement freely negotiated between the parties has given way to the necessity for a uniform set of printed conditions which can be used time and time again, and for a large number of persons".

Periodically, Parliament has intervened, chiefly in the interests of consumers, to control exemption clauses by a variety of methods:

- (a) By providing that certain terms are valid only if drawn to the attention of the party disadvantaged in particular ways, eg. Hire Purchase Act 1959 (Tasmania) s9(2)c, Secondhand Vehicle Dealers Act 1971 (South Australia) s21(2).
- (b) By prohibiting certain exclusions outright, eg. Trade Practices Act 1974 s68, Unfair Contract Terms Act 1977 (UK) s2(1), s6(2)(a); Commercial Transactions (Miscellaneous Provisions) Act 1974 (New South Wales) s7; Consumer Transactions Act 1972-1973 (South Australia) s10.
- (c) By giving jurisdiction to the courts to control unreasonable exclusion clauses, eg. Common Carriers Act 1874 (Tasmania) s13;

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1. Anson's Law of Contract Oxford University Press (1975) 24th edition at p.151.

See the definition and classification of standard form contracts by the Law Commission and the Scottish Law Commission Exemption Clauses Second Report (1975) para 152. For a statutory definition of standard form contracts see the West German law on Standard Contract Terms 1976, para 1. The matter of standard form contracts is discussed in detail in Chapters Four and Eight.

Misrepresentation Act 1971-1972 (South Australia)  
s7(3); Unfair Contract Terms Act 1977 (UK)  
Schedule 2.

Exceptionally, exemption clauses will be imposed in contracts by statute. In such cases the statute usually prohibits any further limitations of liability over and above the statutory provisions. The Civil Aviation (Carriers' Liability) Act 1959 (Cwlth.) incorporates the Warsaw Convention as amended by the Hague Protocol which, inter alia, limits damages payable in the event of death or injury to an airline passenger on a scheduled flight or where luggage has been lost or damaged.<sup>2</sup> The Sea Carriage of Goods Act 1924 (Cwlth.) incorporates the Hague Rules which provide maximum limits for the shipowner's liability for damage to or loss of the goods shipped.<sup>3</sup> The carrier may increase (but not decrease) his liability by agreeing to a higher maximum with the shipper.<sup>4</sup>

Legislative intervention has not proceeded on any clear pattern, although in recent years exemption clauses have been controlled by statute in the interests of the consumer (e.g. the Trade Practices Act 1974 (Cwlth.), s68; the Unfair Contract Terms Act 1977 (U.K.), s4 and Schedule 2). The range and development of legislative control, on one hand, can be illustrated by the early Carriers Acts (both in England and Australia) and, on the other, the

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2. Civil Aviation (Carriers' Liability) Act 1959 (Cwlth.) Part IV as amended by Hague Protocol (1955), Arts.10 and 11 respectively. See N.E. Palmer Bailment Law Book Co. (1979) Chapter 17, at pp. 642-643, 666-667.

3. Sea Carriage of Goods Act 1924 (Cwlth.), Sched. art. IX.

4. Sea Carriage of Goods Act 1924, Sched. art. IV, r.5. On the issue of statutorily imposed exclusion clauses see D. Yates Exclusion Clauses in Contracts at pp. 113-116. See Trade Practices Act 1974 (Cwlth.) S68a; see Chapter Four. See also Carriage of Goods by Sea Act 1971 (U.K.) Sched. art.III(8). Carriage by Air Act 1961, (U.K.) Sched.1, arts.22, 23(1) and 32; Carriage of Goods by Road Act 1965 (U.K.) Sched., arts. 23,41; Carriage by Railway Act 1972 (U.K.), Sched. arts. 6(2), 7 and 10; Carriage of Passengers by Road Act 1974 (U.K.), Sched. arts. 13, 16 and 23(1).

carriage, (c) to be strictly answerable for all loss and damage that occurs during the course of the carriage.

The strict liability imposed on the common carrier by the common law was not balanced by any right of the carrier to check packets presented for carriage or obtain information as to their contents; nor did the common law distinguish between different kinds of goods. The Carrier's Act of 1830 was passed partly to remedy the anomalous position of carriers who would be strictly liable for goods stolen in transit yet had no means of discovering their value. Generally the Act relieved the carrier of liability for particular goods of an especially valuable or fragile nature, worth more than £10, unless the consignor made a special declaration of value. The other reason for the passing of the Carrier's Act was that the courts had come to presume generally that notices excluding or limiting the carrier's liability, provided they were conspicuously placed in the carrier's receiving office where the consignor had an opportunity of reading them, had a binding effect on the consignor. The Act thus gave a remedy to the carrier in relation to liability for valuables and dealt with the public dissatisfaction with unilateral notices.<sup>7</sup>

(b) The Railways and Canal Traffic Act 1854

Rail transport was in its infancy when the Carrier's Act 1830 was passed and railways per se only came within the ambit of that statute by use of the terms "other public conveyances by land for

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7. O. Kahn-Freund op.cit. at p.220.

hire" and "other common carriers". Within a short space of time, however, the railways acquired a monopoly position in inland transport and began to insist on making special contracts with consignors to limit their own responsibilities as common carriers, notice of which terms (as a set of printed conditions) were normally contained in a note or ticket given to the consignor. The courts tended to take the line that the consignor had notice of these conditions when these were placed in his hand. As a result of the general public reacting to what no doubt in modern judicial terms would be expressed as a gross inequality of bargaining power, the Railways and Canal Traffic Act 1854 was passed. This Act imposed upon railway carriers the duty to carry any goods which they were able to carry for anyone who wished them to do so.<sup>8</sup> However, the Act did not debar the railway companies from contracting out from their liability as common carriers. Even so, the railway carrier was made statutorily liable for the loss of or damage to any goods they carried due to the negligence or default by their servants or themselves.<sup>9</sup> Any special contracts made with the consignors purporting to limit such liability with regard to receipt, forwarding and delivery of goods to be valid had to be just and reasonable.<sup>10</sup> The powers of the railway (and canal) carriers were constrained in the making of contracts limiting their liability for the negligence or default of their servants (i.e. committed within the scope of the

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8. Now repealed: Transport Act 1962, Schedule XII, Pt. 1.

9. Railway and Canal Traffic Act s.7.

10. Ibid.

servant's authority). Although in circumstances outside the above the Act left railway and canal carriers free to reduce their common carrier's liability to that of a bailee in any form they chose and under conditions not necessarily just or reasonable,<sup>11</sup> once an act occurred due to the negligence of the carrier or his servants, then any limitation on liability for such loss had to conform to the statutory provision if the carrier were to be relieved of his liability.

In Peek v. North Staffordshire Railway,<sup>12</sup> the House of Lords laid down bases for assessing the reasonableness of a contract of carriage under the 1854 Act. Following the provision that a carrier had to carry for a reasonable remuneration<sup>13</sup> their Lordships noted that in offering to carry at "owner's risk" a railway carrier could alternatively offer to carry on terms that excluded or limited his liability. Such an alternative was neither just nor reasonable unless the carrier offered a reduction in price below what would have been reasonable remuneration if the goods had been carried at "owners' risk" or the carrier in question offered any other advantage he was not bound to give. Thus once the court was satisfied that the railway carrier had offered what came to be known as a "fair alternative" it was presumed that the arrangement was just and reasonable, the onus of demonstrating that the conditions were so being borne by the carrier.<sup>14</sup>

The doctrine of the fair alternative laid down in Peek's case

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11. Shaw v. Great Western Railway [1894] 1 Q.B. 373; see, in particular, Wright J. at pp.382, 383.

12. (1863) 10 H.L. 473.

13. Ibid., s.2.

14. Brown v. Manchester, Sheffield and Lincolnshire Railway (1883) 8 App. Cas. 703, at 716.



was elaborated in later decisions<sup>15</sup> and set a limit to the freedom of carriers by rail to restrict their own liability. As a result the railway companies developed alternative consignment rates governing carriage at owner's and carrier's risk. The owner's risk conditions were those by which the rail carriers restricted their liability and had to be part of a contract signed by the consignor or his agent to be valid. These "owner's risk" conditions were not usually relied on by the railway companies to absolve themselves totally from liability for the safety of goods carried. In practice the companies accepted, even at owner's risk, liability for the wilful misconduct of themselves and their servants since the courts were reluctant to hold conditions of carriage as reasonable if they excluded such liability. Thus an attempt by companies to contract out of this liability ran the risk that the courts would not uphold the conditions.<sup>16</sup>

#### Contracts of Carriage by Rail and Reasonableness: A New South Wales Example

The question of reasonableness in a contract of carriage by rail has been extensively explored in the Australian High Court decision in Commissioner for Railways (N.S.W.) v. Quinn.<sup>17</sup> It has been suggested in English courts that as a matter of common law a

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15. See principally; Glenister v. G.W. Railway (1873) 29 L.T. 423; Lewis v. G.W. Railway (1877) 3 Q.B.D. 195; Dickson v. G.N. Railway (1886) 18 Q.B.D. 197; G.W. Railway v. McCarthy (1887) 12 App. Cas. 218; Williams v. Midland Railway [1908] 1 K.B. 252; and see Gregory v. Commonwealth Railways Commissioner (1941) 66 C.L.R. 50.

16. See Brown v. Manchester, Sheffield and Lincolnshire Railway (1883) 8 App. Cas. 703 and Smith (H.C.) v. S.W. Railway [1922] 1 A.C. 178; W. Young and Son (Wholesale Fish Merchants) v. British Transport Commission [1955] 2 Q.B. 177, at p.193 per McNair J.

17. (1946) 72 C.L.R. 345.

judge might delete a wholly unreasonable term from a contract<sup>18</sup> although there is no authority directly in point and the weight of judicial opinion is against such a contention.<sup>19</sup> In Quinn's case power to delete an unreasonable clause from a contract of carriage was expressly given by statute to the judiciary, and duly exercised. A contract between the appellant and the respondent, Mrs. Quinn, for the carriage of her goods from Coolah Railway station to St. Leonard's station was made subject to the Government Railways Act 1912 as amended, and the provisions of by-laws, regulations and conditions published under the Act and to the terms and consignment note signed by Mrs. Quinn. A by-law incorporated contained (inter alia) two conditions: (1) that a claim for loss or damage to goods tendered for conveyance by rail would not be allowed unless lodged in writing with the Commissioner within fourteen days after the date when delivery was or should have been given; (2) that the Commissioner did not guarantee the arrival or delivery of any goods at any particular time and that he did not undertake to advise the consignor of the arrival of the goods or that delivery had not been taken. The goods were consigned at "Commissioner's risk" rates, were lost and Mrs. Quinn failed to lodge her claim in writing within fourteen days.

On appeal from the Supreme Court of New South Wales the High Court held that the by-law containing the condition requiring claims for loss or damage to be lodged within fourteen days was not invalidated through the failure of the Commissioner to exhibit it on

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18. See the views of Bramwell L.J. in Parker v. South Eastern Railway Co. (1887) 2 C.P.D. 416, at p.428; John Lee & Son (Grantham) Ltd. v. Railway Executive, [1949] 2 All E.R. 581, at 584; Lord Denning's observations in Bonsor v. Musicians' Union [1954] Ch. 479 at p.485; on deletion of unreasonable terms from a contract see generally, Cheshire and Fifoot, Law of Contract (4th Australian ed. Butterworths 1981), pp.124-125.

19. See in particular the observations of Lord Haldane V.C. in the Privy Council case of Grand Trunk Railway Co. of Canada v. Robinson [1915] A.C. 740, at pp.747-748.

railway stations and other places in accordance with ss66 and 67 of the Government Railways Act. It was further held that the condition was not just and reasonable and therefore contrary to the provisions of s9(a) of the Common Carrier's Act 1902 (New South Wales) and thus invalid.<sup>20</sup> Additionally, the court ruled that despite the fact that the goods were tendered to the owner's agent the Commissioner, in the circumstances of the case, remained a common carrier in respect of the goods of which delivery had not been taken and was not a bailee for their safekeeping.<sup>21</sup> The judgment of Dixon J. is of particular interest and his arguments are worth reproducing fully. In the learned judge's view the considerations which told against the justice and reasonableness of the limitation were as follows:

"1. It requires the claim to be in writing and treats an oral claim as useless, even though it had been entertained and investigated by the Commissioner. Many consignees, expecting the arrival of articles despatched by railway, would be likely to make inquiries and then complain at the railway station, but it would not occur to them to reduce a claim to writing until the station staff had rejected it.

2. There was no definite time from which the period of fourteen days limited in the case of loss in transit begins to run. The long distances over which goods may be conveyed and the variable Conditions affecting railway transportation in Australia make it very difficult for a consignee to make up his mind when he should treat failure of the goods to arrive as a reason for inferring their loss. The consignors may not advise the consignees promptly or at all of the despatch of goods. Much of the the goods traffic carried is for consignors and consignees outside the course of routine and organized business. The difficulty of being sure either of the meaning or the application of the expression "fourteen days after that date when delivery should have been given" led the respondent to contend that the provision was void for uncertainty, at all events if considered as a by-law. That it is an extreme contention, but the difficulty has a real bearing on the reasonableness and justice of the clause in the conditions prevailing in Australia.

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20. Barton J. in Hirsh v. Zinc Corporation Ltd. (1917), 24 C.L.R. 34, at p.52.

21. Commissioner for Railways (N.S.W.) v. Quinn (1946) 72 C.L.R. 345, per Rich, Starke, Dixon and McTiernan JJ., Williams J. dissenting.

3. The necessity of giving notice is a thing of which many consignees would be unaware. The voluminous pamphlet in which it is contained would be in the hands of relatively few and of these not many could be expected to discover the clause. Non-fulfilment of the condition is fatal, and the ordinary man would not give notice in writing instinctively unless he knew that he was required to do so.

4. The condition forms part of the Commissioner's risk contract. It is not part of the protection for which the Commissioner bargains in consideration of giving a reduced rate. There is no alternative offered. The consignor paying the higher rate in order to secure the greatest protection he can for the goods can obtain no better contract and finds that the Commissioner escapes liability unless notice in writing is given within fourteen days of a hypothetically ascertained date. The fact that the clause forms part of the Commissioner's risk conditions is perhaps the most important consideration."<sup>22</sup>

These arguments serve, it is submitted, as an admirable basis of assessing contracts where the parties are not of equal bargaining power; it is to the railway carriage cases dealing with a common carrier's liability to his customers that one can profitably look for the source of an evolving doctrine of contractual equality and for early examples of legislative intervention to control exemption clauses.

### Exemption Clauses in Insurance Contracts

Insurance contracts provide particularly notable examples of the use of wide ranging exemption clauses embodied in standard form contracts. As a general rule all contracts of insurance are construed as contracts of indemnity.<sup>23</sup> Most policies contain a long list of

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22. Ibid., at pp.376-377.

23. Except life insurance, insurance against accident or sickness of the insured himself, and certain contingency policies such as those against rain. See Castellain v. Preston (1883) 11 Q.B.D. 380; Theobald v. Railway Passengers Assurance Co. (1854) 10 Exch. 45. See also S.J. Borrie and D.W. Greig Commercial Law Butterworths 2nd edition 1978, at pp.381-382. See also R.B. Vermeesch and K.E. Lindgren Business Law of Australia Butterworths 4th edition 1983, Chapter Twenty Four at pp. 775-776.

exceptions, that is a list of circumstances in which the insurer will not be liable. Common examples include loss or damage caused by war, riots, civil commotion or radioactivity. Any ambiguity in such clauses is construed against the insurer.<sup>24</sup>

The insurer employs a variety of devices in the form of terms and conditions to protect himself against alteration of the risk insured during the period it is covered. These terms and conditions include temporal exclusions and continuing or promissory warranties.

In the case of temporal exclusions cover is limited by excluding liability for loss caused when the risk incurred is increased in a way unacceptable to the insurer. In the context of motor vehicle insurance a typical exclusion reads:

"loss, damage, liability and/or compensation for damage and or injury caused whilst the Motor Vehicle is being driven by or is in charge of any person

- (1) under the influence of any drug or of intoxicating liquor or
- (2) in whose blood the percentage of alcohol is .1 or more grams per 100 millilitres of blood as indicated by analysis of the person's breath or blood".

With regard to continuing or promissory warranties these operate on the basis that statements made by the insured in the proposal form are incorporated as warranties into the policy. The most common example is a clause in the policy that:

"The answers in the proposal form shall form the basis of this contract and be deemed to be incorporated herein".

Such a clause has the effect of making the answers warranties. A continuing or promissory warranty involves a promise by the insured that a certain state of affairs will prevail during the currency of the policy. Such a warranty in a motor vehicle policy reads:

"I warrant ... that ... the motor vehicle has not been

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24. See Alex Kay Pty Ltd v. General Motors Acceptance Corporation & Hartford Insurance Co. [1963] V.R. 548, at Chapter One.

and will not be specially modified from maker's original specifications".

Normally the insured is required to comply with a condition in the policy; for example that a motor vehicle will be maintained in a safe and roadworthy condition. In yet another form a term may be expressed as a proviso in the policy. For example:

"This policy shall be voided and of no effect if, after the date of the inception of the policy the insured vehicle be in any way corrected or modified in a manner that increases its designed maximum speed and performance".

The Australian Law Reform Commission in its Discussion Paper on insurance contracts<sup>25</sup> recommended that all the provisions noted above should be reduced to the status of terms of the contract, thus abolishing the differences in legal result stemming from the varying forms of expression.<sup>26</sup>

The insurer's ability to rely on the terms illustrated has been modified by statute. The New South Wales Insurance Act 1902 by s18 empowers a court to relieve the insured from consequences which otherwise would follow from certain conduct under the terms of a policy. Section 18 covers continuing warranties and conditions, but does not apply to exclusions or simple provisos. The tentative conclusion (so expressed in the Discussion Paper) reached by the Commission was that an insured party should not be denied recovery under a policy under a contract of insurance for conduct which is unrelated to the loss in question. This is the case where a vehicle has been allowed to become unsafe but the accident in respect of

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25. Insurance Contracts, Discussion Paper No.7 Law Reform Commission (1979). I am grateful to Mr. Justice Kirby, former Chairman of the Law Reform Commission and to Mr. W.J. Tearle, a member of that Commission, for drawing my attention to the need to include a reference to insurance contracts in the context of exemption clauses. The Discussion Paper has been drawn upon, particularly paras.40-46.

26. Discussion Paper No.7, para.43.

which the claim is made is not the result of the vehicle's condition; it has occurred, for arguments sake, because another vehicle has run into the back of the insured's vehicle. The view of the Commission was that the insurer in these circumstances should be entitled to cancel the cover due to breach of the policy but that the insured should be indemnified for loss suffered by the insured before cancellation of the policy. This, it was argued, should apply in respect of all conduct of the insured during the period of cover, without regard to the form of control in a particular policy. Such an approach has been given statutory shape in New Zealand in the Insurance Law Reform Act 1977. All distinctions between exclusions, warranties, conditions, and provisos are swept away. By virtue of s11:

"Where -

- (a) By the provisions of a contract of insurance the circumstances in which the insurer is bound to indemnify the insured against loss are so defined as to exclude or limit the liability of the insurer to indemnify the insured on the happening of certain events or on the existence of certain circumstances; and
- (b) In the view of the Court or arbitrator determining the claim of the insured the liability of the insurer has been so defined because the happening of such events or the existence of such circumstances was in the view of the insurer likely to increase the risk of such loss occurring;

the insured shall not be disentitled to be indemnified by the insurer by reason only of such provisions of the contract of insurance if the insured proves on the balance of probability that the loss in respect of which the insured seeks to be indemnified was not caused or contributed to by the happening of such events or the existence of such circumstances".

The Law Reform Commission recommended the adoption of this provision in Australia subject to one important modification. This was that the basis of recovery should be stated separately, rather than be linked with court proceedings.<sup>27</sup>

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27. Discussion Paper No.7, at para.46.

The Insurance Contracts Act 1984 (Cwlth.), which has not yet been proclaimed, has followed the Australian Law Reform Commission's recommendations that statements, by an insured, regarding a state of affairs should cease to operate as warranties.

The Insurance Contracts Act 1984<sup>28</sup> is a detailed enactment which sets out, according to its preamble:

".. to reform and modernise the law relating to certain contracts of insurance so that a fair balance is struck between the interests of insurers, insureds and other members of the public, and so that the provisions included in such contracts, and the practices of insurers in relation to such contracts, operate fairly."

The Act, by s24, declares a warranty of existing fact made in or in connection with a contract of insurance to be a mere representation. A statement made by or attributable to the insured as to the existence of a state of affairs (which will exclude a continuing warranty) is to have effect, not as a warranty, but as though it were a statement made during negotiations before the contract of insurance was entered into. Even if the statement is incorporated in the contract, it is not to be treated as a term of it but as a mere representation and there is consequently no remedy for breach of contract. Therefore the insurer cannot avoid the operation of ss28-30 of the Act dealing with remedies for misrepresentation by making the representation a term of the contract.

Under s15, The Act provides a code of relief in respect of harsh, unconscionable or unfair contracts. Relief includes the variation, avoidance or termination of the contract. Any other legislation providing for relief from the legal consequences of

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28. Repealing the Life Assurance Act 1774 (Imp.), the Fires Prevention (Metropolis) Fires Act 1774 (Imp.) and the Marine Insurance Act 1778 (Imp.) by virtue of s3 of the Act. The Act does not apply to contracts made prior to the commencement of the Act (s4(1)), nor to contracts of re-insurance, health, marine, workers compensation, motor vehicle third party, or State insurance (s9).



misrepresentation does not apply to contracts of insurance within the ambit of the Act. Legislation such as the New South Wales Contracts Review Act 1980 and the South Australian Misrepresentation Act 1971-72 will not apply, although any common law principles of relief from unconscionable contracts will continue to apply (s7).

Part IV of the Act makes major changes in the common law concerning the duty of disclosure and misrepresentation. A duty is laid upon the insured, under s21(1) to disclose, before the contract is entered into, every matter known to the insured which either (a) he knows is relevant to the decision of the insurer whether to accept the risk and if so on what terms; or (b) a reasonable person in the circumstances could be expected to know to be so relevant.

The court is given an overriding power by s31 to disregard avoidance of a contract of insurance for fraudulent misrepresentation or non-disclosure in certain circumstances. If the insured brings proceedings in respect of a loss suffered, the court has a discretion to disregard the avoidance and allow the insured to recover the whole, or such part as the court thinks is just and equitable in the circumstances, of the amount otherwise payable under the contract of insurance. However, the court can only disregard the avoidance if (a) it would be harsh and unfair not to do so, and (b) in the court's opinion, the insurer has not been prejudiced by the insured's breach or, if so, such prejudice is insignificant or minimal (s31(2)). The court, additionally, must have regard to the need to deter fraudulent conduct in relation to insurance and must weigh the culpability of the insured against the loss he would suffer if the avoidance were to stand. The court may take into account other relevant matters in deciding whether or not to exercise its overriding power (s31(3)). If such power is exercised, it operates only to preserve the claim in respect of the loss and does not otherwise operate to restate the contract (s31(4)).

## Trade Practices Act 1974

### (i) Control of Exemption Clauses

#### (a) Supply of goods

(1) The Trade Practices Act 1974 (as amended) has made important changes in the control of exemption clauses and the effect of such clauses upon implied terms in contracts.

Essentially the Act (in Division V) restores the terms implied in a contract for supply by a corporation to a consumer for which, respecting the sale of goods, the Sale of Goods Act 1896 allowed contracting out.<sup>29</sup> The Trade Practices Act provides:

"s68(1) Any term of a contract for the supply of goods or services to a consumer (including a term that is not set out in the contract but is incorporated in the contract by another term of the contract) that purports to exclude, restrict or modify or has the effect of excluding, restricting or modifying -

- a) the application in relation to that contract of all or any of the provisions of this Division;
- b) the exercise of a right conferred by such a provision; or
- c) any liability of the corporation for breach of a condition or warranty implied by such a provision, is void.

(2) A term of a contract shall not be taken to exclude, restrict or modify the application of a provision of this Division unless the term does so expressly or is inconsistent with this provision".

The effect of s68 of the Trade Practices Act is to invalidate exemption clauses (or terms having that effect) that exclude, restrict

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29. Section 57 (New South Wales); s54 (South Australia), (Western Australia); s56 (Queensland), s61 (Victoria), s59 (Tasmania); s56 (New Zealand); s55 United Kingdom. The section allows the exclusion of implied terms and conditions by express agreement between the parties, or by course of dealing, or by usage.

or modify the implied terms of fitness and quality in consumer contracts of supply. Section 68 does not make the use of such clauses (or terms) illegal. However, s58(g) of the Act prohibits false or misleading statements concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy that a consumer may have. The Trade Practices Commission has expressly stated that attempts to exclude liability, as in warranty or guarantees (unless permitted by the Act), lay corporations open to prosecution under s53(g).<sup>30</sup>

Section 68 clearly makes void the use of such standard clauses as:

"This warranty (or guarantee) is expressly in lieu of all other warranties (or guarantees) express or implied and all other obligations and liabilities on our part".

However, the use of such exemption clauses (for this is what they are, in fact) is not illegal under s68, even though their use is struck down by s53(g). There is sufficient evidence that such clauses are still being used in standard form documents even if on a reduced scale since the passing of the 1974 Act.<sup>31</sup> The Trade Practices Commission has recommended that express warranties and guarantees be made accurate and positive and not be phrased in a manner likely to mislead or deceive. Accordingly, the preliminary wording to such documents should read:

"The benefits conferred by this guarantee are in addition to all other rights and remedies in respect of the product (or service) which the consumer has under the Trade Practices Act and other State and Territory laws".

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30. Information Circular No.26 (5/1/1979) replacing Information Circular Nos.5 and 6 (23/4/1975).

31. The reports of Consumer Protection Councils and Bureaux in most States over the past five years verify this. See Appendix A 'Used Car Warranty'.

The present situation is not satisfactory. Some car dealers are still not beyond the stage of describing vehicles in terms of "as is, where is", ignoring the fact that the Trade Practices Act has invalidated the legal effect of this and similar terminology.

More positive steps should be taken to ensure prosecution for the use of warranties and guarantees that infringe s53(g). It was found necessary for the Director-General of Fair Trading under s22 of the Fair Trading Act 1973 (UK) to make regulations to ban the use of such clauses. This followed on a report by the Consumer Protection Advisory Committee dealing with practices which attempted to exclude inalienable rights in consumer contracts.<sup>32</sup> The Consumer Transactions (Restrictions on Statements) Order<sup>33</sup> accordingly prohibits the following acts by persons acting in the course of a business:

- "(1) the display of certain notices which are void where consumer transactions are carried out;
- (2) the publication of any advertisement carrying statements similarly void, intended to induce consumers to enter consumer transactions;
- (3) supplying to a consumer goods bearing on the container a void term, or which would be if it were a term;
- (4) furnishing to any consumer party, or prospective party, to a consumer transaction of a document containing a void term (or which would be if it were a term);
- (5) supplying goods, containers and furnishing documents to a consumer which contain a statement detailing certain rights or obligations of a consumer. Goods, containers or documents must not contain a statement relating to the right or obligations of the consumer where the goods are defective, not fit for a particular

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32. 'Rights of Consumers: A Report on Practices Relating to the Purported Exclusion of Inalienable Rights of Consumers and Failure to Explain their Existence'. H.M.S.O. (1974); presented to Parliament under s83 of the Fair Trading Act 1973.

33. S.I. 1976 No.1813.

purpose or do not correspond with their description unless there is a clear conspicuous statement in close proximity to the other which informs the consumer that his statutory rights are not affected;

- (6) the supplying by the retailer, anticipating a subsequent consumer transaction, of any goods, container bearing, or furnishing a document containing, a statement limiting the liability of the supplier to the retailer. This can only be done if there is a clear conspicuous statement as in (5)."

Under s172 of the Trade Practices Act the Commission has power to make similar regulations.

(ii) Implied Terms

The effect of s68 is that it is no longer possible for corporations to exclude implied conditions and warranties under the guise of warranty or guarantee. Therefore all goods supplied to consumers are sold with the following implied:

- "(a) a condition that the seller had title to sell the goods and that the buyer will enjoy "quiet possession" free of any encumbrance (s69);
- (b) a condition that in a supply by description the goods correspond with that description (s70);
- (c) a condition that goods supplied to a consumer in the course of a business are of merchantable quality unless specific defects are drawn to the consumer's attention or he examines the goods and he could have seen the defects for himself (s71(1));
- (d) a condition that in a supply by sample:
  - (i) the bulk corresponds to the sample in quality;
  - (ii) the consumer has a reasonable opportunity of comparing bulk with sample;
  - (iii) that the goods are free from defects rendering them unmerchantable that would not be apparent on a reasonable examination of the sample (s72)."

felt by most authorities to have nullified the effect of Thornett and Fehr v. Beers and Son<sup>36</sup> in which it was held that a cursory check of the outsides of glue barrels, the contents of which were not of merchantable quality, was, in effect, sufficient to bar a claim for breach of condition.

Section 70 implies, in contracts for the supply of goods by description, a condition that the goods will correspond with the description and such a condition will apply even if the goods for sale or hire are selected by the consumer. The wording of s70 (as with ss68-72) is based on similar terms in the Supply of Goods (Implied Terms) Act 1973 (in this case, s4).<sup>37</sup> A sale in a self-service store, therefore, falls within the category of a sale by description under s70.

Section 71(2) provides that where a corporation supplies goods to a consumer in the course of business, and the consumer expressly or impliedly makes known to the corporation or another supplier any particular purpose for which the goods are required, there is an implied condition that the goods are reasonably fit for that purpose, whether the purpose is a common one or not for the use of the goods in question. When goods are purchased or supplied under s71(2) the condition will apply even though the customer does not make his specific purpose known, as reliance is usually inferred where a customer purchases goods from a retailer or manufacturer.<sup>38</sup>

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36. (1919) 1 K.B. 486. See Benjamin Sale of Goods Sweet & Maxwell (2nd edition 1981), at para.815.; P.S.Atiyah Sale of Goods Pitman (5th edition 1975) at p.83.

37. The wording of the English Act was based on a specific recommendation of the Law Commission and the Scottish Law Commission in their First Report (Exemption Clauses In Contracts) Law Com. No.24, Scot. Law Com. No.12 at para.24.

38. Per Lord Wright in Grant v. Australian Knitting Mills Ltd [1936] A.C. 85, 99; see also Benjamin pp.817, 825, Sutton Sale of Goods Law Book Co. (1974), at pp.142-153.

It should be noted that ss68-72 do not apply to private and auction sales.

(b) Supply of services

There is an important distinction between contracts of sale and contracts for services (also referred to as contracts for skill and labour). In Robinson v. Graves<sup>42</sup> it was held that a contract to paint a portrait was a contract for skill and labour and not a contract for the sale of goods, despite the fact that it was the object of the contract to transfer property in the completed portrait to the defendant. The distinction (termed the "main purpose" test) would appear to be that if the substance of the contract is the production of something to be sold, and the exercise of the skill is primarily for the purpose of producing the goods, then the contract is one for the sale of goods. But if the contract is one for skill and labour to be exercised, and the resulting article is the product of that skill, the contract is for work done and materials supplied.<sup>43</sup>

The application of this test has brought varying results. It has been held that the making of dentures<sup>44</sup> is a sale of goods as is the making of a mink coat or a suit of clothes to measure,<sup>45</sup> but not the drafting of a legal document or the supply of plans by an architect.<sup>46</sup> It is not easy to see the validity of these distinctions

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42. [1935] 1 K.B. 579.

43. See K.C.T. Sutton Sale of Goods (1974) at p.40. In Deta Nominees Pty Ltd. v. Viscount Plastic Products Pty. Ltd. [1979] V.R. 167 it was held that a contract for the manufacture and supply to a furniture manufacturer of an industrial tool suitable for the production of plastic drawers for furniture was for the sale of goods even though the manufacturer of the tool modified the furniture manufacturer's specification to make the tool more practical.

44. Samuels v. Davis [1943] K.B. 526.

45. Marcel (Furriers) Ltd. v. Tapper [1953] 1 W.L.R. 49.

46. Vautier v. Fear [1916] G.L.R. 524.

and the "main purpose" test has itself been categorized as so erratic as to be no guide at all.<sup>47</sup>

The distinction is also important in terms of liability attaching to the supplier. In a contract of sale of goods the seller's obligations extend to latent defects and do not depend on proof of negligence. But in a contract for services the person providing the service is usually held to undertake to exercise due skill and care and is not liable in the absence of negligence. This distinction may be illustrated by the American case of Perlmutter v. Beth David Hospital<sup>48</sup>. In this case the plaintiff was given a blood transfusion in the defendants' hospital. The blood was contaminated with jaundice viruses which, according to the expert evidence, were not detectable by any scientific tests, and the plaintiff suffered injury as a result. The plaintiff, who was a paying patient at the hospital, paid an account charging him separately for the blood supplied. The plaintiff claimed that the blood had been "sold" to him and that the defendants were therefore liable for "defects" in the blood on the basis of breach of the implied warranties in the sale of goods. The New York Court of Appeals held by a majority that the transaction was one of services only and that the supply of the blood was merely incidental to those services.<sup>49</sup>

The Trade Practices Act by s74(1), in respect of services supplied by a corporation to a consumer, provides that there is an

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47. G.W. Bartholomew 'Contracts for the Sale of Goods and Contracts for Work and Labour' (1961) 35 A.L.J. 65.

48. 123 N.E. 2d. 792 (1955).

49. Contrast Dodd v. Wilson [1946] 2 All E.R. 691. In this case the plaintiff contracted with a veterinary surgeon to inoculate his cattle with a serum which the latter had purchased for suppliers of vaccine. It was held that there was no contract of sale but nevertheless the surgeon impliedly warranted the vaccine to be fit for the purpose for which it was supplied. He was therefore liable although not guilty of negligence. See for comment on this case see P.S. Atiyah Sale of Goods Pitman (5th edition) at p.15.



implied warranty that the services supplied will be rendered with due care and skill and that any materials supplied in connection with those services will be reasonably fit for the purpose for which they are supplied. In respect of the requirement that services supplied are rendered with due care and skill s74(1) would appear to do no more than restate the common law position outlined above. If the consumer, either in so many words or by implication, indicates to the supplier a particular purpose for which the services are required or what he wants them to achieve, there is an implied warranty that the services and materials supplied will be reasonably fit for that purpose or might be reasonably expected to achieve that result.<sup>50</sup> There is a proviso that this will not apply where the circumstances show that the consumer did not rely on the skill and judgement of the corporation or that it would be unreasonable in the circumstances for him to do so (s74(2)).

(i) Definition

"Services" are restricted by definition<sup>51</sup> to

- "(a) the construction, maintenance, repair, treatment, processing, cleaning or alteration of goods or of fixtures on land;
  - (b) the alteration of the physical state of land; or
  - (c) the transportation of goods otherwise than for the purposes of a business, trade, profession or occupation carried on or engaged in by the person for whom the goods are transported"
- (s74(3))."

This would include services such as dry-cleaning, transportation and removal (but not storage) of goods, building

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50. Warranties are also implied that materials used are of good quality and free from latent defects and that they are reasonably fit for their intended purpose : Helicopter Sales (Australia) Pty. Ltd. v. Rotor Work Pty. Ltd. (1974-5) 132 C.L.R. 1 and cases there cited.

51. For a general definition of services see s4(1) of the Act as amended. See now Trade Practices Amendment Bill cl.36 which repeals s73. See Postscript.

contracts, car repair work, and repair work in general. It would not include most professional services (except those of civil engineers and architects) nor important bailment contracts such as those governing car parking facilities. Nor does the section apply to services carried out by sub-contractors, where there is no direct contract between the sub-contractor and the consumer. The definition excludes the majority of professional services and bailment contracts (save transportation), such as those applying to car parking facilities. The section does not apply to services carried out by a subcontractor, where there is no direct contract between the subcontractor and the consumer.

Services are also defined in s4; these include property rights, other benefits or facilities provided by way of trade or commerce, contracts for performance of work (including that of a professional nature). The definition also includes contracts for the provision of amusement, instruction, entertainment or recreation, insurance, banking and moneylending.

The narrowness of the definition of the types of services under s74(3) to which the implied warranties apply can be strongly criticised. Why should dry-cleaners, removalists and builders be covered but not solicitors, auditors, bankers or insurance brokers? Car parks can still absolve themselves from contractual and tortious liability to their clients by the use of suitably worded exemption clauses in notices prominently displayed at point of contracting, while dry-cleaners who damage clothing entrusted to their care cannot do so. These anomalies should not exist. Therefore s74(3) should be amended so that s74(1),(2) (subject to the changes already suggested) apply to all services. A consumer may suffer as much, if not more, from negligent advice as from defective, unfit goods. His remedy should not depend on bringing an action within a relatively

uncertain area of negligence in the form of a Hedley Byrne<sup>52</sup> tort or making a contract that falls within the current restrictive definition of services. If it were felt proper, on grounds of policy, to exempt certain services from the proposed remodelled s74(3) this could be done on the basis of the Fair Trading Act 1973 (UK).<sup>53</sup>

(ii) "Mixed" Contracts

Certain problems arise with regards to "mixed" contracts for the supply of goods and services. The difficulties of distinguishing a contract for the supply of services for a contract for the supply of goods have been outlined earlier. A typical "mixed" contract would be one for the brick cladding of a house. There is no legislative guidance as to whether such a contract is to be governed by ss69-73 (supply of goods) or s74 (supply of services with related materials). The definition of supply of goods is not an exhaustive one and it is not made clear in the Act as to whether a contract for the supply of goods is, by that fact, excluded from the ambit of s74. In practice, contracts for the supply of goods and services cannot be precisely delineated. The definition of services under s74(3) does not provide guidance in a given set of facts as to which type of contract is under consideration. A court might decide a contract was primarily one for the supply of goods in order to give the consumer maximum protection. It has been suggested above that the courts, faced with this problem would employ a "main purpose" test to assist them. In

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52. Hedley Byrne & Co Ltd v. Heller & Partners Ltd [1964] A.C. 465; MLC Assurance Co Ltd v. Evatt [1971] A.C. 793; Scott Group Ltd v. McFarlane [1978] 1 N.Z.L.R. 553; but see now Shaddock & Associates v. Paramatta City Council [1981] 36 A.L.R. 385 (HC).

53. See Schedules 4 and 5 of that Act. Services excluded under the Schedules are, inter alia legal, medical, dental, ophthalmic, veterinary, nursing services and services of architects, those of accounting and auditing, surveyors, professional engineers and technologists, the provision of primary, secondary, further and tertiary education. The supply of gas for domestic purposes, electricity, the carriage of passengers by road and the carriage of passengers and goods by rail and letter post services are also excluded.

such a case, the greater part of contracts for work and materials would be dealt with under s74. It can be argued that the consumer, in such contracts, should have the same protection as is given under ss69-72 in the case of supply of goods.

The problem is illustrated by a recent case in the Supreme Court of New South Wales involving the supply of a computer system, Toby Construction Products Pty Ltd v. Computer Bar Sales Ltd<sup>54</sup>. The plaintiff alleged that it entered into a deed with Ward Computer Co Pty Ltd for the acquisition of a computer system.

The deed described three items of "hardware" and two items of "software" and referred to them collectively as "the equipment". It nominated a total price of \$14,390 and allocated \$12,230 for the hardware and \$2,160 for the software. Delivery was to be effected within 30 days of the agreement and the vendor was to install all the equipment at its expense and train the plaintiff's staff in its use. The plaintiff sued in respect of losses alleged to have been caused by deficiency in the equipment supplied.

The court only dealt with the issue as to whether the contract sued upon constituted an agreement for the sale of "goods" within the meaning of the New South Wales Sales of Goods Act 1923 and the Trade Practices Act 1974. The balance of the action, due to the quantum of the claim, was remitted to the District Court.

It was held by Rogers J. that :

- (i) The sale of the computer system, comprising both hardware and software, constituted a sale of goods within the meaning of both the New South Wales Sale of Goods Act 1923 and the Trade Practices Act 1974.<sup>55</sup>

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54. (1983) 50 A.L.R. 684

55. Ibid, at p.690

The substance of the contract was the sale of a total system to be supplied to the plaintiff. The system, software included, whilst representing the fruits of much research and work, was, in current jargon, off the shelf, in a sense, mass produced.

The fact that it was necessary for the effective working of the system that it should comprise software did not disqualify the aggregate operative system from the application or description of "goods". There was a sale of tangible chattels, a transfer of identifiable physical property.

- (ii) It is a debatable question whether or not the sale of computer software by itself is sufficient to constitute a sale of goods within the meaning of the legislation under consideration.<sup>56</sup>

Admittedly, the issue in this case was whether the supply of computer hardware and software came within sale of goods for the purposes of the New South Wales Sale of Goods Act 1923. Rogers J. applied an American decision Triangle Underwriters Inc v. Honeywell Inc<sup>57</sup> where the supply of computer equipment and services was held to be a sale of goods.

The problem in Toby's case could be dealt with by amending the Trade Practices Act so that any materials supplied in connection with services be deemed to be a supply of goods within the meaning of the Act.<sup>58</sup>

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56. Ibid.

57. 475 F. Supp 765; 604 F (2d) 737 (C.A.)

58. This is the solution provided in the proposed draft Tasmanian Supply of Goods and Services Bill (c. 1(4)), see Tasmanian Law Reform Commission Report No. 33, Report and Recommendations relating to Exclusion Clauses and Implied Obligations in Contracts for the supply of Goods and Services (1983) Government Printer, Hobart; subsequently referred to as Tasmanian Law Reform Commission Report No. 33 (see Appendix B).

There are additional problems in the relationship between s74(1) and s74(2). Section 74(2) makes a distinction between the purpose for which materials are supplied and the results that they are required to achieve. Under s74(1), where the consumer does not rely on the supplier's skill and judgement, the supplier has no relief. Therefore, if a consumer insisted on a particular product being used under a contract for work and materials and he could bring himself under s74(1) he could recover damages, despite the fact that he may have designated materials that the supplier had indicated to the consumer were unsuitable. It would seem that a supplier in such a situation might refuse to perform the work at the outset. The anomaly that exists between the two subsections should be resolved.<sup>59</sup>

#### Constitutional Limitations of the Provisions of the Trade Practices Act

The provisions of the Trade Practices Act considered are constitutionally limited in their application. They have no effect upon contracts made between a consumer and a non-corporate body, such as a sole trader, unless the contract involves interstate or overseas trade. Because of these constitutional limitations and also due to the differing approaches to the substantive law by the jurisdictions of each State, conditions and warranties implied by law into contracts are not uniform.

The Trade Practices Act is founded on a number of legislative powers that the Federal Parliament can use under the Constitution. That chiefly relied on is the corporation's power (s51(xx)), but others are also invoked, such as the powers in relation to trade and commerce (s51(i)), external affairs (s51(xxix)), postal and telecommunication services (s51(v)), banking (s51(xlii)), insurance

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59. The resolution of the anomalies discussed and the suggested solution is drawn from N.E. Palmer and F.D. Rose 'Implied Terms in Consumer Transactions: The Australian Approach' (1977) 26 I.C.L.Q. 169, at pp.174-175.

(s51(xiv)), Territories (s122) and dealings with the Commonwealth and its agencies (s51(1) and incidental powers). Although the prohibitive sections of Part V of the Trade Practices Act refer chiefly to corporations the Act generally is so drafted to cover all whose activities fall within the constitutional powers on which the Act is based. This is provided expressly by s6 of the Act. In Australian Industrial Court, Ex parte CLM Holdings Pty Ltd it was held that s6(2):

"... extends the application of the principal provisions of the Act to persons not being corporations, as well as to corporations, whilst they are engaged in interstate or overseas trade or commerce, trade or commerce between territories or with a territory or in the supply of goods or services to the Commonwealth or an authority or instrumentality of the Commonwealth".<sup>60</sup>

The position is that, in general, the provisions of the Act (including those already discussed) embrace restrictive agreements and conduct of corporations in the course of inter-state, intra-state and overseas trade. In addition, these provisions cover the agreements and conduct of all legal and natural persons arising from the operation of trade between Territories, a Territory and a state, interstate and overseas and from dealings with Federal instrumentalities. Additionally, by s6(3) of the Act, the unfair practices provisions of Part V Division 1 govern conduct so caught when radio, television, postal, telephonic or telegraphic facilities are used by a person.<sup>61</sup>

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60. [1977] 13 A.L.R. 273, at p.279.

61. The constitutional ambit of the Act is also constrained by limitations on the corporations power. See Strickland v. Rocla Concrete Pipes Ltd (1971) 124 C.L.R. 468, R v. Trade Practices Tribunal and Commissioner of Trade Practices; Ex parte St George County Council (1974) 130 C.L.R. 533. See R v. Judges of the Federal Court and Adamson; Ex parte Western Australian Football League (1979) 23 A.L.R. 439 where a football league and club were held to be trading corporations and Commonwealth v. State of Tasmania (1983) 46 A.L.R. 625, where the Hydro Electric Commission of Tasmania was held by a majority of the High Court to be a trading corporation within the meaning of the corporations power (s51(xx) of the Constitution).

The Trade Practices Act provides expressly that Commonwealth and State laws should operate concurrently by reason of s75 which states that:

- "(1) Except as provided by sub-section (2), this Part is not intended to exclude or limit the concurrent operation of any law of a State or Territory.
- (2) Where an act or omission of a person is both an offence against section 79 and an offence under the law of a State or Territory and that person is convicted of either of those offences, he is not liable to be convicted of the other of those offences.
- (3) Except as expressly provided by this Part, nothing in this Part shall be taken to limit, restrict or otherwise affect any right or remedy a person would have had if this Part had not been enacted".

This section was considered in General Motors Acceptance Corporation v. Credit Tribunal.<sup>62</sup> It was stated by the High Court that, though s75 did not rectify an inconsistency where it occurred, it did show an intention by Federal Parliament that it was not intended to cover the field. In the case at issue, GMAC had been summoned before the South Australian Credit Tribunal to explain its failure to meet the requirements of s40 of the South Australian Consumer Credit Act 1972-1973 by which the company was under a duty to serve certain notices to consumers who had obtained credit from it. GMAC argued that the notice required to be served under the Thirteenth Schedule of Regulations made under the Consumer Credit Act was misleading and if served would infringe s52(1) of the Trade Practices Act. The Schedule in question required a credit provider to summarize the protection available to consumers under the Consumer Credit Act relating to implied terms as to title, quality and fitness (which could not be excluded) and to state that the benefit of these terms was

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62. (1977) 14 A.L.R. 252.



available to borrowers. It was argued on GMAC's behalf that as the Schedule required a statement only of the rights available under the State Act, it was misleading as these rights had been superseded by the non-excludable rights given under ss68-72 of the Trade Practices Act. The High Court found that though there were similarities in the ambit and effect of the terms in each Act, there were also important differences. Both the terms and the situations in which they would be implied in contracts were distinguishable. There was, therefore, no inconsistency between the State and Federal Acts. The Federal Parliament had indicated in s75 that it did not intend to cover the field. It can be stated with a degree of certainty then, that unless the rights given to a consumer under Federal and State legislation are exactly the same, the issue of inconsistency does not arise. Where there is inconsistency s75 effectively indicates an intention by the Federal Parliament not to cover the field and there may then be room left for the State Act to operate, leaving the consumer with rights under both State and Federal Acts. The GMAC case shows that the High Court is likely to interpret each Act to give it concurrent and separate areas of operation.

#### State-Federal Relationships and Part V of the Trade Practices Act

In dealing with the question of State-Federal relationships in applying the consumer protection provisions of the Trade Practices Act the Report of the Trade Practices Act Review Committee, subsequently referred to as the Swanson Report, expressed the desire that State agencies and courts be more involved in the administration of those provisions.<sup>63</sup> The Committee was asked by its terms of reference to give attention to any particular problems arising from the inter-relationship of the consumer protection

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63. Swanson Report at para.9.35.

provisions with State laws. The Committee considered that the causes of the uncertainty and confusion arising from different State and Federal laws attempting to deal with similar matters in marginally differing ways stemmed in turn from the possible interaction of s75 and s109<sup>64</sup> of the Constitution, and in the difference in terms and substance of the laws themselves. In relation to implied conditions and warranties in consumer transactions under the Trade Practices Act neither s75 of the Act nor administrative action coordinated between State and Federal agencies, in the Committee's view, overcame the problem of the multiplicity of laws. Due to the constitutional limitations already noted, and differences of legislative approach by the States (particularly in the definition of "consumer") numerous technical distinctions, which were basically irrelevant to both commercial behaviour and consumers' interests, determined questions of both the conditions and warranties implied by law into contracts and to which contracts they applied. In the interests of uniformity it was essential that these conditions and warranties be uniform throughout Australia, the present situation being unsatisfactory to all those affected by the law.<sup>65</sup>

The Committee concluded, in respect of conditions and warranties to be implied into transactions, that the field should be covered by Federal legislation to rid the relationship of Federal and State laws in this area of existing confusion. The one exception to this conclusion was the particular legislation of States, such as the New South Wales Motor Dealers Act 1974, dealing with specific conditions or warranties especially relevant to goods or services. As

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64. By s109 of the Constitution it is provided that where a State Act is inconsistent with a Federal Act the Federal Act shall prevail to the extent of the inconsistency.

65. (Swanson Report, at paras. 9.8-9.13).

legislation of this type gave, in the Committee's view, an important source of consumer rights in given industries Federal law should not override it.

The Committee, in the context already considered, recommended that the Federal government seek to persuade the States to adopt enactments to cover the non-corporate bodies which were outside the ambit of the Trade Practices Act and to frame such State laws in terms similar to those of the Trade Practices Act. The Committee's recommendation that a Standing Committee of Commonwealth and State Ministers responsible for consumer affairs be set up to co-ordinate reform of consumer law was consequently taken up.<sup>66</sup>

#### Trade Practices Act 1974: Problems of Consumer Definition

The present definition of a consumer in the Trade Practices Act was introduced by the Trade Practices Amendment Act 1977. Clearly the manner in which a consumer is defined determines the application under the Act of the implied terms and the invalidation of exemption clauses which attempt to remove the protection of those terms in consumer contracts, as well as indicating the ambit of protection considered desirable on the grounds of public policy.<sup>67</sup>

For the purposes of the Act (as amended), unless a contrary intention appears, it is provided by 4B that:

- "(1) (a) a person shall be taken to have acquired particular goods as a consumer if, and only if -
- (i) the price paid or payable by the person for the goods did not exceed the prescribed amount; or

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66. The practical results of this development can be seen in the Goods (Sales and Leases) Act 1981 (Victoria), Chattels Securities Act 1981 (Victoria) and the Credit Act 1984 (Victoria); see also Credit Act 1984 (New South Wales).

67. See G.Q. Taperell, R.B. Vermeesch and D.J. Harland Trade Practices and Consumer Protection Butterworths (3rd edition) 1983 at p.577.

- (ii) where that price exceeded the prescribed amount - the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption, and the person did not acquire the goods, or hold himself out as acquiring the goods, for the purpose of re-supply or for the purpose of using them up or transforming them, in trade or commerce, in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land; and
- (b) a person shall be taken to have acquired particular services as a consumer if, and only if -
  - (i) the price paid or payable by the person for the services did not exceed the prescribed amount; or
  - (ii) where that price exceeded the prescribed amount - the services were of a kind ordinarily acquired for personal, domestic or household use or consumption.
- (2) For the purposes of sub-section (1) -
  - (a) the prescribed amount is \$15,000 or, if a greater amount is prescribed for the purposes of this paragraph, that greater amount;
  - (b) if a person acquired goods together with other property or with services, or with both other property and services, and a specified price was not allocated to the goods in the contract under which they were acquired, the price paid or payable by the person for the goods shall be taken to have been the market value of the goods at the time when that contract was entered into; and
  - (c) if a person acquired services together with property or with other services, or with both property and other services, and a specified price was not allocated to the first-mentioned services in the contract under which they were acquired the price paid or payable by the person for the first-mentioned services shall be taken to have been the market value of those services at the time when that contract was entered into.
- (3) Where it is alleged in any proceeding under this Act or in any other proceeding in respect of a matter arising under this Act that a person was a consumer in relation to particular goods or services, it shall be presumed, unless the contrary is established, that the person was a consumer in relation to those goods or services."

One effect of this section is to bring, under the definition of consumer, a firm which is supplied with goods or services of up to \$15,000 (a figure which can be changed by regulation) in value. The

amendment arises from specific recommendations made by the Swanson Report.<sup>68</sup> Under the unamended Act, a person was treated as a consumer if the goods or services were of a kind ordinarily acquired for private use or consumption. Any acquisition for re-supply was thereby excluded from being supply to a consumer. A person would not be so regarded, in the case of services, if they acquired them for the purposes of, or in the course of, a profession, business, trade or occupation or for a public purpose.<sup>69</sup>

The above definition has been subjected to a number of criticisms. What if large quantities of a commodity such as sugar, are ordered, does this then make them goods of a kind not ordinarily acquired for private use or consumption? In relation to the type of goods purchased, is the buying of a reconditioned engine for a car which the purchaser is installing on a private do-it-yourself basis a consumer purchase, or not? If two friends wish to paint the roofs and frames of their weatherboard properties and agree that one shall purchase for both of them in order to save by bulk buying, is the sale a consumer purchase, even though an ordinary consumer would purchase half the quantity of paint? A salesman in a large building supplies outlet would only know essentially for what purposes the paint was required. Sales of paint in larger quantities than given in the example might be conducted at a separate part of the retailer's establishment set aside for "trade sales". However, modern methods of retailing increasingly make bulk buying a system of purchase that

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68. See discussion of consumer definition, paras.8.38-9.45.

69. Section 4(3)(a),(b) of the unamended Trade Practices Act; see also the definition from which the above section derives, of s55(7) of the English Sale of Goods Act (see now s6 of the Unfair Contract Terms Act 1977 (UK)). See s68A of the Trade Practices Act.

the private consumer, as distinct from the trade buyer, is encouraged to use. It has been suggested by Professor Greig that some of the uncertainty of this part of the definition could be removed by adding a clause to the effect that a purchase of goods not ordinarily for private use would still count as a consumer sale if the seller was aware that the goods were in fact for private use.<sup>70</sup> The authors of Benjamin on Sale of Goods argue that if the word "type" is taken to refer strictly to the nature of the actual goods, then bulk sales of goods normally sold for consumer purposes in small quantities will be designated as consumer sales. Sales outside this heading will be those of goods ordinarily purchased for commercial use only (they include commercial weedkiller and furniture vans). However, they doubt, if under "type of goods" their packaging is included, or whether a box containing 144 toilet rolls are "goods of a type ordinarily bought for private use or consumption".<sup>71</sup> This illustration crystallizes the problems in determining the nature of goods, commercial or consumer, inherent in the increasing trend to sell in bulk direct to the general public.

Where a person acquires, in the course of business, goods, of a kind ordinarily acquired for private use or consumption, provided these goods are not for re-supply, the person will fall within the category of a consumer. Therefore, under the unamended s4(3)(a) an insurance company purchasing a suite of chairs for its visitors' lounge would acquire as a consumer. The section does not require that goods be used for private use or consumption, only that the goods be of a kind ordinarily acquired for private use or consumption. The factor of acquiring such goods in the course of a

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70. See D W Greig, Sale of Goods Butterworths (1974), at p.229.

71. Benjamin, Sale of Goods, Sweet & Maxwell (1981), at para.1011.

business does not then affect the status of the buyer.<sup>72</sup> However, in respect of services the status of the person acquiring these is of importance. Therefore, if a doctor purchased a typewriter for his receptionist this would come under s4(3)(a) as a consumer acquisition. On the other hand, if he hired or leased the machine from an office equipment firm this could be taken as an acquisition for the purposes of the doctor's profession and not to be counted as a consumer acquisition. If one adopted Professor Atiyah's criticism of ss55(7)(a), (b) of the English Sale of Goods Act, it could be argued that acquisition of services by a business should fall within the consumer category if the services are to be used by the business in the same way as by consumers. If this is so, the doctor in the example does not acquire the typewriter in the course of a business for the purposes of s4(3)(b).<sup>73</sup>

#### Criticism of the Consumer Definition by the Swanson Report

The Swanson Report held that the test of a consumer as it then stood had been correctly criticised on the following grounds:

- "(a) that it was insufficiently sensitive to the inequalities that occurred in commercial transactions that did not involve "consumer goods" in the narrow sense,
- (b) that it had inherent uncertainties, and
- (c) that it made an illogical distinction between goods and services."<sup>74</sup>

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72. See the criticisms of the differently worded s55(7) in the English Sales of Goods Act, (1893) (now 1979) s6 Unfair Contract Terms Act 1977, P.S. Atiyah, The Sale of Goods Pitman (5th ed.), at p.134; Benjamin, Sale of Goods at para.1011; D.W. Grieg, Sales of Goods (1974) Sweet & Maxwell, at pp.227-228.

73. See P.S. Atiyah op cit p.5. In his example he argues that to demonstrate that a sale was not a consumer sale it would have to be shown that the buyer made a business of buying goods of a relevant type. A firm of solicitors buying carpet for their offices would purchase as consumers, on this basis.

74. Swanson Report, at para.9.42.

Both (b) and (c) have already been discussed, although it has not been there suggested that the uncertainties of the definition were insurmountable or presented great practical difficulties. In respect of (a), discussion is left for the moment as to the need to extend the definition of consumer to include certain business transactions.<sup>75</sup>

Since the Committee was charged in their terms of reference, amongst other matters, to consider and report on whether the Trade Practices Act was sufficiently certain in its language to enable persons affected by it to understand its operation, they had to consider the certainty of the then current definition of consumer. It concluded that the "best approach" should be by reference to the price paid by the consumer for the goods or services.<sup>76</sup> This solution was noted as having been used in legislation such as the Hire Purchase Act, 1960 (New South Wales).<sup>77</sup> This method of framing a consumer definition was specifically rejected by the English and Scottish Law Commissions, both in an early Working Paper and confirmed by their First Report on Exemption Clauses.<sup>78</sup> Contracting out in sales exceeding a particular price on the precedent of hire purchase legislation was not favoured on the basis that any maximum price which would be adequate for sales to private purchasers would cover many more "business sales" than it did in the case of hire purchase transactions. Additionally, even if sales to corporate bodies were excluded (which is not the case with the current Trade Practices Act), there would be anomalous distinctions between small businesses which were incorporated and others which are not.

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75. See Chapter Four.

76. Report, at para.9.43.

77. Sub-section 1(6) as amended by the New South Wales Commercial Transactions (Miscellaneous Provisions) Act, 1974.

78. Working Paper No.18, Scottish Law Commission Memorandum No.7, para.54; First Report (1969), at para.73.



The \$15,000 limit which represents the definition of a consumer does not then produce the certainty sought by the Swanson Committee. A price limit is an arbitrary device and is made even less certain in its application by the proviso that the services or the goods will still be acquired by a person as a consumer if they are above \$15,000 if they are "of a kind ordinarily acquired for personal, domestic or household use or consumption".<sup>79</sup> Despite the fact that the Committee regarded the ambit of this latter qualification as uncertain (even if only, in their view, in a limited number of cases) the overall conclusion is that a marginally uncertain definition has now been replaced by a wholly arbitrary and considerably more uncertain one.

As a result, it would be advantageous to revert to the original definition of consumer in the Trade Practices Act, subject to the removal of the anomaly existing between supply of goods and supply of services. The addition of Professor Greig's rider to that definition suitably expressed would also assist in making it more certain so that, a purchaser will acquire goods or services which are not ordinarily for private use if the supplier was aware at the time of supply that the goods or services, in fact, were for private use.

Although total certainty in a workable definition of a consumer is likely to be illusory if not, indeed, unattainable, the merits of the definition advocated above would appear to exceed those currently found in the Trade Practices Act.

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79. Section 4B(1)(b)(ii). In a Green Paper, The Trade Practices Act: Proposals for Change (1983) Canberra, the Attorney General, the Minister for Home Affairs and the Environment and the Minister for Employment and Industrial Relations propose changes in the current definition of consumer. An exposure draft bill, included in the Green Paper, the Trade Practices Amendment Bill by cl.4 would raise the \$15,000 limit to \$200,000 and extend the definition of consumer to include those engaged in a forming business (defined by cl.4(4)).

Clearly, if the original definition of "consumer" is preferred, - that is, a person who acquires goods or services of a kind ordinarily acquired for private use or consumption, to the exclusion of certain commercial transactions, - then the conclusions of the Swanson Report must be rejected on this issue. It follows that the Report's argument that the definition should be broad enough to provide protection to a range of business transactions, particularly by small businesses, is unacceptable. The examples given to justify the extension of "consumer" to business are not particularly apt. It was argued that an insurance company purchasing a lounge chair for its reception area or a small pie manufacturer buying an office typewriter were in no better bargaining position or had any greater ability to evaluate goods or services than an ordinary consumer.<sup>80</sup> However, those examples, it is submitted, would put the purchaser within the category of a "consumer" in the original definition since neither business would be dealing specifically in those goods.<sup>81</sup> In respect of the bargaining power of the businesses, it appears to be a misplaced concern to regard an insurance company, which typifies an industry positively revelling in the use of exemption clauses, as being in a disadvantaged position as a purchaser. Both the insurance company and the pie manufacturer have an advantage which distinguishes them from the ordinary consumer: they can both insure against risks which are part of their business. Even if they were not so protected in the earlier examples given, as "consumers", it does not seem that either company would be financially unable to bear a premium covering them against the risks of goods or services which prove defective, or could cause loss, injury or damage (for instance,

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80. Swanson Report, at para.9.40.

81. See Professor Atiyah's argument above, Sale of Goods, Pitman (5th edition), at p.135.

as in the case of a small computer malfunctioning and electrocuting an employee). The proper role of consumer protection legislation is to protect the consumer. It should not be designed to replace the use of insurance in commercial transactions where, even if the purchaser and supplier are not on an equal footing, it is possible to meet the eventuality of loss or damage by payment of a premium which would, in turn, constitute a legitimate business expense. This view is expanded later.<sup>82</sup>

### The Unfair Contract Terms Act 1977 (U.K.) and Control of Exemption Clauses

The Unfair Contract Terms Act 1977 (U.K.) now provides that where parties contract with each other, one as a consumer or on the other's written standard terms of business the latter cannot exclude or restrict his liability for breach of contract, when in breach, or claim to be entitled to render either a substantially different contractual performance or to render no performance at all in relation to part or all of the contract (s3). This provision is subject to the contract term satisfying a test of reasonableness (laid down in Schedule 2 of the Act).

Dealing as a consumer is defined by s12:

- "(1) A party to a contract "deals as a consumer" in relation to another party if -
- (a) he neither makes the contract in the course of business nor holds himself out as doing so; and
  - (b) the other party does make the contract in the course of a business; and
  - (c) in the case of a contract governed by the law of sale of goods or hire-purchase, or by section 7 of this Act, the goods

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82. See Chapter Four, infra.

passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption.

- (2) But on a sale by auction or by competitive tender the buyer is not in any circumstances to be regarded as dealing as a consumer.
- (3) Subject to this, it is for those claiming that a party does not deal as consumer to show that he does not".

(a) Control of Varieties of Exemption Clauses

The Unfair Contract Terms Act by reason of s13(1), extends control over exemption clauses by making certain categories of clause ineffective where exclusion or restriction of liability is also prevented by the Act. The provisions which are to be treated similarly to exemption clauses are provisions which (a) restrict the means of enforcing liability, or (b) restrict or exclude the remedy stemming from it or (c) restrict or exclude the rules of evidence or procedure.

Provisions of type (a), "making the liability or its enforcement subject to restrictive or onerous conditions", are rendered ineffective.<sup>83</sup> Provisions falling within this category are those which stipulate that complaints must be made within a certain time as a condition of the defendant accepting liability,<sup>84</sup> or require several copies of a claim or that certain persons attest to it. It is suggested that a clause providing a shorter limit than allowed under the Limitation Act 1939 is prima facie restrictive.<sup>85</sup> "Onerous" is not defined, but may be regarded as meaning unfairly burdensome or simply unfair.

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83. Section 13(1)(a). For criticism of s13 see D. Yates Exclusion Clauses in Contracts Sweet & Maxwell, 2nd edition (1982), at pp.75-81; N.E. Palmer and D. Yates 'The Future of the Unfair Contract Terms Act 1977' [1981] C.L.J. 108-134, at pp.126-130. See Chapter Eight.

84. See Commissioner of Railways for New South Wales v. Quinn (1946) 72 C.L.R. 307.

85. P.K.J. Thompson, Unfair Contract Terms Act Butterworths (1977) p.8.

Provisions of type (b) are those which restrict or exclude any right or remedy in relation to the liability concerned or subject a person to any prejudice as a result of his pursuing any such right or remedy. For instance, a clause stated -

"... the buyers shall be bound to accept and pay for (the goods) unless the sellers shall within 14 days after arrival of the goods at their destination receive from the buyers notice of any matter or thing whereof they may allege that the goods are not in accordance with the contract".

It was held in Szymonowski & Co v. Beck & Co<sup>86</sup> that this clause did not end the seller's liability after 14 days, but only restricted the buyer's right to reject the goods. Damages were available as a remedy if it could be proved that the goods did not accord to the terms of the contract. In a consumer contract the clause quoted would be rendered ineffective (subject to the reasonableness test) as if it were an exemption clause.<sup>87</sup>

Provisions of type (c) are those that restrict or exclude rules of evidence or procedure. A common example of this provision is that, in a sale of goods or contract of hire, which states that the buyer (or hirer) acknowledges, that before signing the agreement, he has carefully examined the goods and is satisfied that they are of merchantable quality and fit for the purpose for which they are required and that he has read all exemption clauses and accepts them as fair and reasonable. Provisions of this kind, prior to the 1977 Act, had been held to be without legal effect at common law.<sup>88</sup> The Act controls such provisions in that they cannot now be used to exclude evidence that the hirer or buyer did not satisfy himself as to the quality of the goods or the fairness of the agreement.<sup>89</sup>

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86. [1923] 1 K.B. 457.

87. Section 13(1)(b).

88. See Lowe v. Lombank Ltd [1960] 1 W.L.R. 196.

89. Sections 13(1)(c), 25(3)(c).

Section 13(1) also provides that to the extent that exclusion or restriction of any liability is prevented by ss2 or 5-7 of the Act,<sup>90</sup> these sections also prevent exclusion or restriction of liability by reference to terms and notices which exclude the "relevant obligation or duty". This provision covers a notice which, instead of excluding liability for negligence, states, (in effect), that no duty of care is accepted. Such a notice will be treated as operating as an exemption clause.

An agreement in writing to submit present or future differences to arbitration is not to be treated under the Act as excluding or restricting any liability.<sup>91</sup>

(b) Control of Indemnity Clauses

A clause such as that one in the South Wales Switchgear case has been termed a "boomerang" clause.<sup>92</sup> Under the Unfair Contract Terms Act 1977 (UK) a similar clause, because of its commercial context, would still fall to be governed by the common law rules. The Unfair Contract Terms Act, however, controls the use of exemption clauses that are unreasonable under the Act (s4). Where a person deals as a consumer, no term of a contract will be effective to compel him to indemnify another person (irrespective of whether that person is a party to the contract, or not) in respect of liability incurred by the other for negligence or breach of contract. It will be permissible to rely on such a contract term where it satisfies a test of reasonableness (laid down in Schedule 2 of the Act). Section 4 is further qualified by s4(2):

"(2) This section applies whether the liability in question -

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90. These sections are considered at Chapters Five and Six.

91. Section 13(2).

92. [1978] 1 W.L.R. 165; see P.K.J. Thompson Unfair Contract Terms Act 1977 Butterworths (1978), at p.11.

- (a) is directly that of the person to be indemnified or is incurred by him vicariously;
- (b) is to the person dealing as consumer or to someone else".

The potential operation of s4(2) has already been illustrated in the example given in Chapter One of a car firm operator's employees causing injury or damage in respect of which the car owner undertakes to indemnify the operator against claims.

#### Control of Indemnity and Exemption Clauses: Australian Applications

The extension of control to exemption clauses governing areas such as negligence that are within the ambit of the Unfair Contract Terms Act will be considered later in the Australian context.<sup>93</sup> The issue to be considered now is the desirability of amending the Trade Practices Act to cover both exemption and indemnity clauses and to ensure that all clauses which operate as exemption clauses are subject in consumer transactions to the same controls.

Indemnity clauses are not specifically dealt with in the Trade Practices Act. Section 68 refers only to terms which have the effect of excluding, restricting or modifying. That indemnity clauses are impliedly within this section seems self-evident, however, the section could be amended advantageously to include indemnity clauses expressly. Similarly, provisions which are dealt with under s13 of the Unfair Contract Terms Act as having effects similar to those of exemption clauses are within the ambit of s68 of the Trade Practices Act. However, additional guidance may be usefully given by using the categories outlined above under s13 of the Unfair Contract Terms Act. That is to say, s68 could be amended within the terms of s13 to

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93. See Chapter Eight.

the effect that the section applies to provisions that (a) restrict the means of enforcing liability, (b) restrict or exclude the remedy in relation to the liability incurred, (c) restrict or exclude the rules of evidence or procedure. It should be noted that although the Supply of Goods (Implied Terms) Act 1973 (which provided the model for s68 of the Trade Practices Act) originally provided for the invalidation of exemption clauses in consumer contracts for the sale of goods it has been necessary to specify the type of clause to which the extended provisions of the Unfair Contract Terms Act 1977 apply.<sup>94</sup> If, as is later suggested, the Trade Practices Act were to be amended to cover clauses that limit or exclude liability for death or injury arising from negligence, it would be consequentially necessary to introduce the amendment modelled on s13 of the 1977 Act.<sup>95</sup>

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94. The Supply of Goods (Implied Terms Act 1973 (U.K.) s4.

95. See Chapter Seven. For a discussion of the reasonableness test see Chapter Seven.



## CHAPTER THREE

### THE DEFICIENCIES OF THE SALE OF GOODS ACTS

The passing of the Trade Practices Act in 1974 served to accentuate the deficiencies of the Sale of Goods Acts in various states including Tasmania.<sup>1</sup> These shortcomings arose from the inappropriateness of the earlier legislation to consumer transactions of the mid-twentieth century. As Professor Atiyah has put it:

"... the Sale of Goods Act has not proved one of the more successful pieces of codification undertaken by Parliament towards the end of the nineteenth century. The principal reason for this may well be that there has been a change in the type of sale of goods cases coming before the courts. The nineteenth century cases on which the Act was based were, in the main, sales between businessmen or organizations, i.e. sales by manufacturers and suppliers. Since the Act was passed, however, a large proportion of the cases coming before the courts appear to have been sales by retailers to the consuming public. In view of the very different social and economic nature of these transactions, both of which are in law sales of goods, it is not surprising that an Act devised principally for the one has not always worked satisfactorily for the other. It is now noticeable that one of the principal trends of modern legislative change is to discriminate between consumer and non-consumer transactions".<sup>2</sup>

The protection of the implied terms given under the Trade Practices Act to consumers (ss68-72) applies essentially only to those goods supplied to a consumer by a corporation. This leaves it open

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1. Unless otherwise stated all further references in this chapter to the Sale of Goods Act are to the Tasmanian Act.

2. The Sale of Goods Pitman, 5th edition (1975), at p.2. Reference is to the United Kingdom Act.

to a partnership or sole trader or other non-corporate body to exclude or vary the implied terms in a contract under the Sale of Goods Act. The Sale of Goods Act permits the two parties to a contract for sale to exclude any requirements of the Act by either express agreement or in the course of dealings between them.<sup>3</sup>

In transactions between commercial buyers and sellers, the Sale of Goods Act provides a generally suitable code. In order to provide suitable remedies for consumers, it has been judged appropriate in some States to amend the Act by inserting a new section to deal specifically with consumer sales. This is an approach which has been taken in New South Wales by the Commercial Transactions (Miscellaneous Provisions) Act 1974 inserting Part VIII in the Sale of Goods Act 1923 and more recently canvassed by the Victorian Goods (Sales and Leases) Act 1981.<sup>4</sup>

#### The Goods (Sales and Leases Act) 1981 (Victoria)

The Goods (Sales and Leases) Act was introduced in the Victorian Parliament in 1978 as a result of deliberations of the Standing Committee of the Attorneys' General concerning uniform consumer legislation. The Bill was withdrawn then reintroduced and passed in 1981.<sup>5</sup>

The Act by s2(1), inserts a new Part IV in the Victorian Goods Act 1958 making provision for non-excludable terms to be

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3. Section 57 (New South Wales); see note 29, *supra*, Chapter Two.

4. See also Consumers Transactions Act 1972 (South Australia) and the Supply of Goods (Implied Terms) Act 1973 (UK). The latter provided the precedent for subsequent Commonwealth and State legislation.

5. The other Bills, also intended to create a uniformity in important areas of consumer law amongst the States, are now enacted as the Credit Act 1984 and the Chattel Securities Act 1981. See also Credit Act 1984 (New South Wales). For comment and criticism of the Goods (Sales and Leases) Act 1981 see A.J. Duggan and S.W. Begg, 'The New Implied Terms' (1983) 11 A.B.L.R. 284, *et seq.*, 367 *et seq.*

implied in all sales and services (as defined in the Goods (Sales and Leases) Act). Such terms are also implied in certain leases of goods where the cash price of the goods or services or rent under the lease does not exceed \$15,000. Where the cash price does exceed this figure the terms will apply where the goods or services are for personal, domestic or household use or consumption. By s85(1) a reference to a sale does not include -

- "(c) a contract or agreement made before the date of commencement of the Act
- (d) a contract of sale of, or an agreement to sell, goods where a buyer buys, or holds himself out as buying, the goods for the purpose of re-supply or, where the goods are raw materials or goods that are ordinarily acquired for the purposes of repairing or treating other goods or fixtures on land or being incorporated in other goods, for the purpose of -
  - (i) transforming them; or
  - (ii) incorporating them in other goods -in trade or commerce, in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land; or
- (e) a contract of sale of, or an agreement to sell, services where the buyer of those services has contracted to provide those services, or goods and services including those services to a third person."

Division 2 which governs sales repeats the wording of the Trade Practices Act 1974 (as amended) save that "sale" is substituted for the word "supply". The implied terms and conditions under the Trade Practices Act are therefore transferred under the Goods (Sales and Leases) Act to apply those implied terms and conditions to sales, including those by non-corporate bodies, to a consumer (ss.86-90).

Sale of services are dealt with under ss91-94. Notably, the terms implied under these sections are designated conditions rather than warranties as distinct from the latter approach under the Trade Practices Act (s74). Section 92 generally follows the provisions of s74(1) and (2) of the Trade Practices Act, but with some important

differences.

Section 91 implies, in effect, that the services are of merchantable quality. Under s91 services will be provided with an implied condition that these will be rendered with due care and skill. In the case of a sale of services by a person who sells these in the course of a business there is an implied condition that the services are as fit for their purposes for which services of that kind are commonly bought as is reasonable to expect having regard to their price, the terms of the sale and all other relevant circumstances. Section 92 implies into a sale of services in the course of a business a condition (not found in the corresponding provision in s74(2) of the Trade Practices Act) of fitness for purpose or result where the buyer makes known to the seller (or in the course of antecedent negotiation to a dealer or person acting on the seller's behalf<sup>6</sup>) the particular purpose for which the services are required or the result he desires the services to achieve. This implied condition will not apply where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the skill or judgement of the seller, dealer or other person. In contrast to s74 of the Trade Practices Act there is no requirement to the quality or fitness of materials supplied in connection with services<sup>7</sup>.

Section 93 provides for a sale of services by demonstration as follows:

"In a sale of services -

- (a) where the seller shows to the buyer a demonstration of, or a result achieved by, services and the buyer is induced by the demonstration or by the showing of the result to buy services of that kind; or

6. 'Antecedent negotiations' and 'dealer' are defined in s84(1) and (6) respectively.

7. But see s94, infra.

- (b) in which there is a term express or implied to the effect that the sale is a sale of services of the kind that are shown to the buyer in a demonstration, or that achieved a particular result shown to the buyer -

there is -

- (c) an implied condition that the services will correspond in nature and quality with the services shown in the demonstration or will correspond in quality with the services that achieved that result; and
- (d) an implied condition that the services will be free from any defect rendering them unfit for the purposes for which services of that kind are commonly bought that would not be apparent on reasonable examination of the services shown in the demonstration or the result achieved by services of that kind and of which the buyer is not aware when the sale is made".

There is no counterpart to s93 in the Trade Practices Act.

Part IV applies to sale of goods which include services and sale of services which include goods by virtue of s94(1). Sections 94(1) and 94(2) provide that -

"(1) Where, in a sale of goods and services, there is a term that -

- (a) would be a condition of the sale if it were a sale only of the goods; or
- (b) would be a condition of the sale if it were a sale only of the services -

the term shall not be treated for the purposes of this Part as a condition of the sale of the goods and services unless having regard to the sale as a whole, it is shown that the term ought to be regarded as a condition of the sale.

- (2) For the purposes of sub-section (1), a statement in a sale to the effect that a term is not a condition does not of itself establish that the term should not be treated as a condition.
- (3) Notwithstanding anything to the contrary in sub-section (1) a reference to the sale of goods includes a reference to the supply of materials in connexion with a sale of service".

A provision in a contract of sale (including a term that is not set out in the sale but incorporated by another term of the sale) that excludes, restricts or modifies a condition or warranty implied by Division 2 of the Act, or purports to have a similar effect, is void (s95(1)). Additionally, a seller, by s96, who includes, or permits to be included, an exclusionary, restricting or modifying provision in a sale affecting such a condition or warranty, is guilty of an offence.

Section 97<sup>8</sup> deals with limitation and indemnity clauses as follows:

"97(1) Subject to sub-section (3), a contract or provision in or that relates to a sale [is void and constitutes an offence]

- (a) that excludes, restricts or modifies or purports to have the effect of excluding, restricting or modifying liability for damages or limits or purports to have the effect of limiting the amount of damages that may be recovered by a buyer in respect of a breach by a seller of a condition or warranty implied by this Part in a sale;
- (b) requires a buyer to indemnify a seller in respect of damages payable for breach of a condition or warranty implied by this Part in a sale; or
- (c) that provides that a buyer is not entitled to damages, or is entitled only to a limited amount of damages, in respect of a breach by a seller of a condition or warranty implied by this Part in a sale unless he takes such steps or follows such procedures as, but for the provision, a buyer would not reasonably be expected to take or follow. The penalty for breach of ss96 and 97 is 10 penalty points".

It could be argued that s68 of the Trade Practices Act covers the subject matter of s97(1). However, the latter section serves to clearly identify offending clauses. Importantly, ss96 and 95 improve upon s68 of the Trade Practices Act. Section 96 not only

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8. Section rephrased by transposing 'is void' above (a) and adding 'and constitutes an offence' (s98(2)) to assist clarity.

makes void a provision in a contract of sale that excludes, restricts or modifies a condition or warranty implied by Division 2 of the Goods (Sales and Leases) Act but makes it an offence for the seller to include, or permit to be included, such a provision. In addition s95 prohibits such a provision contained in contracts separate from, but related to, the principal contract.

Section 97(3) provides for limitation of liability for breach of condition or warranty in respect of goods and services not of kind commonly purchased for personal, domestic or household use or consumption. A term will not be void which limits the liability of the seller for breach of a condition or warranty (apart from a transaction to the value of \$15,000 under s86) in the circumstances listed below:

"(a) in the case of goods, any one or more of the following:-

- (i) the replacement of the goods or the supply of equivalent goods;
- (ii) the repair of the goods;
- (iii) the payment of the cost of replacing the goods or of buying equivalent goods;
- (iv) the payment of the cost of having the goods repaired; or

(b) in the case of services -

- (i) the supply of the services again, or
- (ii) the payment of the cost of having the services supplied again".

Section 97(3) will not apply in relation to a term in a contract of sale if the buyer establishes that it is not fair or reasonable for the seller to rely upon it; the court in deciding this (following the wording of s4B of the Trade Practices Act)<sup>9</sup> shall have regard to all the circumstances of the case and in particular to the following matters:

"(a) The strength of the bargaining positions of the seller and the buyer relative to each other, taking into account, among other things, the

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9. As amended by the Trade Practices Amendment Act (No. 2) 1977 s3.

availability of equivalent goods and services and suitable alternative sources of supply;

- (b) Whether the buyer received an inducement to agree to the term or, in agreeing to the term had an opportunity of buying the goods and services or equivalent goods and services from any source of supply under a sale that did not include that term;
- (c) Whether the buyer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade or any previous course of dealing between the parties); and
- (d) In the case of a sale of goods, whether the goods were manufactured, processed or adapted to the special order of the buyer."

In a contract for a sale of goods, whether the seller is in breach of the implied conditions of title, freedom from charge or encumbrance (ss86(1)(a),(b)), or in breach of such conditions in the case of a limited title or modified freedom from charge or encumbrance given by a seller or a third party (ss86(3)(c),(d),(e)) the buyer cannot discharge the sale under s98 on grounds of breach unless:

- "(a) he has given notice to the seller to the effect that he will discharge the sale unless the seller within a reasonable time provides good title to the goods or removes the charge or encumbrance on the goods, as the case may be; and
- (b) the seller has not, within a reasonable time after the notice was given, provided good title or removed the charge or encumbrance, as the case may be."

By s99(2) a buyer is not deemed to have accepted goods by reason only that he has retained or used them or if he has not informed the seller of rejection of the goods or returned the goods to him unless a reasonable period of time has expired after the defective nature of the goods became apparent. This applies to a sale of goods where:

- "(a) the goods at the time of delivery to the buyer are defective in breach of a condition implied by this Part in the sale;
- (b) the fact that they are so defective is apparent at that time or becomes apparent within a reasonable period after that time; and



- (c) the buyer has not done any act or thing by reason of which the goods cannot be returned to the seller in substantially the same state as they were in when they were delivered to the buyer".

By s99(3) a buyer is not deemed to have accepted goods as specified by s42 of the Goods Act 1958 (Victoria) where, by agreement with the seller, the buyer, before acceptance, delivers the goods to the seller or to one nominated by him for repair or replacement. Acceptance by the buyer, in these circumstances, will not be effective until the buyer accepts the goods after such repair or replacement. Section 99 does not limit the time within which a buyer may return the goods and treat the sale as repudiated by reason of a breach of condition under s98 (s99(4)). No right is given under s99 to a buyer to discharge a sale of goods where the goods are rendered unmerchantable after delivery to the buyer or are damaged by abnormal use after delivery to the buyer (s99(5)).

Section 100 represents a vital reform by granting rescission to a buyer in the case of innocent misrepresentation:<sup>10</sup>

- "100. (1) Where a buyer enters into a sale of goods after a misrepresentation that is not fraudulent is made to him and, if the misrepresentation had been fraudulent the buyer would have been entitled to rescind the sale by reason of the misrepresentation, the buyer may rescind the sale by notice given to the seller before, or within a reasonable period after, acceptance of the goods.
- (2) Sub-section (1) applies whether or not the misrepresentation has become a term of the sale".

Section 101 governs the situation where a buyer discharges a sale of goods by repudiation or on breach of condition by the seller or rescinds for innocent misrepresentation:

"101. Where a buyer -

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10. See Misrepresentation Act 1971-1972 (South Australia) s6, s7(1); Misrepresentation Act 1967 (UK) ss1,2(1).

- (a) discharges a sale of goods by reason of repudiation or breach of a condition by the seller; or
- (b) in accordance with section 101 (1) rescinds a sale after a misrepresentation that is not fraudulent is made -

the following provisions apply -

- (c) where the goods have been delivered to the buyer and have not been returned to the seller, the buyer shall return the goods to the seller or permit the seller to take possession of the goods;
- (d) the buyer is liable to the seller for loss or damage caused to the goods -
  - (i) by the buyer wilfully or by his negligence while the goods are in his possession during a period of 21 days after discharging or rescinding the sale; and
  - (ii) by the buyer wilfully while the goods are in his possession after the expiration of a period of 21 days after discharging or rescinding the sale;
- (e) where the property in the goods passed to the buyer before the discharge or rescission, the property re-vests in the seller;
- (f) the seller is liable to the buyer for money paid and for the value of any other consideration paid or provided under the sale by the buyer to the seller; and
- (g) where -
  - (i) the buyer used the goods before the discharge or rescission; and
  - (ii) the seller acted honestly and reasonably in selling the goods -

the court by which or arbitrator before whom the matter falls to be considered may if it or he considers it just to do so having regard to all the circumstances of the case allow the seller to recover from the buyer an amount equal to the whole or any part of the fair value to the buyer of this use of the goods".

Division 3 of the Goods (Sales and Leases) Act repeats the provisions of Division 2 in respect of leases.

The Goods (Sales and Leases) Act makes certain improvements to the existing law governing terms implied in consumer transactions. For example, it provides that the use of exempting provisions in contracts are not only void, but illegal (s96) and prohibits such provisions contained in contracts separate from, but related to, the principal contract. Similarly, s91 adds to the protection of the consumer by implying that, effectively, services sold are fit for their purpose. Section 93 is also an innovation in that it implies a condition that services sold will correspond with services demonstrated respecting nature and quality.

However, there are serious deficiencies in the Goods (Sales and Leases) Act<sup>11</sup>. First, the Act does not mirror the corresponding sections of the Trade Practices Act (ss68-74). For example there is no requirement in ss91-93 of the Goods (Sales and Leases) Act relating to the quality or fitness of materials supplied in connection with services. Where the Good (Sales and Leases) Act increases as, for example, protection of the consumer under the provision of ss91, 93, 95-97 noted above, this puts the Victorian Act more out of line with the Federal Act. Since no attempt has been made to consequentially amend the Trade Practices Act there now exists two pieces of legislation, which are applicable to the same transactions, and which effect different reforms although sometimes the same reforms in different ways. The Goods (Sales and Leases) Act, by its very title, covers a narrower ground than that of the Trade Practices Act; so that where the former applies to sales and leases, the latter applies to contracts for the supply of goods and services, and,

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11. See A.J. Duggan and S.W. Begg 'The New Implied Terms' (1983) 11 A.B.L.R. 367, at pp. 394-395.

additionally, has the merit of implying a single set of terms into such contracts.

Secondly, although the intention preceding the passage of the Goods (Sales and Leases) Act was to rationalize the different State laws implying terms into consumer transactions, such an intention has failed. The Goods (Sales and Leases) Act cannot be said to provide a workable model for such a rationalization.<sup>12</sup>

Thirdly, the Goods (Sales and Leases) Act is not entirely consistent in its treatment of transactions which are substantially similar. For example, a person who purchases goods for re-supply will not obtain the benefit of the implied terms under the Act, whereas if he had leased them, he probably would so benefit. With the passage and coming into force of the Victorian Credit Act 1984 this discrepancy is exacerbated with the result that, where goods are acquired by way of hire purchase for the purpose of re-supply that, where goods are acquired by way of hire purchase for the purpose of re-supply, the hirer may, if incorporated, obtain the benefit of the implied terms mentioned above, but not if he is unincorporated.

An alternative, and arguably, better approach to uniformity of implied terms in consumer contracts is outlined subsequently.<sup>13</sup>

#### Implied Conditions in Hire Purchase Transactions

Under the uniform hire purchase legislation,<sup>14</sup> terms of quiet possession, title, freedom from charge or encumbrance, of

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12. See the examples cited by A.W. Duggan and S.W. Begg (see note 11 *supra*); inconsistencies exist between Part IV of the Victorian Goods Act, the Victorian Hire Purchase Act, s5 and the common law in their concurrent application to hire purchase agreements.

13. See below; see Tasmanian Law Reform Commission Report No. 33 1983 (Government Printer) Hobart.

14. Hire Purchase Act 1960 (New South Wales) (now repealed see note 18), Hire Purchase Act 1959 (Victoria), Hire Purchase Act 1959 (Queensland), Hire Purchase Act 1959 (Western Australia), Hire Purchase Act 1959 (Tasmania), Hire Purchase Ordinance 1961 (ACT).

merchantability and of fitness of purpose similar to those implied under the Sale of Goods Acts are written into hire purchase contracts. In respect of consumer transactions, legislation has been enacted in South Australia and, more recently, in Victoria and New South Wales.<sup>15</sup>

The implied conditions of merchantability and fitness of purpose under the Hire Purchase Acts do not apply where the agreement itself contains a statement (acknowledged by the hirer in writing that it has been brought to his notice) that the goods are second-hand and all conditions as to quality (in relation to merchantability) or fitness and suitability (in relation to fitness of purpose) are expressly negated.<sup>16</sup> The provisions will only apply where the owner is a non-corporate body and the transaction is not one of an interstate or overseas nature. For the bulk of consumer transactions the Trade Practices Act will apply because the owner of hired goods will, in the majority of cases, be a corporation.<sup>17</sup> Transactions over \$15,000, unless relating to goods for household, personal or domestic use, continue to be governed by the Hire Purchase Acts, except in New South Wales and South Australia. Such commercial contracts remain unaffected by the recent credit legislation in Victoria and New South Wales.<sup>18</sup>

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15. Consumer Credit Act 1972 (South Australia), Consumer Transactions Act 1972 (South Australia), Credit Act 1984 (New South Wales) Credit Act 1984 (Victoria).

16. Hire Purchase Act 1959 (Tasmania) Part III Division 1, s9(2), (3).

17. See Trade Practices Act 1974 ss68-72.

18. In New South Wales the Hire Purchase Act 1960 has been repealed by the Hire Purchase Repeal Act 1983. In Victoria, however, the Hire Purchase Act 1959 will continue to apply to all hire purchase agreements outside the regulated area (ie. commercial contracts). In South Australia the Consumer Transactions Act 1972 has repealed both the Hire Purchase Agreements Act 1960 and the Moneylenders Act 1946 and in abolishing hire purchase replaced it and the repealed legislation by a rational legal framework for credit including a chattels mortgage. See in relation to bills of sale the Chattels Securities Act 1981 (Victoria).

The Credit Act 1984 (Victoria) and the Credit Act 1984 (New South Wales) regulate credit sales, loan, continuing credit contracts and property mortgages.<sup>19</sup> The supplier and credit provider are both made liable to the consumer if the credit provider is linked to the supplier. This liability is joint and several and covers liability for misrepresentation, breach of contract or failure of consideration in respect of the sale of goods and services.<sup>20</sup> A "linked credit provider" is defined widely to include credit providers who have a continuing relationship with the supplier and to whom consumers are referred or who are promoted by sellers by agreement or arrangement.<sup>21</sup> Both the New South Wales and Victorian Acts make it an offence punishable by a penalty of \$500 for a credit provider (or a mortgagee) to attempt to exclude the provisions of the Act.<sup>22</sup>

#### Further Reform

Clearly the Goods (Sales and Leases) Act 1981 (Victoria) goes a considerable way towards reforming the Goods Act 1958 (Victoria) but does not bring it into line with the Trade Practices Act.<sup>22</sup> An alternative approach to that of the Victorian and New South Wales

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19. Credit Act 1984 (Victoria), Credit Act 1984 (New South Wales) 1981 ss5 and 29.

20. Credit Act 1984 (New South Wales), Credit Act 1984 (Victoria) s24, see Consumer Transactions Act 1972 (South Australia) s13.

21. Credit Act 1984 (New South Wales), Credit Act 1984 (Victoria) s5, Consumer Transactions Act 1972 (South Australia) s5, Trade Practices Act 1974 s73.

22. Section 160 in both Acts; see also Consumer Transactions Act 1972 (South Australia) s47. For a general discussion of the Victorian and New South Wales credit legislation see P.Latimer Australian Business Law C.C.H., 1984 edition, Chapter Fourteen.

23. Criticism of the definition of 'services', 'consumer', and the 'reasonableness' test used in the Victorian Act applies equally to the Trade Practices Act. See Chapters Two and Four.

legislation has been taken by the draft Tasmanian Supply of Goods and Services Bill 1983.<sup>24</sup> The draft legislation, accords with the recommendation of the Swanson Report that States adopt legislation to cover non-corporate bodies outside the Trade Practices Act, in terms similar to the latter Act.<sup>25</sup> It goes further than the Victorian and New South Wales Acts in that it also repeals and amends the Sale of Goods Act.<sup>26</sup> Thus, the whole of the present principal Act is recast to cover all contracts of supply of goods and services. The result is that reference can be made to one single Act that deals with contracts of supply (including sale) and the implied terms apply to all transactions save where these are suitably excluded by agreement in the case of inter-business dealings. It can be noted that the Irish legislature had moved part way to the position taken by the draft Tasmanian Bill in its Sale of Goods and Supply of Services Act 1980.<sup>27</sup>

#### The Irish Sale of Goods and Supply of Services Act 1980

The Irish Sale of Goods and Services Act 1980 in respect of the implied conditions as to title, correspondence with description, merchantable quality and reasonable fitness for purpose, follows

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24. See Appendix B, reproducing the draft legislation contained in Tasmanian Law Reform Commission Report No 33 Report and Recommendations Relation to Exclusion Clauses and Implied Obligations in Contracts for the Supply of Goods and Services (1983).

25. See supra note 8; other differences between the Supply of Goods and Services Bill and the Trade Practices Act are discussed in context, see infra concerning definition of durability.

26. (1896) (Tasmania), amending s1 of that Act and the corresponding long title and amending the Hire Purchase Act 1959 (Tasmania) ss9 and 10.

27. No.16 of 1980. The Act includes, by Part III, provisions concerning implied terms in hire purchase agreements (construing the Irish Hire Purchase Acts 1946 and 1960 and Part III as one). I am grateful to Mr William Binchy, Research Counsellor with the Irish Law Reform Commission in Dublin, for a copy of the Act. For comment on the Act see note by M.H. Whincup [1981] J.B.L. 478.

broadly the wording of the Supply of Goods (Implied Terms) Act 1973 (UK) but with some significant additions. Sale by description is changed by amending s13 of the principal Act in the following terms:

"A reference to goods on a label or other descriptive matter accompanying goods exposed for sale may constitute or form part of a description" (s.10).<sup>28</sup>

Arguably, the new definition makes it easier to reject goods which do not fulfil reasonable expectations raised by presentation or marketing of the goods. It may also make breaches of promises of after-sales service and guarantees actionable.

Goods are of merchantable quality under the Act:

"... if they are as fit for the purpose or purposes for which goods of that kind are commonly bought and as durable as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances, and any reference in this Act to unmerchantable goods shall be construed accordingly" (s10).<sup>29</sup>

By specifying durability as an ingredient of merchantable quality the Irish Act provides a useful innovation in contrast to the existing gap in the principal Act.<sup>30</sup>

The Act further provides an implied warranty for spare parts and servicing. By s12 the Act lays down an implied warranty that spare parts and an adequate after sales service will be available from the seller for any advertised time or, where this is not done, for a reasonable time. The Minister of Industry, Commerce and Tourism is empowered to make orders defining what is a reasonable time. Any attempt to exclude the warranty is void.<sup>31</sup>

In contracts of sale of motor vehicles,<sup>32</sup> s13 implies a condition

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28. Inserting a new s13(3) in the principal Act.

29. Inserting a new s14(3) in the principal Act.

30. See infra.

31. See Trade Practices Act 1974 s74F, noted in Chapter Five infra together with the issue of the provision of spare parts and servicing.

32. Including mopeds and electrically driven vehicles.



that at the time of delivery the vehicle is free from defects endangering the public or anyone in the vehicle. Section 13 does not apply in the case of car trade buyers nor when buyer and seller agree that the vehicle is not intended for use in the state in which it is delivered and a document is signed to that effect by both parties and given to the buyer on or before delivery. An agreement is only effective if it is fair and reasonable in the circumstances. Unless the dealer excludes the implied condition of roadworthiness in the above manner the dealer must give the buyer a certificate in the prescribed form stating that the vehicle is free from dangerous defects when delivered. In an action for breach of the implied condition, where no certificate has been given, it will be presumed that the defect in question existed at the time of delivery.<sup>33</sup> Section 13 also entitles anyone using the motor vehicle with the consent of the owner to sue the seller for breach of the implied condition of roadworthiness "as if he were the buyer" (s13(7)); this innovation marks a move away from the narrow confines of the doctrine of privity.<sup>34</sup>

Manufacturers' guarantees<sup>35</sup> are dealt with in ss15-19. Guarantees are defined as documents, notices or other statements supplied by a manufacturer or supplier other than the retailer which indicate that the manufacturer or supplier will service, repair or otherwise deal with the goods after purchase (s15). A guarantee is required to be clearly legible, to define the goods supplied, to state the name and address of the person offering the undertaking, its duration, precise terms, cost to the buyer, and the procedure for

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33. For Australian legislation see Chapter Five. The English courts have held that a used car dealer gives an implied warranty that the vehicle can be safely and lawfully used on the road unless, it appears, the vehicle is sold 'as is' or for scrap; Lee v York Coach [1977] R.T.R. 35.

34. See Chapter Six.

35. See Chapter Five.

claiming under it. It is an offence to supply a guarantee which does not conform to these requirements (s16). A seller who delivers a manufacturer's guarantee to a buyer is liable for the observance of its terms as if the seller were himself the guarantor, unless he informs the buyer he is not so liable, or gives his own guarantee (s17). Importantly, the buyer may maintain an action against a manufacturer or other supplier who fails to observe any of the terms of the guarantee as if that manufacturer or supplier had sold the goods to the buyer and had committed a breach of warranty. The court is empowered to order the manufacturer or supplier to take such action as may be necessary to observe the terms of the guarantee or pay damages to the buyer. A buyer includes all persons who acquire title to the goods within the duration of the guarantee (s19). This provision may be compared with those under Division 2A of the Trade Practices Act, discussed subsequently.<sup>36</sup>

Part III of the Sale of Goods and Supply of Services Act 1980 deals with title and fitness of goods in hire purchase transactions (ss25-38). Duties imposed on creditors are similar to those imposed elsewhere on sellers in the Sale of Goods and Supply of Services Act (see ss10-12). However, s32 declares the dealer a party to the contract and makes him and the owner jointly and severally liable for any breach of the hire purchase agreement. This contrasts with the usual position of the dealer as an intermediary who links the consumer and the finance company and bears no liability for breach of any implied term of the contract, except upon an express promise which he, as a dealer, makes.<sup>37</sup>

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36. See Chapter Five.

37. See Andrews v. Hopkinson [1957] 1 Q.B. 289; but now see Credit Act 1984 (Victoria), Credit Act 1984 (NSW) s24(1); Consumer Transactions Act 1972 (SA) s13(1); in respect of the liability of the seller and a person conducting antecedent negotiations see Goods (Sales and Leases) Act 1981 (Victoria) s102(1).

Part IV deals with supply of services. The implied undertakings as to quality of service are worded in similar terms to the Trade Practices Act, s74;<sup>38</sup>

- "(a) that the supplier has the necessary skill to render the service;
- (b) that he will supply the service with due skill, care and diligence; and
- (c) that, where materials are used, they will be sound and reasonably fit for the purpose for which they are required; and
- (d) that, where goods are supplied under the contract, they will be of merchantable quality".  
(s39)

These terms may be excluded or varied by agreement or usage. Where the supply is to a consumer it must be shown that any express exclusion of the implied terms is fair and reasonable and has been specifically brought to the consumer's attention.

The United Kingdom legislature has enacted its own Supply of Goods and Services Act 1982. This Act contrasts with both the Irish legislation and the proposed Tasmanian draft legislation.

#### The Supply of Goods and Services Act 1982

The Supply of Goods and Services Act 1982, which was passed on 13 July 1982, makes changes in the law concerning implied terms in contracts for the transfer of property in goods, for the hire of goods and for the supply of services. The Act stems from the recommendations of the Law Commission report Implied Terms in Contracts for the Supply of Goods<sup>39</sup> and the National Consumer Council's report Service Please. The Supply of Goods and Services Act 1982 deals with "Supply of Goods" in Part I (which came into effect together with s17 and related parts of ss18 and 19 on January

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38. See Chapter Two.

39. Law Com. No. 95 (1979).

4 1983) and with the "Supply of Services" in Part II (which with related parts of ss18 and 19 came into effect on July 4 1983). Part III deals with supplementary matters.

The Act has two aims. The first, under Part I implements the Law Commission's recommendations, and reforms the law in respect of the terms to be implied in certain contracts for the supply of goods and to bring these implied terms generally into line with those terms implied by ss12-15 of the Sale of Goods Act 1979. The second, in Part II which is based on the National Consumer Council's report (noted above), is to provide statutory protection to the consumer in the case of contracts of service, and this is mainly done by codifying the common law relating to contracts for service.

### Supply of Goods

A contract for the transfer of goods for the purposes of the Act means a contract under which one person agrees to transfer property in goods to another, other than an excepted contract. An excepted contract (ie. one the Act does not cover means a contract -

- (a) for a sale of goods;
- (b) for a hire purchase agreement;
- (c) under which the property in goods is (or is to be) transferred in exchange for trading stamps or their redemption;
- (d) for a transfer on agreement to transfer which is made by deed and for which there is no other consideration other than the presumed consideration imported by the deed;
- (e) intended to operate by way of mortgage, pledge, charge or other security (s(1(2))).

Under the Act a contract is regarded as a contract for the transfer of goods whether or not services are provided (or to be provided) under the contract and whatever the nature of the

consideration for the transfer or the agreement to do so (subject to s1(2)). The latter provision will therefore cover such items as goods supplied in return for product labels or tear off coupons on packets.<sup>40</sup>

Part I deals with implied terms in the supply of goods. These implied terms are, with one important difference, similar to those in the Sale of Goods Act 1979 ss12-15 concerning title (s2), correspondence with description (s3), merchantable quality and fitness of purpose (s4) and sale by sample (s5).

Where the transferor transfers the property in goods in the course of a business and the transferee either expressly or impliedly makes known any particular purpose for which the goods are being acquired to the transferor and to a credit broker (where the consideration (or part) for transfer is a sum payable by instalments and the goods were previously sold by a credit broker to the transferor) there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied (s4(4),(5)). The background to this provision is to be found in cases such as Spencer Trading Co<sup>41</sup> and Ashington Piggeries.<sup>42</sup> These provisions will not apply when the circumstances show that the transferee does not rely or that it is unreasonable for him to rely, on the skill or judgement of the transferor or credit broker (s4(6)). A credit broker is defined by the Act as a person acting in the course of a business of credit brokerage carried on by him (s18). The above provisions also apply to a transfer by a person who in the course of business is acting as agent for another. They also apply to a transfer by a principal in the course of a business, except

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40. Chappell & Co Ltd v. Nestle's Co Ltd [1959] 2 All E.R. 701; Esso Petroleum Ltd v. Commissioners of Customs and Excise [1976] 1 All E.R. 117.

41. [1947] 1 All E.R. 284.

42. [1971] 1 All E.R. 847. See Chapter Two supra.

where the other person is not transferring in the course of a business and either the transferee knew this or reasonable steps are taken to bring it to the transferee's notice before the contract concerned is made (s4(8)).

An implied condition or warranty about quality or fitness for a particular purposes may be annexed by usage to a contract for the transfer of goods (s4(7)).

### Hire of Goods

A contract for the hire of goods is defined as a contract under which one persons bails or agrees to bail goods to another by way of hire. It does not include a hire purchase agreement or a contract under which goods are (or are to be) bailed in exchange for trading stamps on their redemption (s6(1),(2)). A contract is a contract for hire whether or not services are also provided or to be provided under the contract whatever the nature of the consideration for the bailment, or agreement to bail by way of hire (s6(3)).

A bailor is defined, in relation to a contract for the hire of goods, as a person who bails the goods under the contract or a person who agrees to do so, or a person to whom the duties under the contract of either of those persons have passed. A bailee is described in similar terms as a person to whom goods are bailed under the contract. In each case the definition will be dependent on the context (s18(1)). Essentially, a bailment occurs where one person (the bailor) gives over possession of goods to another (the bailee).

Implied terms concerning hire by description (s8), quality and fitness (s9) and hire by sample (s10) are similar to those governing supply of goods (ss3-5). Additionally, in a contract for the hire of goods, there is an implied condition on the part of the bailor that in the case of a bailment he has the right to transfer possession of the

goods by way of hire for the period of the bailment and in the case of an agreement to bail he will have such a right at the time of bailment. There is also an implied warranty that the bailee will enjoy quiet possession of the goods for the period of bailment except so far as the possession may be disturbed by the owner of other person entitled to the benefit of any charge or encumbrance disclosed or known to the bailee before the contract is made (s7(1),(2)). These provisions do not affect the right of the bailor to repossess the goods under an express or implied term of the contract (s7(3)).

In the case of a contract for the transfer of goods or a contract for the hire of goods a right, duty or liability which would otherwise arise under such a contract may be negated or varied by express agreement, by a course of dealing between the parties, or by such usage as binds both parties to the contract (s11). This is subject to the provisions of concerning consumer supply under the Unfair Contract Terms Act 1977<sup>43</sup> and the provision that an express condition or warranty does not negative a condition or warranty implied by preceding provisions of the Supply of Goods and Services Act unless inconsistent with it. Nothing in those preceding provisions prejudices the operation of any other enactment or rule of law whereby any condition and warranty (apart from one relating to quality and fitness) is to be implied in a contract for the transfer of goods or for the hire of goods (s11).

### Supply of Services

A contract for the supply of services is defined as a contract under which the supplier agrees to carry out a service (s12). A contract of service or apprenticeship is expressly excluded from the

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43. The Supply of Goods and Services Act 1982 by s18 amends the Unfair Contract Terms Act 1977 in that liability for breach of s7 of the 1982 Act (implied condition as to title, etc) cannot be excluded or restricted; see s7(3A) Unfair Contract Terms Act 1977.

definition of a contract for the supply of services. A contract is one for the supply of services under the Act whether or not goods are also transferred or to be transferred, or bailed or to be bailed by way of hire under the contract, and whatever is the nature of the consideration for which the service is to be carried out (s12(1)-(3)). In a contract for the supply of service, where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill (s13). Where the contract does not fix the time for the service to be carried out, or it is left to be fixed in a manner agreed by the contract or to be determined by the course of dealing between the parties, there is an implied term that the supplier will carry out the service within a reasonable time. What is a reasonable time is a question of fact (s14). There is an implied term in similar circumstances to s14 that the party contracting with the supplier will pay a reasonable charge (again, a question of fact) as consideration for the supply of a service (s15).

The Secretary of State may provide by order (the power exercisable by statutory instrument) either of ss13-15 shall not apply to services of a description specified in the order which may make different provision for different circumstances (s12(4),(5)). Exclusion of the implied terms is governed by s16 which is identical to s11. Nothing in this part of the Act may be taken to prejudice any rule of law which imposes on the supplier of services a duty stricter than under s13 or s14 or one whereby any term is implied not inconsistent with this part of the Act. This part of the Act has effect subject to any other enactment which defines or restricts the rights, duties or liabilities arising in connection with a service of any description (s16). The Supply of Goods and Services Act 1982 enacts the recommendations of Law Commission Report Implied Terms in



Contracts for the Supply of Goods (1979). In that Report the Commission stated that the reforms recommended would involve the enactment of further legislation in the supply of goods. One way of reducing the number of statutes in this area, might be, in the Commission's view, to consolidate the then existing legislation on implied terms in contracts of sale, hire purchase and for the redemption of trading stamps with the legislation proposed in the Report.<sup>44</sup> This course has not in fact been followed in the Supply of Goods and Services Act 1982. Even if that course had been followed it would still have been necessary to refer to five major statutes to find all the sale of goods legislation.<sup>45</sup> The Commission regarded the better way of reducing the number of statutes in the field of supply of goods would be to consolidate the legislation relating to contracts for the sale of goods. This was subsequently done in the form of the Sale of Goods Act 1979.<sup>46</sup>

Australian jurisdictions are not faced with the confusing array of statutes concerned with supply of goods and services to be found in the United Kingdom. Arguably, by comparison, the draft Tasmanian Supply of Goods and Services Bill provides a modern and rational framework.

### Durability

The question has been canvassed of how far it is a part of the concept of merchantability that goods supplied should last for a

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44. Law Com. No 95 para.15.

45. Sale of Goods Act 1893; Misrepresentation Act 1967; Supply of Goods (Implied Terms) Act 1973; Consumer Credit Act 1974; Unfair Contract Terms Act 1977. See M. James 'The Supply of Goods and Services Act 1982' [1983] J.B.L. 10.

46. Repealing and re-enacting the 1893 Act and partly doing the same for Supply of Goods (Implied Terms) Act 1973.

particular period of time.<sup>47</sup> The position is unclear, there being few authorities on the point; such reported cases deal with perishable goods and with the issue whether the seller impliedly warrants that the goods will reach their destination in a merchantable condition.<sup>48</sup> The durability of goods is of prime importance to a consumer and it is a defect in the existing law that this aspect should be left in limbo.<sup>49</sup>

The principle that is followed is the general one that goods must be of merchantable quality at the time they were sold and that the criterion of merchantability in the legislation is determined partly by reference to the period of time for which it is reasonable to expect them to last in a sound condition.<sup>50</sup> For example, where a washing machine is sold with an expected durability of five years (not guaranteed expressly to the consumer) and breaks down persistently after one year's use it will not meet the implied conditions of fitness of purpose or of merchantable quality. The alternative approach, and one consistent with the authorities, is that goods should be merchantable and fit for their purpose at the time of sale, and there is no breach unless it can be shown that the defect existed at that time. As Lord Denning M.R. stated in Crowther v. Shannon Motors "If the car does not go for a reasonable time but the engine breaks

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47. See Ontario Law Reform Commission Report on Consumer Warranties and Guarantees in the Sale of Goods (1972) at pp.37-38, referred to subsequently as the Ontario Report; Law Commission, Working Paper No.71 (1977) at p.43 paras.71-75; New South Wales Law Reform Commission Working Paper on the Sale of Goods, pp.148-151.

48. See a review of the earlier cases in Marsh & Murrell Ltd v. Joseph I. Emmanuel Ltd [1961] 1 All E.R. 77.

49. See on the issue of durability Law Commission No.95, Implied Terms in Contracts for the Supply of Goods (1979) paras.100-114. The provisions of Part II of the Supply of Goods and Services Act 1982 (UK) are currently being examined by the Law Commission. The Law Commission is also examining the need for further implied terms as to durability and the availability of spare parts and servicing.

50. This is the principle laid down in Working Paper No.71 in para.72, see note 51 infra.

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up within a short time, that is evidence which goes to show it was not reasonably fit for the purpose at the time it was sold".<sup>51</sup>

The crucial question then arises, what constitutes a reasonable period of time? Although it may be useful to provide specific express warranties in respect of fitness for purpose and merchantability for special classes of goods - e.g. second hand cars - there is also merit in the proposal that the condition of merchantability be enlarged to include a requirement of durability for a reasonable period of time.

The provisional view of the English Law Commission was that this change was not necessary as a court would, unless evidence showed otherwise, find that (in their example) a refrigerator that broke down after one year was not of merchantable quality or fit for the purpose at the time of sale.<sup>52</sup>

The Law Commission had earlier left open the question as to whether the law was satisfactory or whether some new statutory provision was necessary to introduce the concept of durability.<sup>53</sup> They have now concluded that a provision for reasonable durability should become part of the implied obligations of a seller as to quality and fitness. The Commission noted in their report Implied Terms in Contracts for the Supply of Goods that some Canadian Provinces had

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51. [1975] 1 W.L.R. 30, at p.33.

52. Law Commission Working Paper No.71, at para.75; see also the application of fundamental breach to the frequent breakdown of a motor cycle supplied under a hire purchase agreement; the breakdowns were referred to by Lord Denning M.R. termed as "congeries of defects", Farnworth Facilities v. Attryde [1970] W.L.R. 1053. Although the case was not concerned with the implied term of reasonable fitness but a fundamental term of compliance with description the case factually illustrates a not uncommon course of experience on the part of a consumer supplied with defective goods. See also Benjamin Sale of Goods Sweet & Maxwell (1981), at para.995 and the cases there cited, including Yeomen Credit Ltd v. Apps [1962] 2 Q.B. 508.

53. Law Commission Working Paper No.71, at para.75.

implemented this view.<sup>54</sup> On the basis of evidence received on consultation the Commission was convinced that a provision to this effect would help simplify and clarify the existing law. Therefore in all contracts for the supply of goods the suppliers' obligations in respect of the fitness and quality of the goods should include an obligation to the effect that the goods will remain reasonably fit for their purpose for a reasonable period of time. This should be so, in the Commission's view, whether the purpose is general or particular and is made known to the seller. Thus, goods purchased six months earlier should be as fit for their purpose as six-month old goods of their kind can reasonably be expected to be. The Commission regarded the simple concept of reasonable durability as being inadequate. Apart from the common case where goods did not last as long as the purchaser expected them to, there was also the case to be considered where goods were expected to change or develop in a particular way after the supplier had supplied them. As an example, the purchase of seeds for sowing at a later date was instanced. The same principles, it was felt should apply and that goods should be fit at the time of purchase to fulfil that purpose and remain reasonably fit for a reasonable time after that. The Commission did not include their recommendations as to durability in their draft Bill to amend the Sale of Goods Act as they were proposing to investigate undertakings as to quality and fitness of goods under a new reference.<sup>55</sup>

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54. See the Nova Scotia Consumer Protection Act R.S.N.S. 1967 c.53 as amended by R.S.N.S. 1975 c.19 s20c(3)(j); the Saskatchewan Consumer Products Warranties Act 1977, s11(7) and see note 48 supra.

55. Implied Terms in Contracts for the Supply of Goods Law Com. No.95 (1979) para.113. See note 32 of the 1979 Report for the Law Commission's new terms of reference. The draft Bill was subsequently incorporated into the Sale of Goods Act 1979 which repealed and re-enacted the 1893 Act (as amended). See now Working Paper No 85 (The Law Commission), Consultative Memorandum No. 58 (The Scottish Law Commission) Sale and Supply of Goods (1983) discussed infra.

However, legislation in particular Canadian provinces had, for some time, contained provisions governing this aspect of a seller's obligations.<sup>56</sup> The Report was opposed to limitation by a seller of his obligation to supply goods that remain fit for their purpose by imposing a time period. The Report, therefore, recommended that the statutory test of reasonable durability should remain the paramount test and that a buyer should not be prevented from challenging the adequacy of an express warranty of durability. The original Goods (Sales and Leases) Bill (Victoria) excluded the application of the conditions of correspondence of goods, or sample, with description, merchantable quality and fitness of purpose in the case of a contract for the sale or agreement to sell a second-hand car to which Part VI of the Motor Car Traders Act 1973 (Victoria) applies. The present Goods (Sales and Leases) Act 1981 does not contain such an exclusion.<sup>57</sup>

It is noteworthy that there have been legislative proposals made in the United Kingdom to amend the definition of merchantable quality and of fitness. A Bill, the Supply of Goods Amendment Bill, introduced in the autumn of 1978 in the House of Commons by the Rt Hon Donald Stewart MP, was subsequently withdrawn.<sup>58</sup> This Bill sought to amend s62(1) of the Sale of Goods Act and s7(2) of the Supply of Goods (Implied Terms) Act 1973. By s1 the Bill added in place of s7(2) of the 1973 Act; the following :

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56. See Farm Implement Act 1970 (Alberta), Agricultural Implements Act 1968 (Saskatchewan), Farm Machinery and Equipment Act 1971 (Manitoba), Farm Implement Act 1968 (Prince Edward Island); see also Table 10 at pp.98-99 of the Ontario Report.

57. In the Tasmanian context see comparable provisions of the lapsed Secondhand Vehicle Dealers Bill 1978 (Tasmania).

58. I am grateful to Mr Stewart M.P. for a copy of his Bill and of the reply by then Secretary of State for Prices and Consumer Affairs, the Rt Hon John Fraser, to Mr Stewart's question as to plans for reviewing the Sale of Goods Act 1893 (31/1/1979).

"(2) After section 62(1) of the principal Act there shall be inserted the following subsection:

(1A) Goods of any kind are of merchantable quality within the meaning of this Act if the goods tendered in performance of the contract are of such type and quality and in such condition that having regard to all the circumstances, including the price and description under which the goods are sold, a buyer with full knowledge of the quality and characteristics of the goods, including knowledge of any defects, would, acting reasonably, accept the goods in performance of the contract."

The Bill was later withdrawn with the approval of the Consumers' Association and the then Minister of Prices and Consumer Affairs arranged for the matter to be referred to the Law Commission. In a reply to a tabled question in Parliament, the Secretary of State for Prices and Consumer Affairs stated that the government recognised the need, which the Bill had highlighted, for a thorough-going examination of the rights of buyers where goods were defective.<sup>59</sup>

#### The Law Commissions' Provisional Proposals

In 1979 the Law Commissions in both England and Scotland were asked by the Lord Chancellor to consider, amongst other matters, whether the undertakings as to quality and fitness of goods implied under the law relating to the sale of goods, hire purchase and other contracts for the supply of goods required amendment<sup>60</sup>.

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59. See note 58, supra.

60. Under the Law Commission Act 1965, s.3(1)(c). The reference also included for consideration: (b) the circumstances in which a person to whom goods are supplied under a contract of the kind specified above, where there has been a breach by the supplier of the term implied by statute is entitled to (i) reject the goods and treat the contract as repudiated; (ii) claim against the supplier a diminution or extinction of the price; (iii) claim damages against the supplier; (c) the circumstances in which by reason of the Sale of Goods Act 1893 a buyer loses the right to reject the goods and to make recommendations. This part of the reference will not be discussed.

In October 1983 the Law Commissions published a Working Paper entitled Sale and Supply of Goods<sup>61</sup>. Amongst other matters the Law Commissions assessed the implied terms of quality and fitness in the Sale of Goods Act 1979, in contracts for the hire purchase of goods under the Supply of Goods (Implied Terms) Act 1973 and in other contracts for the supply of goods by virtue of the Supply of Goods and Services Act 1982.<sup>62</sup>

### Merchantable Quality

The Law Commissions noted that two main approaches had developed in reaction to the question of what was meant by merchantable quality. The first, termed the "acceptability test" by the Law Commission, derived from the statement of Dixon J. in Australian Knitting Mills v. Grant<sup>63</sup>:

"(the goods) should be in such an actual state that a buyer fully acquainted with the facts and, therefore, knowing that hidden defects existed and not being limited to their apparent condition would buy them without abatement of the price obtainable for such goods if in reasonably sound order and condition and without special terms."

The second, termed the "usability test" was set out by Lord Reid in Kendall and Sons v. Lillico and Sons Ltd. as follows<sup>64</sup>:

"What subsection (2)<sup>65</sup> now means by merchantable 'quality' is that the goods in the form in which they were tendered were of no use for any purpose for which goods which complied with the description under which these goods were sold would normally be used, and hence were not saleable under that description."

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61. Working Paper No. 85 (The Law Commission), Consultative Memorandum No. 58 (The Scottish Law Commission).

62. Under ss.10 and 15 of that Act. The Act does not apply to Scotland.

63. (1933) 50 C.L.R. 387, at p.418 (H.C.)(reversed on the facts by the Privy Council) adapting the earlier test of Farwell L.J. in Bristol Tramways v. Fiat Motors [1910] 2 K.B. 831, at p.841.

64. [1969] 2 A.C. 31, at pp.77-78.

65. Now s.14(2) of the Sale of Goods Act 1979.



The distinction between the acceptability test and the usability test, however, was not clear cut, as both tests being referred to with approval in several judgments.<sup>66</sup> In cases concerning goods purchased for business purposes, the usability test has tended to be applied. In at least one case goods were held to be of merchantable quality on the basis that they were saleable or usable for some purpose, even if not for the primary purpose for which they were bought. Thus in Brown v. Craiks<sup>67</sup> cloth unfit for dress material was nevertheless held to be merchantable as it was usable for industrial purposes.<sup>68</sup>

In 1968, the Law Commissions in their consultative document<sup>69</sup> on amendments to the Sale of Goods Act proposed, for comment, an improved and expanded version of the acceptability test as follows:

"'Merchantable quality' means that goods tendered in performance of the contract shall be of such type and quality and in such condition that, having regard to the circumstances, including the price and description under which the goods are sold, a buyer with full knowledge of the quality and characteristics of the goods, including knowledge of any defects, would, acting reasonably, accept the goods in performance of the contract."

The test attracted criticisms, accepted by the Law Commissions subsequently in their report, Exemption Clauses in Contracts, First Report: Amendments to the Sale of Goods Act,<sup>70</sup> that whether a fully informed buyer would accept the goods would depend on whether the

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66. See Kendall v. Lillico [1969] 2 A.C.31 per Lord Guest 107, 108 (favouring the acceptability test as it referred to price); Cehave N.V. v. Bremer [1975] 3 All E.R. 739 (C.A.), per Roskill L.J. 758-760, Ormrod L.J. 763-764. In Bartlett v. Sydney Marcus [1965] 2 All E.R. 743, 756 Salmon L.J. was of the opinion that there was nothing between the two tests other than semantics.

67. [1970] 1 W.L.R. 752.

68. See also Kendall v. Lillico, above, where groundmeat extracts were found unfit for poultry but usable as cattle food.

69. Working Paper No. 18. Consultative Memorandum No. 7.

70. Law. Co. No. 24, Scot. Law com. No. 12(1969).

goods did comply with the contract; the definition thus circuitously concluded by saying that goods would comply with the contract if they complied with the contract. The Commission bowed to these criticisms<sup>71</sup> and dropped the proposed test and recommended that test now enshrined in the Sales of Goods Act 1979.<sup>72</sup>

The Law Commissions in their 1983 consultative document dealt with two criticisms of the implied term as to merchantable quality.<sup>73</sup> First, that the criterion of merchantability itself is out of date and inappropriate in the context of modern consumer transactions. Secondly, that the term concentrated too exclusively on fitness for purpose and did not make sufficiently clear that other aspects of quality were of importance, such as appearance and freedom from minor defects, durability and safety.

#### "Merchantable"

The Law Commissions regarded the word "merchantable" as having a meaning inappropriate in the context of consumer transactions; the expression "merchantable quality" according to Benjamin "... [is] and always has been a commercial man's notion."<sup>74</sup> The basic objection, given the commercial bias in the definition itself which assumed that goods unsatisfactory for one purpose may generally be sold or used for another, was that "from the consumer's point of view ... the very starting point is wrong and needs to be considered."<sup>75</sup> The term "merchantable quality" had also been

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71. Ibid, para 43. For comment, see infra at pp. 121-122.

72. Section 14(6) which requires goods of merchantable to be as fit for the purpose or purposes for which goods of that kind are commonly bought as is reasonable to expect having regard to any description applied to them, the price (if relevant) and all other relevant circumstances.

73. Working paper No. 85, paras. 2.5-2.13.

74. Benjamin Sale of Goods 2nd edition, (1981), at para. 808.

75. Working Paper No. 85, para. 2.6.

criticised in the context of commercial transactions in Cehave N.V. v. Bremer<sup>76</sup>. The Court of Appeal held that a consignment of citrus pulp pellets was merchantable, even though part of it was damaged and could only be used mixed in cattle food in smaller amounts than if the product had been undamaged. There were, however special factors in the case. One was the existence of an express term entitling the buyer to an allowance off the price if the condition of the pellets was defective. The other was the fact that the buyer, having rejected the goods, repurchased them at a lower price, owing to a fall in the market and then used them for their originally intended purpose. The court may, thus, have intended to avoid a situation where the buyer made a profit. In considering the term "merchantability" Ormrod L.J., in Cehave, pointed out difficulties which had surrounded it since the inception of the Sale of Goods Act 1893:

"In the intervening period the word [merchantability] has fallen out of general use and largely lost its meaning except to merchants and traders in some branches of commerce. Hence the difficulty today of finding a satisfactory formulation for a test of merchantability. No doubt people who are experienced in a particular trade can still look at a parcel of goods and say 'those are merchantable but only at a lower price' distinguishing them from 'job lots' or 'seconds'. But in the absence of expert evidence of this kind it will often be very difficult for a judge or jury to make the decision except in obvious cases."

The Law Commissions were of the view that even where experts in the trades referred to by Ormrod L.J. in the above case could meaningfully reach a conclusion, it doubted how far the term "merchantable" could be used other than it was used in the Sale of Goods Act. Accordingly, the Law Commissions regarded "merchantable" as essentially obsolete for all ordinary purposes and

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76. [1975] 3 All E.R. 739.

77. Ibid. p.80. In this case the finding of commercial arbitrators as to merchantable quality of the goods was held to be wrong in law.

recommended that it be replaced.<sup>78</sup>

### Minor Defects

The Law Commissions also considered the position concerning minor defects in goods. In its view the law was not clear before the introduction of the statutory definition of merchantable quality<sup>79</sup> and had remained unclear subsequently. Criticism of this definition has been based on the view that minor defects (for example, scratches and dents in new articles for consumer use, cars and electrical household goods) may cause inconvenience for a buyer who may justifiably claim that these goods are clearly not in the condition in which they should be when delivered. Two arguments were cited by the Law Commissions:<sup>80</sup> first, the definition is claimed to concentrate exclusively on the fitness of the goods for the purpose or purposes for which they are commonly purchased. The usability test, thus, concerns itself only with defects which interfere with the main use or uses of the article and not with less important defects which do not prevent such use or uses. Secondly, defining goods as being of merchantable quality if they are fit for the purpose or purpose, "as it is reasonable to expect", possibly may result in the definition lowering the appropriate standard of merchantable quality in cases where a seller is able to establish that goods of a particular type, such as a new car, can reasonably be expected to have a number of minor defects on delivery. Thus, as defects increase in number and frequency they are less likely to be regarded as being a breach of contract. Lowering of manufacturing standards, including quality control would be accompanied by a corresponding decline in the

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78. Working Paper No. 85, para 2.7. See comment infra at pp.121-122.

79. Sale of Goods Act 1979, s.14(6), originally enacted in the Supply of Goods (Implied Terms) Act 1973, s.27(2).

80. Working Paper No. 85, paras. 2.10-2.11, referring to Merchantable Quality - what does it mean?, Consumers' Association (1979), at p.32.

statutory standard of merchantable quality.

The Law Commissions, as an illustrative example of the validity of the above arguments, referred to a Scottish decision, Millars of Falkirk Ltd. v. Turpie<sup>81</sup>. In that case, a new car was found, on delivery, to have an oil leak in the power-assisted steering column. The dealers took the car back on the same day and effected repairs but nevertheless on the next day the leak recurred. The buyer then refused to pay the balance of the price on the car and rejected it on the ground that it was not of merchantable quality. The court unanimously upheld the decision of the Sheriff that the car complied with the requirement of merchantable quality. Lord President Emslie held that the Sheriff was entitled to reach that conclusion; he stated:

"I have in mind particularly that the relevant circumstances included these: (i) the defect was a minor one which could readily and very easily be cured at very small cost; (ii) the pursuers were willing and anxious to cure the defect; (iii) the defect was obvious and the risk of the car being driven long enough to create some danger if the steering unexpectedly ceased to be assisted was slight; (iv) many new cars have, on delivery to a purchaser, some defects and it was not exceptional for a new car to be delivered in the condition in which the defender's car was delivered."<sup>82</sup>

The Lord President added that it appeared to have been common ground that the car had been sold with a manufacturer's repair warranty, although this had not been produced in evidence. Such a document, it may be assumed, would have been a further factor in considering "... all other circumstances" under the statutory definition.

The Law Commissions regarded Turpie's case as illustrative of the approach courts would be likely to take in similar cases where several, or, perhaps even numerous, minor defects are found to exist on delivery in goods such as cars which are of complex structure. Despite support for the view that the present statutory definition

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81. 1976 S.L.T. (Notes) 66; Inner House of the Court of Session.

82. Ibid., at p.68.

covered freedom from minor or cosmetic defects<sup>83</sup>, the Law Commissions considered it as highly undesirable that there should be any uncertainty on the point.<sup>84</sup> Accordingly there should be a clear statutory provision that the requirement of quality included freedom from minor defects.<sup>85</sup>

### Durability

The Law Commission had recommended in its earlier report Implied Terms in Contracts for the Supply of Goods that an express provision on durability be incorporated in the Sale of Goods Act<sup>86</sup>. The Law Commissions now took the view that lack of an express reference to durability was a justifiable criticism of the present law and such a provision would make it easier for a consumer to establish a breach of contract.<sup>87</sup>

### Safety

The Law Commissions similarly noted the lack of a clear requirement that the implied term as to quality should include a requirement that goods should be reasonably safe. As in the case of durability the Law Commissions regarded safety as a specific ingredient in the definition of quality.<sup>88</sup>

### Spare parts and servicing facilities

The Law Commission reaffirmed the earlier conclusions, made in

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83. R. Goode, Commercial Law, Harmondsworth; Penguin Books (1982), at p.262.

84. Citing Jackson v. Rotax Motors and Cycle Co. [1910] 2 K.B. 937 (minor scratches and dents held to make motor horns unmerchantable); Winsley Bros v. Woodfield Importing Co. [1929] N.Z.L.R. 480 (machine costing 90 held to be unmerchantable because of defects costing 1 to remedy).

85. Working Paper, at para. 2.13; see specific proposals discussed *infra*.

86. Law Com. No. 95, (1979), at para.113. See also the recommendation of the Scottish Consumer Council, Review of the Law of Sale of Goods in Scotland (1981), at para. 8.5.

87. Working Paper No. 85, at para. 2.15.

88. Ibid., at para.2.16.

the Law Commission's report Implied Terms in Contracts for the Supply of Goods, that no legal obligation should be created where the seller or supplier is required to maintain stocks or provide servicing facilities.<sup>89</sup> This aspect may be contrasted with the Australian approach under the Trade Practices Act 1974 where such an obligation exists.<sup>90</sup>

#### Comment on the Law Commissions' Criticism of the Current Definition of Merchantable Quality

At this point, it is useful to review the Law Commissions' criticisms of the term "merchantable quality".

The first area of criticism centres on the imprecision of the term itself, both in its statutory form and as judicially interpreted. Against this can be set the cautionary words of Lord Reid in Brown v. Craiks:

"... judicial observations can never be regarded as complete definitions, they must be read in the light of the facts and issues raised in the particular case. I do not think that it is possible to frame, except in the vaguest terms, a definition of 'merchantable quality' which can apply to every kind of case."<sup>91</sup>

This passage was cited with approval by Lord Denning in Cehave N.V. v. Bremer<sup>92</sup>. Lord Denning in that case regarded the definition of merchantable quality<sup>93</sup> as "the best that has yet been devised".<sup>94</sup> His subsequent analysis, epitomises the recognition by many judges that, in their view, "merchantable quality" is a general term which is to be given a meaning according to the facts of each case:

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89. Law Com. No. 95 (1979), at para. 115.

90. See Trade Practices Act 1974, Division 2A, s.74F. This matter is discussed separately, Infra. Chapter Five.

91. [1970] 1 All E.R. 824, at p.825.

92. [1975] 3 All E.R. 739, at p.748.

93. At that time, s.27(2), Supply of Goods (Implied Terms) Act 1973.

94. [1975] 3 All E.R. 739, at p.748.

"... I should have thought a fair way of testing merchantability would be to ask a commercial man : was the breach such that the buyer should be able to reject the goods? In answering that question the commercial man would have regard to the various matters mentioned in the new statutory definition. He would, of course, have regard to the purpose for which goods of that kind are commonly bought."

The statement of Lord Denning would appear to be a convenient summary of how merchantable quality or merchantability, has been regarded by the courts. Lord Denning uses the phrase "commercial man" partly because the instant case involved an inter-business contract and particularly because the original Act was framed with commercial practice and rules as its basis. What the Law Commissions recommend in their Working Paper is the replacement of the current definition with more precise criteria (considered below) and the removal of the term "merchantable" quality from the statute. The problem with this approach is that it presupposes that what will be beneficial in the case of contracts involving a consumer or consumers will be of equal benefit to commercial parties contracting between themselves. It can be argued that, apart from requirements that goods be durable and safe, the present definition needs to change on the grounds that it is a general definition which applies to both commercial and consumer contracts.

In criticising the imprecision of the term "merchantable quality", the Law Commissions may have ignored the flexibility which stems from this. This flexibility would be lost in the case of commercial contracts if the definition was made more precise, in that criteria other than those outlined by Lord Denning were statutorily written into the term merchantable quality. If the issue of minor defects is taken into account, as the Law Commissions suggest, then undue inflexibility would result in commercial contracts which could well run counter to the express terms accepted by the parties. One



can usefully contrast the Cehave<sup>95</sup> and Turpie<sup>96</sup> cases. In the Cehave case the contract contained a stipulation that the goods were "shipped in good condition." Lord Denning regarded this clause as comparable to a clause as to quality so that if a small proportion of the goods sold was a little below that standard it would be met by commercial parties by a reduction of price.<sup>97</sup> Therefore the buyer would have no right to reject the whole of the goods unless the difference in quality was serious and substantial. In the case before him, his Lordship noted, the standard form provided for percentages of contamination, below which there was a price allowance, and above which there was a right of the buyer to reject.<sup>98</sup> Similarly in the case of the clause "shipped in good condition," if a small proportion of the whole cargo was not in good condition and had arrived a little unsound, it should be met by a reduction in the price. The buyers, in Lord Denning's view, should not have the right to reject the whole cargo unless the defects in the cargo were serious and substantial. His Lordship cited the difficulty arising on a c.i.f. contract as to whether the damage was done before or after shipment. In the latter case the buyer would have no claim against the seller but would be left to claim against the insurers. Therefore, as a matter of good sense, the buyer should be bound to accept the goods and not reject them unless there was a serious and substantial breach, for which the seller was responsible.

Buyers should not have a right to reject the whole cargo unless the difference in quality was serious and substantial. This contention Lord Denning regarded as being borne out by the difficulty often arising in c.i.f. contracts (as this was) as to whether

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95. Cehave N.V. v. Bremer [1975] 3 All E.R. 739.

96. Supra, Millars of Falkirk Ltd. v. Turpie, 1976 S.L.T. (Notes) 66.

97. [1975] 3 All E.R. 739, at p.747.

98. Form 100 Cattle Food Trade Association, cl.5.

the damage was done before shipment or afterwards.<sup>99</sup> In the latter case the buyer would have no claim against the seller but would have to pursue his claim against the insurers. As a matter of common sense, his Lordship felt that the buyer was bound to accept the goods and not to reject them, save where there was a serious and substantial breach that could be fairly attributable to the seller.<sup>1</sup> Further, he considered the term "shipped in a good condition" as neither a condition nor a warranty but an intermediate stipulation, an innominate term, which gave no right to reject the goods unless the breach went to the root of the contract. The condition of the goods, delivered by instalments, could not, in Lord Denning's view, be considered very bad as all of them were in fact used for their intended purpose. Accordingly the breach entitled the buyer to damages only, not the right to reject the goods.<sup>2</sup>

If one compares the Cehave case, which involved the sale of citrus pulp pellets under a standard commercial contract, with Turpie's case which concerned a consumer contract for a new car, the inappropriateness of writing in liability for minor defects to a general definition of merchantable quality becomes apparent. In Turpie's case the defect, an oil leak in the power-assisted steering column of the car, did not affect the main use of the car, nor did it render it unsafe. It was capable of being readily and easily cured at little cost and the suppliers were willing to effect the repairs; the sale under the manufacturer's repair warranty would have been an additional factor in concluding that the car was of merchantable quality. If one were to apply the standard of the fastidious and, as in the above case, arguably, unreasonable consumer to inter-business sales contracts not only will flexibility be lost but uncertainty will appear in transactions to a degree much greater than currently exists.

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99. [1975] 3 All E.R. 739 at pp.747-748.

1. Ibid. at p.748.

2. [1975] 3 All E.R. 739, at p.748.

Given that the Law Commissions subsequently rejected the argument that different standards of quality should apply to different types of transactions, goods or classes of buyer and seller, on practical grounds and regarded a newly formulated definition of "quality" should embrace both consumer and non-consumer contracts,<sup>3</sup> it is, then, important to consider the effect of a reformulated statutory standard of quality which specifically included freedom from minor defects as a factor.

#### Proposals for Reformulation of a New Standard of Quality

The Law Commissions regarded the best method of reformulating a new standard of quality was to lay down a flexible standard linked with a clear statement of certain important elements included within the idea of quality - such as freedom from minor defects, durability and safety - and a list of the most important factors, such a description and price, which would normally be taken into consideration in determining the standard to be expected in any particular case. The method the Law Commissions proposed would not give priority to any particular element, all of which might not necessarily be relevant in particular cases<sup>4</sup>. Three options appeared open, (i) to formulate the standard by using some qualitative adjective such as "good"; (ii) basing the standard on a concept of "full acceptability"; (iii) basing the standard on a neutral adjective with few connotations, relying for its meaning on subsequently specified matters on the circumstances of the particular case. In all cases, the Law Commissions' envisaged that the formulation of the required standard of quality would be accompanied by a statement of certain important elements included within the concept of quality and by a list of factors to be taken into account in deciding whether the

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3. Working Paper No. 85, para 4.6.

4. Ibid., at para. 4.7.

required standard had been reached.<sup>5</sup>

(i) "Good" Quality

The Law Commissions, as earlier noted<sup>6</sup>, regarded the word "merchantable" as having little meaning save "saleable". However, replacing it with "good" or "sound" was felt<sup>7</sup> to be appropriate for some transactions but not others. "Reasonable quality" was thought to indicate that goods were not expected to be of high quality. Doubt was expressed that a suitable qualitative adjective existed with sufficient flexibility and suggestions were sought as to what might be suitable.<sup>8</sup>

(ii) "Full Acceptability"

The standard of "full acceptability" ought to convey in the Law Commissions' view, that the goods supplied should be of such quality as would in all the circumstances of the case be acceptable to a reasonable buyer who had full knowledge of their condition, quality and characteristics<sup>9</sup>. This standard of "full acceptability" or "acceptability in all respects", was based on the concept of the "reasonable buyer" and his assumed knowledge of the condition, quality and characteristics of the goods.<sup>10</sup> The intention was for the standard to be, as far as possible, an objective one. For instance, a reasonable buyer would not consider the goods acceptable if they had minor defects; however, the test of a "reasonable buyer in all circumstances" should, as the Law Commissions recommended, prevent too high a standard being required where, as regards price for example, only a lower standard could reasonably be demanded. Despite the flexibility claimed for the standard of "full acceptability",

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5. Working Paper No. 85, at para. 4.6.

6. *Ibid.*, at para 2.7, *supra* p.117.

7. Working Paper No.85, at para 4.9.

8. *Ibid.*

9. Working Paper No. 84, at para. 4.10.

10. *Ibid.*

the test is open to objections. The concept of the hypothetical "reasonable buyer" might complicate the implied term and make it more difficult to apply. Such a buyer, on the one hand, would not be credited with intentions such as the use of the goods for one purpose rather than another but might operate as an objective bystander. However, on the other hand, he might also be credited with a knowledge of latent defects and deficiencies in the goods. This, therefore, might be regarded as making it more difficult to solve the problem of a satisfactory formula. Additionally, the "reasonable buyer" concept could be seen as an illusion as there is no actual, ascertainable standard of full acceptability to the reasonable buyer, even in ordinary transactions. Accordingly, the Law Commissions did not regard this approach as laying down a meaningful test as this, essentially, said that goods must be of such quality that a court would regard as being fully acceptable in all the relevant circumstances.<sup>11</sup>

(iii) "Proper Quality"

The third possibility raised by the Law Commissions was to replace the word "merchantable" by a single neutral adjective such as "appropriate", "suitable" or "proper" followed by a list of principal factors relevant in deciding whether the standard had been met. This approach would require the standard to be judged by reference to the specified matters rather than vice versa. Hence, concentration could be directed at the essential question - whether the goods are of the appropriate quality having regard to the specified matters and all the circumstances. On the other hand, while the Law Commissions considered that the third option was free of some of the objections to the second, the form of words might be regarded as close to

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11. Working Paper No. 84, at para. 4.11.

meaningless. Such a position would be regarded as unsatisfactory, in that the legislation should provide a standard which would be virtually without content except to the extent that the court might take into account the specified matters and all the circumstances of the case in deciding if the standard had been met.<sup>12</sup>

#### Elements to be Specified as Relevant to Quality

The Law Commission selected four elements that might be specified as relevant to the standard of quality. These were : fitness for purpose, appearance, finish and freedom from minor defects, suitability for immediate use, durability and safety. A draft clause including these elements was also proposed for comment.

The Law Commissions were of the view that, in a new definition of quality fitness for purpose or purposes for which goods of that kind are commonly bought should be included as one aspect of quality but not a predominant one. This "demotion" of the fitness test would prevent the re-emergence of the notion that quality was confined to usability.<sup>13</sup>

The new definition should also include a provision that made it clear that quality appearance, finish and freedom from minor defects. The Law Commissions were of the view that the provision should be directed primarily, but not exclusively, to consumer sales. The criticism of inclusion of this provision in a new definition has already been made above. There should also be a specific reference to the suitability of the goods for immediate use. As an example, a complex self-assembly kit was instanced, which although not suitable for immediate use because of its very nature, might not be so if it was sold without adequate instructions.

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12. Ibid., at para. 4.12.

13. Working Paper No. 85, at para.4.13. The state or condition of quality under the Sale of Goods Act 1979, s.61(1); this should continue to be included in the opinion of the Law Commissions (para.4.14).

As noted earlier,<sup>14</sup> the Law Commissions maintained that there should be a reference to durability which would be applied to both consumer and commercial contracts. No express reference ought be made to relevant codes of practice on the basis that judicial discretion should decide the issue and particular reference might lead to manufacturers and trade associations objecting to the use of the codes.<sup>15</sup>

On the issue of safety, the argument was noted that no express reference to the matter was necessary, as its importance was sufficiently obvious. However, the Law Commissions were of the opinion that to leave out reference to such an important matter would seem odd given the nature of many modern consumer goods. The Law Commissions therefore provisionally proposed an express reference to safety in any definition.<sup>16</sup>

#### Factors Affecting the Required Standard of Safety

The current definition of "merchantable quality" in the Sale of Goods Act 1979<sup>17</sup> requires goods to be,

"as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all other relevant circumstances."

The words "as is reasonable to expect" would be removed under the Law Commissions' proposals, but the variables affecting the standard of quality, eg. description and price, would be retained in the present wording.

For the purposes of obtaining opinions on its proposals concerning a new term as to quality, the Law Commissions put forward the following clause for consideration and comment.

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14. Working Paper No. 85, at paras.2.14-2.15.

15. Ibid., at para.4.19.

16. Working Paper No. 85, at para.4.21.

17. Section 14(6).

"(1) Where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of [proper quality][acceptable quality in all respects] except that there is no such term -

(a) as regards defects specifically drawn to the buyer's attention before the contract is made; or

(b) if the buyer examines the goods before the contract is made, as regards defects which that examination ought to reveal.

(2) For the purposes of paragraph (1) above "quality" in relation to goods includes, where appropriate, the following matters:

(a) fitness for the purpose or purposes for which goods of that kind are commonly bought;

(b) appearance, finish, suitability for immediate use and freedom from minor defects;

(c) safety;

(d) durability;

and in determining whether goods supplied under a contract are of [proper quality][acceptable quality in all respects] regard shall be had to any description applied to them, the price (if relevant) and all the other relevant circumstances."

#### Comment on the Law Commissions' proposals for a new definition of quality

The Law Commissions proposals put forward for comment in respect of the implied terms of quality and fitness discussed above would appear to have two main weaknesses. First, although the term "merchantable" may have little meaning outside commercial circles, and even within them be limited to a general concept of "saleable," no viable alternative is offered by the Law Commissions, on their own admission.<sup>18</sup> "Good", "sound" or "reasonable" quality were all rejected, the Law Commissions doubting, "whether any qualitative adjective exists which contains the necessary flexibility." The suggested standard of "full acceptability" was also discarded, on the basis that it would be left to the court to decide as to whether the goods were of such quality as to be fully acceptable in the circumstances. This attitude can be linked to the general issue of the "usability" and "acceptability" tests. The Law Commissions had previously, as noted, put forward an improved version of the acceptability test<sup>19</sup>. Despite

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18. Working Paper No. 85, at paras.4.9,4.12.

19. See Law Com. No. 24, Scot. Law Com. No. 12 (1969).



the fact that this was subsequently dropped in favour of the test of "usability" now enshrined in the Sale of Goods Act 1979<sup>20</sup>, the acceptability test has a number of merits. Since the test is subjective, this gives it the merit of flexibility in that it is made dependent upon the circumstances of the transaction, be it of a commercial or a consumer nature. The objection that such a test has the appearance of circularity can be met by the argument that definition of merchantability is of lesser importance than the clear formulation of the elements included within the idea of quality and the listing of key factors to be taken into account in determining the standard of merchantability. On this approach, retention of merchantability as a term and phrasing of its definitional standard can be seen as a semantic exercise<sup>21</sup>. It can, therefore, be argued that the term merchantability should be retained, first, on the basis of continued usage as a general concept, and secondly, as no valid alternative has been advanced. Its alleged obsolescence and limited meaning becomes of minor importance given the greater precision that can be obtained from the formulation of particular elements, such as those of "durability" and safety. The commercial nature of the current definition is thus counter-balanced by specific requirements, such as that of "durability".

The second weakness that can be noted in the Law Commissions proposals concerning minor defects has been examined earlier. It would appear to be inappropriate to list liability for minor defects as an element of merchantable quality, given the differing circumstances of consumer and commercial contracts. It should be reiterated that applying such a requirement to both commercial and

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20. Section 14(6), see note 72 *supra*.

21. See Salmon L.J. in Bartlett v. Sidney Marcus [1965] 2 All E.R. 743, 756, and see Lord Reid's comments in Brown v. Craiks [1970] 1 All E.R. 824, 825.

consumer contracts could lead to a loss of both certainty and flexibility in commercial transactions. In some cases, where minor defects had been specifically provided for in a commercial contract, the result would be that the express intention of the parties would be defeated by statute. It is difficult to see why the Law Commissions were unable to accept, in this instance, different standards for commercial and consumer contracts. The Sale of Goods Act 1979 distinguishes between such contracts in respect of not contracting out of the implied terms.<sup>22</sup> Since the issue of minor defects is one principally affecting consumer contracts it could be argued that it would be sufficient that a provision be inserted in the Act that goods supplied to a consumer would be required to be free of minor defects to meet the standard of merchantable quality.

However, the balance of the Law Commissions proposals in the context of merchantable quality would appear to pursue a desirable strategy. Notably, the current implied term as to fitness of purpose (s.14(3)) is seen by the Law Commissions to require no change, despite its overlap with the implied term of merchantable quality.<sup>23</sup> It is the latter which should provide the yardstick by which the quality of goods supplied are measured. The approach suggested by the Law Commissions, subject to the criticisms made above, would appear to provide more precise criteria by which the merchantable quality of goods can be judged.

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22. Sched. 1, paras. 11(3), 11(4).

23. Working Paper No. 85, para.2.20.

## CHAPTER FOUR

### STATUTORY CONTROL OF EXEMPTION CLAUSES IN COMMERCIAL CONTRACTS: UNREASONABLENESS OR UNCONSCIONABILITY?

Statutory control of exemption clauses has already been discussed in outline.<sup>1</sup> The specific issue of whether exemption clauses in commercial contracts should be subject to statutory tests will now be examined.

As noted earlier<sup>2</sup> exemption clauses in contracts of carriage by rail had been required to pass a statutory test of reasonableness contained in the English Railways and Canals Traffic Act 1854<sup>3</sup>. The most recent statutory example of such a test is found in the United Kingdom Unfair Contract Terms Act 1977<sup>4</sup>. By contrast with statutory tests of reasonableness the courts have developed principles, particularly in the last ten years, on which the terms of a contract may be reopened for examination on grounds of unconscionability. In the United States the Uniform Commercial Code, s2-302, has set guidelines for the courts to strike down or modify contracts that are wholly or partly unconscionable. More detailed legislative guidance has been provided in Australia by the New South Wales Contracts Review Act 1980, but essentially limited to consumer contracts.

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1. See Chapter Two.

2. Ibid.

3. Section 7.

4. Section 4, Schedule 2; see also Trade Practices Act 1974 (Cwlth.) s68A.

In order to evaluate and distinguish the different approaches under the tests of reasonableness and unconscionability the following order of analysis will be followed. Firstly, the issue of reasonableness will be discussed. This will include the issue of control of exemption clauses in commercial contracts with particular reference to the 1968 English Law Commission's Working Paper. Then the judicial interpretation of the reasonableness test laid down by the Unfair Contract Terms Act 1977 will be dealt with through consequent decided cases. Next the legitimacy of the reasonableness test in s68A of the Trade Practices Act 1974 will be examined. In the second part, the issue of unconscionability will be discussed. As background, the origins and development of the concept of unconscionability will be charted. Then, the relationship of unconscionability and standard form contracts in the light of s2-302 of Uniform Commercial Code will be dealt with. Next the background to the Contracts Review Act 1980 will be outlined, including the Peden Report. This will be followed by a description of the Act and resulting litigation. Finally, the Act will be criticized and contrasted with a lapsed South Australian bill, the Contract Review Bill and draft proposals in the Federal government's Green Paper, The Trade Practices Act : Proposals for Change. As a conclusion the tests of unconscionability and reasonableness will be compared and their respective suitability for control of exemption clauses in commercial contracts evaluated.

(A) The Issue of Reasonableness

Control of Exemption Clauses in Commercial Contracts

The Working Party, which advised the Law Commissions in their First Report and produced their own Working Paper were, by a majority, opposed to the extension of control of exemption clauses in

commercial sales contracts.<sup>5</sup> This opposition was based on four main arguments:

- "(1) A distinctive factor noted by the Molony Committee<sup>6</sup> was that traders elect to buy and sell as a matter of business and those who form the commercial links in the chain of distribution of consumer goods are fully capable of protecting themselves. The Committee regarded non-consumer sales as being outside their terms of reference and made no positive recommendations on this matter. Evidence before the Working Party supported these two points.
- (2) It is of the utmost importance in commercial contracts to establish with certainty where the risk lies in order to fix prices and insurance. It was often in the interests of both parties that the buyer should accept the risk. Certainty assisted confidence in the giving of legal advice and reduced litigation.
- (3) Even if there were some commercial buyers in need of protection they represented too small a minority to justify extension of control to the whole field of commercial contracts.
- (4) In some cases judicial rewriting of commercial contracts might produce inequity between the parties.
- (5) If UK sellers were subject to restrictions not borne by their foreign competitors, export sales might suffer as a result".

The arguments favouring extension of control to commercial contracts were as follows:

- "(1) Although the bulk of complaints concerning the law as it stood (circa. 1968) came from private consumers there were indications that certain business consumers also needed protection. The National Farmers' Union had given evidence that harsh exemption clauses were used in the sale of agricultural machinery to farmers.

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5. Law Commission Published Working Paper 18, Scottish Law Commission Memorandum No.7, at para.60; see First Report, p.2.

6. Molony Committee on Consumer Protection (1962); Cmnd. 1781, para.3.

- (2) While the weight of commercial opinion as currently expressed was hostile to the extension of control to commercial transactions, the Motor Agent's Association regarded as inequitable any proposal forbidding exemption clauses in the retail sale of motor cars while allowing them on sales to retailers.
- (3) It remained practically impossible to frame a definition of consumer sale which would be free of anomaly. The Society of Motor Manufacturers and Traders had raised the issue as to why a purchaser of a commercial vehicle should not have the same rights as the purchaser of a private car.
- (4) Attempts by the courts to control exemption clauses in commercial sale by restrictive interpretation of terms and the application of the doctrine of fundamental breach indicates that a problem exists beyond the consumer level.
- (5) Forbidding contracting out of liability for misrepresentation under s3 of the Misrepresentation Act while allowing it in the case of statutory conditions and warranties would produce considerable anomalies. A breach of s13 of the Sale of Goods Act would entail a misrepresentation as might generally be the case with s14(1) and occasionally s14<sup>11</sup>.

The Working Party then went on to consider the various courses of action which had been raised in regard to contracting out of the statutory conditions and warranties in commercial sales.

The Working Party suggested that a trader, professional businessman or farmer was in no better position when he purchased complex office equipment or a tractor.<sup>8</sup> The definition of a sale to a consumer should be drafted, it had been suggested, so as to include end-purchasers of goods for the purposes of a trade or business who might need protection as much as the private purchaser. The objection that this might cover transactions where the purchaser

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7. For equivalent sections see ss 18, 19(1), of the Sale of Goods Act 1896 (Tasmania), (ACT), (New South Wales), ss17, 18(1), (Victoria); (NT) ss13, 14(1), (South Australia), (Western Australia); ss6, 17(1), (Queensland).

8. Working Paper, at para.64. See Chapter Two.

was clearly capable of looking after his own interests could be met, it was suggested, by setting a price limit beyond which contracting out would not be restricted. The Working Party noted that the provisional conclusion of the Law Commissions was that it would be difficult to formulate a workable definition of a consumer sale on those lines.<sup>9</sup>

Another proposal the Working Party discussed was that contracting out of the statutory conditions and warranties would be ineffective in a sale unless a court held that it would be fair to rely upon it in the circumstances of a particular case. This was based on a provision in s3 of the United Kingdom Misrepresentation Act 1967 which did not involve a definition of a consumer sale and so gave the courts a flexible instrument of control. Such legislation might contain guidelines to the court by indicating particular matters it should take into account - for example, the abuse by a superior party where there was an inequality of bargaining power. The majority of the Working Party favoured the onus of proof being placed upon the person seeking to impose the limitation and also favoured making the date of contract the material date for judging the reasonableness of any contracting out provisions.<sup>10</sup>

Any uncertainty as to the enforceability of an exemption clause which could occur if such clauses were subject to a proposed reasonableness test, it was suggested, could be avoided by a procedure whereby the Restrictive Practices Court, or another similar body, might pronounce the contracting out provision void ahead of its adoption, if it were held, in all the circumstances of the case, to be unfair. Alternatively, an exemption clause could be initially considered as void unless it were approved by the

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9. Ibid.

10. Working Paper, para.65, on the basis of s2- 302 of the US Uniform Commercial Code.

the Restrictive Practices Court. Both the Law Commissions and the Working Party considered both these suggestions to be impracticable;<sup>11</sup> however, it was further discussed by the Working Party as to whether the Registrar of Restrictive Trade Agreements might be given a power to refer clauses which he considered to be unfair to the Restrictive Practices Court. Such a power could include a procedure which enabled manufacturers or other interested parties to bring standard form clauses before the Court for approval. The disadvantage of this procedure would be that, although suited to an overview of standard form contracts, it was not suitable for particular contracts, which might involve the Court in a great deal of work while if, in relation to the former, the parties were agreed on the fairness of the provisions, the court's functions would be essentially formal.<sup>12</sup>

Standard form contracts might themselves be defined as a printed collection of proposed contract terms, formulated in advance for use in a large number of similar transactions and presented to the other dealing party as a condition of doing business.<sup>13</sup> This definition is used in discussing additional aspects of standard form contracts.

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11. Ibid., at para.67; the first suggestion was made on the basis of a procedure similar to the Israeli Standard Contracts Law, 1964, s5, for comment on the Israeli legislation see A.L. Diamond 'The Israeli Standard Contracts Law' (1965) 14 I.C.L.Q. 1410; K.F. Berg 'The Israeli Standard Contracts Law 1964 : Judicial Control of Standard Form Contracts' (1979) 28 I.C.L.Q. 560.

12. Working Paper, at para.69; on the issue of the courts striking down 'unconscionable' clauses see infra.

13. See R.Dugan 'Standardized Forms - An Introduction' 24 Wayne L.R. 1307 (1978), at p.1316. See also the West German Law on Standard Contract Terms 1976 para.1 and the discussion by O.Sandrock 'The Standard Terms Act 1976 of West Germany' 26 Am. J Comp. Law 551 (1978) (a translation of the Act is provided at the end of the article); W.F.Von Marshall 'The New German Law on Standard Contract Terms' (1979) L.M.C.L.Q. 278, E. Von Caemmerer 'Standard Contract Provisions and Standard Form Contracts in German Law' (1976) 8 Vlc. U. Well. L.R. 235.



## The Insurance Factor

The effect of the impact of insurance was considered on any proposal that effectively put risks on sellers against which they were previously able to protect themselves in contract. The views given to the Working Party by insurance experts on this aspect were as follows:

- "(1) In respect of accident insurance there would be no insuperable problem. Cover was currently available against personal injury or damage to property arising from accidents caused by defective products. The use of exemption clauses was rarely important in assessing an insurance premium as insurers realised that even though a clause might be legally watertight it might be made impossible or inexpedient to rely upon it because of business considerations. The general practice of insurers was to fix a maximum in respect of any single claim and/or a maximum in respect of claims by the same assured policyholder. Although the banning of exemption clauses in commercial contracts might increase current insurance rates, the prevailing rates were not high. If they were doubled the rate would still be so small in relation to turnover so as not cause any significant increase in the price of goods.
- (2) Special problems, however, were presented by both quality insurance and insurance to cover consequential risks such as loss of profits. Under existing practice the cost of replacing faulty or substandard goods or consequential loss of profits was not covered by insurance. It would be essential for the law to make clear where liability lay. Predicting the likely cost of this type of insurance cover was difficult due to lack of experience by insurance companies in this field. The assumption was that premiums would be fairly steep at the beginning but rates would adjust on the basis of experience gained".<sup>14</sup>

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14. First Report, at para. 98; the views expressed relate to those of insurance companies operating in the UK. In respect of quality insurance and consequential risks these are now substantially affected by Division 2A, ss74B-K of the Trade Practices Act; see Chapter Five.

## Evidence on Contracting Out in Commercial Sales

The Working Party received evidence which indicated that the practice of contracting out was common in a wide range of business sales. For example, contracts for the sale of complex products (such as aircraft, computers and different types of machinery) often contained exemption clauses. In the case of certain types of goods sold to retailers or dealers for resale, exemption clauses were normally written into the contract by the supplying manufacturer. However, evidence from some organizations representing large retail firms indicated that exemption clauses were rarely imposed on their members.<sup>15</sup>

The First Report, despite the fact that the majority of the Working Party were of the view that there was no justification for extending the control of exemption clauses to business sales, did not regard this evidence as conclusive. Accordingly, the First Report dealt with opinions they had sought on questions where the Working Party, they felt, gave no firm guide.

These comments showed, again, a division of opinion as to whether there should be any control at all of exemption clauses in business sales.

The retailers' organizations and those representing consumers were the strongest supporters of control, as were some local authority organizations. Trade associations for industrial interests were against control by a majority (including the Association of British Chambers of Commerce), as were organizations representing the practicing legal profession, certain members of the higher

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15. First Report, at para. 98.

judiciary and some government departments.<sup>16</sup> The latter, as buyers, wished to be free to negotiate terms under which the risk of defects was laid on them in circumstances where it was to their advantage to take out their own insurance against such defects. Some trade associations, representing particular commercial interests, favoured some form of control as did the British Insurance Association, the National Farmers'<sup>17</sup> Union, and the Bar Association for Commerce, Finance and Industry. Academic opinion was divided on the question.<sup>18</sup>

In relation to retailers, a representative organization of the insurance interest argued that without control of exemption clauses in business sales there would be a tendency for increased claims to be made upon retailers than upon manufacturers. However, it was felt that fairness required that the cost of replacing or repairing defective goods should be borne by those from whom the defect originated rather than by those who sold to the public. The retailers indicated an anxiety that retaining freedom of contract above the consumer level, apart from the danger of increasing insolvencies amongst retailers, would unfairly damage their legitimate interests.<sup>19</sup>

Opinion was equally divided on the form of control. The insurance interests, retailers, consumer organizations and the Bar Association for Commerce, Finance and Industry favoured a reasonableness test. The Association of British Chambers of

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16. First Report, at para. 101.

17. Ibid., at para. 103.

18. First Report, at para. 103. No indication is given in the First Report as to what academic opinions had been given or how these were represented by individuals.

19. First Report, at para. 102.

Commerce and other representative bodies of the commercial community, legal practitioners' organizations and indicative views of industrial opinion were against such test.<sup>20</sup> Once more, academics showed division on the issue.<sup>21</sup> The main reason for the opposition the First Report found:

"It was feared that a general reasonableness test would create an intolerable degree of uncertainty in commercial affairs, lead to an increased amount of litigation, and make it difficult for legal advisers to satisfactorily advise their clients".<sup>22</sup>

The Law Commissions expressed themselves as divided on the issue as to whether exemption clauses in business sales should be controlled at all. They were agreed, however, that if there were to be a general control of business sales it should be in the form of a reasonableness test.<sup>23</sup> There then followed a rehearsal of the arguments for and against such general control, which covered in part the points raised in the Working Report.

Those individuals in the Commissions who were opposed to the extension of controls argued that the evidence had not gone beyond showing that some commercial buyers needed better protection than was provided by the existing law. These commercial buyers, however, represented too small a minority to justify extending control to business buyers of consumer goods who did not deal in such goods by including these sales under the definition of a consumer sale. In the Federal Republic of Germany, where exemption clauses were subject to judicial review, was cited as an instance of where a test akin to the criterion of reasonableness had produced uncertainty and unnecessary litigation. Those supporting control argued that a strong trend towards mergers had led to a

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20. Ibid.

21. See note 18 supra.

22. First Report, at para.103.

23. First Report, at para.107.

reduction in alternative sources of product supply to retailers and this had lessened their effective bargaining power. It was also debatable whether products liability insurance would be generally available, so that retailers would be able to bear any consequent risk. It was more convenient for this type of insurance to be carried by manufacturers who were accustomed to insuring against consumer claims. Section 3 of the United Kingdom Misrepresentation Act 1967 (U.K.) already contained a reasonableness test, so that no great innovation was involved. Section 2-302 of the US Uniform Commercial Code was cited as an example of where the courts, as an adjunct to the adverse construction of exemption clauses, have developed powers of striking down such clauses on the grounds of unconscionability.<sup>24</sup>

Those advocating the control of exemption clauses in business sales recommended amending the Sale of Goods Act 1893 by adding a provision that, in business sales and sales by auction, exemption clauses would be invalid to the extent that it was shown to the satisfaction of the court or arbitrator that it would not be fair or reasonable in all the circumstances of the case to allow reliance on the clause. Those opposed to control agreed to such a test being adopted if it was decided, as a matter of policy, to subject exemption clauses in business sales to legal controls.<sup>25</sup>

Subsequently, the Sale of Goods Act 1893 was amended by the Supply of Goods (Implied Terms) Act 1973;<sup>26</sup> the reasonableness test is now outlined in ss6 and 11 of the Unfair Contract Terms Act 1977, and guidelines for that test's application are contained in Schedule 2 to that Act.

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24. First Report, at para.109.

25. Ibid., at paras.110, 111.

26. Section 4 of the Supply of Goods (Implied Terms) Act 1973 amending s55 of the Sale of Goods Act 1893; see now Sale of Goods Act 1979.

## Judicial Interpretation of the Reasonableness Test

So far, there are four reported cases where the reasonableness test as set down by the English legislation has been judicially considered. In the first, Rasbora Ltd v. J.C.L. Marine,<sup>27</sup> Lawson J. considered, obiter, whether a sale, which he held was a consumer sale, contained an exemption clause which could not be relied on (if the sale were regarded as a non-consumer sale) because it was not fair and reasonable within the meaning of ss5(4) and (5) of the Sale of Goods Act.<sup>28</sup>

In the Rasbora case a motor yacht was built in a boat yard and sold for cash to J.C.L. Marine. On her maiden voyage the vessel caught fire and sank. The occupants escaped, but their personal possessions were lost. The fire, it was found, was due to defective electrical wiring in the yacht. It was undisputed that the seller was in the course of a business and that the yacht was goods " ... of a type ordinarily bought for private use and consumption". The status of the buyer was the essence of the case: in other words were the goods sold to a person who did " ... not buy or hold himself out as buying in the course of business"?

The purchaser, a Mr Atkinson, who had previously purchased a similar yacht from the defendants, decided, while the yacht in question was under construction, to purchase it through a company solely owned by himself which was incorporated in Jersey. The strategy behind this idea was to avoid a large amount of Value

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27. [1977] 1 Lloyd's Rep. 645.

28. Now see Schedule 2 and ss6 and 11 of the Unfair Contract Terms Act 1977.

Added Tax on the vessel. J.C.L. Marine had no objection to the method of payment.

Lawson J. held that the contract was a consumer sale, even though the purchase was apparently made by the company, Rasbora Ltd.<sup>29</sup> The original contract between the defendants and Mr Atkinson had been a consumer sale and the rights and duties passed to the plaintiff company by novation. Such rights and duties remained those of a consumer sale. It may be misleading to suggest that the original contractual rights and obligations were transferred by novation as this creates a new contract and the status of the buyer under the fresh contract requires re-examination.<sup>30</sup> Even if Rasbora Ltd. could be regarded as the purchaser, which Lawson J. held was not the case, the learned judge concluded that the sale would have been a consumer sale, nonetheless. This view was arrived at on the basis that the vessel was to be used by Mr Atkinson and not hired or let out for reward. The true issue, it can be respectfully suggested, was whether the company had bought or held itself out as buying in the course of business, not any consideration of who was the ultimate user of the yacht. It was simply held that the sellers had not discharged the onus of demonstrating that the sale was not a consumer sale. It was also stated, obiter, that even if the sale were not a consumer sale, it would not, in all the circumstances, be fair or reasonable to permit the seller to rely on the exclusion clause since the vessel was totally

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29. For criticism of this case see Professor P.B. Fairst, "Consumer Protection for Whom?" (1978) 128 N.L.J 1127, the article is drawn upon in the subsequent discussion. See also note in [1977] J.B.L. 349 where the reasons of Lawson J. are described as 'disappointingly brief' (p.350).

30. Professor Fairst, ibid., at p.1127.

destroyed.<sup>31</sup> This argument seems unconvincing: the clause allocated the risk between the parties which the buyer freely accepted, because the yacht was insured comprehensively. The insurer had paid out for a total loss and, by subrogation, was suing through the plaintiff.

It is difficult to see any real merit in this case. Although remarks in the case concerning the application of the reasonableness test were obiter it seems that, on the facts the parties were at arms length and there was no inequality of bargaining power and insurance had covered a clearly allocated risk.<sup>32</sup>

What has been described as a more carefully argued application of the reasonableness test<sup>33</sup> than that in the Rasbora case can be found in R.W. Green Ltd. v. Cade Bros. Farm.<sup>34</sup> In this case, the plaintiffs, who were seed potato merchants, regularly did business with the defendants on the basis of the standard conditions of the National Association of Seed Potato Merchants (NASPM). These conditions provided that "notification of rejection, claim of complaint must be made to the seller ... within three days ... after the arrival of the seed at its destination", and that any claim for compensation should not amount to more than the contract price of the potatoes. In the case of one of three contracts for the sale of twenty tons of seed potatoes, eight months after delivery it

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31. [1977] 1 Lloyd's Rep 645, 651.

32. On the issue of exemption clauses in inter-business contracts see D.Yates Exclusion Clauses in Contracts Sweet & Maxwell 2nd edition (1982), at pp.16-33. One main reason for the use of exemption clauses in commercial contracts appears to be the '... desire to avoid court proceedings should something go wrong', Yates, ibid at p.25. On business contractual practices in the UK see H.Beale and T.Dugdale 'Contracts between Businessmen : Planning and the Use of Contractual Remedies' (1975) 2 British Journal of Law and Society 45. See also Chapter Seven.

33. D.Yates ibid., at p.100.

34. [1978] 1 Lloyd's Rep. 602. See J.S.Zeigel note on R.W. Green Ltd in (1979) 57 Can. Bar. Rev. 105.



appeared that they were infected by a potato disease (virus Y) which could not be detected by inspection at the time of delivery. The plaintiffs sued for the price of the potatoes and the defendants counter-claimed for loss of profits.

The court allowed the defendants' counter claim for damages on the basis of a breach of s.14 of the Sale of Goods Act. These, damages however, were limited to the price of the potatoes and were set off against the plaintiffs' claim for the price. Griffiths J. held that there were no grounds for holding the limitation clause which restricted claims to the level of the contract price to be unreasonable. He noted that, although it would have been difficult for the buyers to obtain seed potatoes otherwise than on the NASPM conditions, it was possible to obtain seed stock certified by the Ministry of Agriculture as virus free, at a much higher price. Further, the standard conditions had been used for over twenty years and had been the subject of discussion between the Association and the National Farmers' Union.<sup>35</sup> The limitation of compensation to the contract price was regarded as reasonable.<sup>36</sup> However, it was a different matter in respect of the requirement that complaints be made within three days of delivery. The plaintiffs had attempted to justify this as being reasonable on the grounds that potatoes are a very perishable commodity and might deteriorate badly after delivery, particularly if they were badly stored. Therefore, they argued, it was quite reasonable that all risks be carried by the buyer

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35. Griffiths J. argued strongly that the contract, like any commercial contract, must be considered and construed against its trade background; [1978] 1 Lloyd's Rep. 602, at pp.606-607.

36. The criteria (a) (b) and (c) of Schedule 2 of the Unfair Contract Terms Act being satisfied.

within a short time of delivery. Griffiths J. regarded this as an acceptable argument in relation to defects which might be discoverable by reasonable examination, but not in respect of a defect such as a virus infection, which was not discoverable on inspection, within the time allowed by the contract. That part of the clause was held to be unreasonable and could not be relied on.

The third case of George Mitchell (Chesterhall) Ltd v. Finney Lock Seeds Ltd<sup>37</sup> has already been noted in relation to fundamental breach.<sup>38</sup> In the lower court, relying essentially on fundamental breach, the learned judge held that seed supplied by the defendants which failed to produce winter cabbage suitable for either animal or human consumption was a supply of something entirely different from that which was ordered. This reasoning was adopted in the Court of Appeal by Oliver L.J. However, the other two judges, Lord Denning M.R. and Kerr L.J., did not rely on fundamental breach, but held that the clause under review was unreasonable under the test contained in the Unfair Contract Terms Act 1977.<sup>39</sup>

Lord Denning held that the ultimate question in exemption clause cases is whether it would be fair and reasonable to allow the vendor to rely upon the clause.<sup>40</sup> In his view, the House of

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37. [1982] 3 W.L.R. 1036, affirmed by the House of Lords [1983] 3 W.L.R. 163.

38. See Chapter One.

39. Since the contract was concluded before February 1, 1978; see now ss55(4) and (5) in Schedule 1 of the Sale of Goods Act 1979. Section 55(5) is identical to the guidelines in the Unfair Contract Terms Act 1977. See the criticism of the judgements of the trial judge and of Oliver L.J. on the common law issue by Lord Bridge of Harwich in the appeal to the House of Lords, [1983] 3 W.L.R. 164. He states : '... it seems to me, with all due deference, that the judgements of the learned trial judge on the common law issue come dangerously near to re-introducing by the back door the doctrine of "fundamental breach" which this House in Securicor .. had so forcibly ejected by the front'; at p.168.

40. [1982] 3 W.L.R. 1036, 1046.

Lords in the Securicor case<sup>41</sup> had replaced the doctrine of fundamental breach by the test of reasonableness. This was the test applied by the trial judge in the Securicor<sup>42</sup> case, MacKenna J., which Lord Denning quoted with approval in the Court of Appeal hearing of the case.<sup>43</sup> MacKenna J. said:

"Condition 1, as I construe it, is, I think a reasonable provision ... Either the owner of the premises, or the person providing the service, must bear the risk. Why should the parties not agree to its being borne by the owners of the premises? He is certain to be insured against fire and theft, and is better able to judge the cover needed than the party providing the service ... That is only another way of shifting the risk from the party who provides the service to the party who receives it. There is, as I have said, nothing unreasonable, nothing impolitic, in such a contract".

Approval of this judgement<sup>44</sup> by the House of Lords, in Lord Denning's view, was on the basis that the limitation clause was valid because it was a reasonable way of apportioning risks as between the insurers on either side. Lord Denning also regarded the speeches in the second Securicor case, Ailsa Craig,<sup>45</sup> as appearing to rely on the reasonableness of the limitation clause. Noting that the judges in the Ailsa Craig case said, obiter, that they would construe an exclusion clause much more strictly, he suggested the better reason was because it would not be fair or reasonable to allow the proferens to rely on them in the circumstances of the case.<sup>46</sup>

Turning to s55(4) of the Sale of Goods Act 1893 which says:

"In the case of a contract of sale of goods, any term ... shall ... not be enforceable to the extent that it is shown that it would not be fair or reasonable to allow reliance on the term".

41. [1980] 1 All E.R. 556.

42. *Ibid.*

43. [1978] 1 W.L.R. 856, at p. 765.

44. Citing Lords Wilberforce and Diplock [1980] 1 All E.R. 556, at pp. 564 and 568 respectively; the passages cited by Lord Denning are given in Chapter One.

45. 1982 S.L.T. 377, HL (Sc.); Lord Diplock, at p.380, Lord Fraser of Tullybelton at p.382.

46. [1982] 3 W.L.R. 1036, 1047.

Lord Denning held this provision to be exactly in accord with principle he had advocated. The ultimate question in the case was: to what extent would it be fair and reasonable to allow the seed merchants to rely on the limitation clause?

Dealing with R.W.Green Ltd,<sup>47</sup> where it was held fair and reasonable for seed potato merchants to rely on a limitation clause which limited their liability to the contract price of the potatoes, Lord Denning distinguished that case as being very different from the one before him. The contract terms in R.W.Green Ltd had been evolved over twenty years and the judge regarded the conditions as a set of trading terms on which both sides were content to do business, nor did either know, or could have been expected to know, that the potatoes were infected.<sup>48</sup>

By contrast, Lord Denning regarded the present case as borderline. On one hand, the price of the cabbage seed was small, £192, but the damages were claimed high, £61,000. On the other hand, the clause was not negotiated between persons of equal bargaining power but inserted by the seed merchants in their invoices without any negotiation with the farmers. Additionally, the buyers had no opportunity of finding out if the seed was not cabbage seed while the sellers could and should have known this. Such a mistake could not have occurred without serious negligence by the seed merchants or their suppliers. As to risk, the buyers were not covered by insurance and, indeed, appropriate cover was not available.

As to the position of the seed merchants Lord Denning cited with approval the judge at first instance:

"I am entirely satisfied that it is possible for seedsmen to insure against this risk... that the cost of doing so would not materially raise the price of seeds on the

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47. [1978] 1 Lloyd's Rep. 602; see supra.

48. Per Griffiths J., at pp.607, 608.

market ... that the protection of this clause for the purpose of protecting against the very rare case indeed, such as the present, is not reasonably required. If and in so far as it may be necessary to consider the matter, I am also satisfied that it is possible for seedsmen<sup>49</sup> to test seeds before putting them onto the market".

Kerr L.J., in his judgement dealt with the construction and effect of the clause in question. In his view it was settled law that, whatever the nature of the breach, an exemption clause could never "terminate" or cease to have effect, but remained to be construed in order to decide whether or not the parties intended that its terms should apply to the breach in question.<sup>50</sup> Nor, in Kerr L.J.'s opinion did the doctrine of fundamental breach survive as a rule of construction. Rules of construction were not rules of law but merely guidelines to the presumed intention of the parties in the light of the events which had occurred. Provided the words did not go so far as effectively to absolve one party from any contractual obligation, all provisions of a contract, including exemption clauses however wide, fell to be construed and applied if, on their true construction, it was clear that the parties intended them to apply to the situation in question. If, in a hypothetical contract for the sale of apples or cheese, the contract provided clearly and expressly that the seller was to be under no liability in damages if he delivered pears or chalk instead, then, in Kerr L.J.'s view, there was no rule of construction which disentitled the seller from relying on that exempting provision. He considered that, in such cases, the buyer's only remedy, where applicable, would be to invoke the statutory test of reasonableness, thus enabling the court to hold

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49. Per Parker J. [1981] 1 Lloyd's Rep 476, 480, cited at [1982] 3 W.L.R. 1036, 1048. See the 'Wrong Variety of Seed Indemnity Insurance Scheme' set up by the United Kingdom Agricultural Supply Trade Association Ltd (UKASTA).

50. [1982] 3 W.L.R., at pp. 1036, 1055.

that such a provision or the seller's reliance upon it, would not be fair and reasonable. In the lower court the judge treated the exemption clause as being incapable of application to a breach which involved both the supply of the wrong kind of seed and seed that was unmerchantable. Against the background outlined above Kerr L.J. considered this approach to the terms of the exemption clause taken by the judge to be wrong in principle.<sup>51</sup>

However, in Kerr L.J.'s view, the balance was tipped against the merchants because, although all the breaches complained of could have arisen without negligence on their part, there was nothing in the exemption clause that protected the merchants against the consequences of their own negligence. Accordingly, the merchants were not protected by the clause, as the plaintiffs would not have suffered total loss if there had not been negligence by the merchant's staff and the clause could not be construed to cover buyer's loss which was caused, in part, by seller's negligence.<sup>52</sup>

An alternative ground for finding in favour of the plaintiffs (were his argument above to be wrong), was proposed by Kerr L.J. on the basis that it would not be fair and reasonable to allow the defendants to rely on the clause, the balance of fairness and reasonableness, in his view, being overwhelmingly on the side of the plaintiffs. They had lost 61,000 and 60 acres had been wasted for over a year and nothing they could have done would have avoided this. As between them and the defendants all the fault admittedly lay on the side of the defendants. Further, farmers did not, and could not be expected to, insure against this type of loss; whereas suppliers could.

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51. [1982] 3 W.L.R. 1036, at pp.1056, 1057.

52. Applying the tests in Canada Steamship Lines Ltd v. The King [1952] A.C. 192, 208, see Lord Fraser of Tullybelton in the Ailsa Craig case 1982 S.L.T. 377, 382. See Chapter One.

Noting a seed growers indemnity scheme,<sup>53</sup> his Lordship was not persuaded that liability for rare events of the kind litigated could not be adequately insured against, nor that the cost of such cover would add significantly to the cost of the seed. Further, the clause, although in existence for some time, was never negotiated, but was effectively imposed by the suppliers. Kerr L.J. stated:

"To limit the supplier's liability to the price of the seed in all cases, as against the magnitude of the losses which farmers can incur in rare disasters of this kind, appears to me to be a grossly disproportionate and unreasonable allocation of the respective risks".<sup>54</sup>

In his view, an overriding consideration, was that the statutory reasonableness test was designed for exempting provisions whose meaning was clear. One of the matters to be taken into account, in judging fairness and reasonableness was "... whether the buyer knew or ought reasonably to have known of the .. extent of the term".<sup>55</sup> In view of the fact that there had been long argument concerning the meaning and effect of the clause, Kerr L.J. regarded the legislation as not designed to meet such a situation, but framed for provisions the meaning of which was plain. But where these provisions were obscure, and until their meaning was determined by the courts, the courts should decide that enforcement of such provisions would be unfair and unreasonable.<sup>56</sup>

The George Mitchell case represents, in its treatment at the hands of Kerr L.J. and Lord Denning M.R., the first detailed application of the reasonableness test to an exemption clause. Of

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53. See note 49 supra.

54. [1982] 3 W.L.R., at pp.1036, 1059.

55. Sale of Goods Act 1979, s55, Unfair Contract Terms Act 1977 Sched.2.

56. [1982] 3 W.L.R. 1036, 1059.

the two, Lord Denning, by holding that the ultimate question was whether it would be fair and reasonable to allow a vendor to rely on an exemption clause, comes close to substituting a doctrine of unfairness and unreasonableness to replace the doctrine of fundamental breach (which he helped build) that the House of Lords swept away in the Securicor case.<sup>57</sup> However, the basis for Lord Denning's new found doctrine is statutory (which he readily recognised)<sup>58</sup> and contains its own criteria for judging fairness and reasonableness. These criteria - negotiability of the term or terms, equality of bargaining power and availability of insurance to cover the allocated risk - were all applied by his Lordship in George Mitchell. Kerr L.J., by contrast, was primarily concerned with the construction and effect of the clause at issue, including the protection of the sellers against their own negligence. In finding for the farmers he gave, as an alternative ground, that the balance of fairness and reasonableness was on their side. This can be compared with Lord Denning's view that the present case, contrasted with the R.W.Green case, was "borderline".<sup>59</sup> Although Kerr L.J. followed the statutory criteria he did make one addition which seems arguable. His contention that the legislation was framed to deal with provisions that were clear in their meaning and that reliance on obscure provisions would be unfair and unreasonable would appear to pre-empt the construction of such clauses. Provisions couched in vague and ambiguous terms would be, and are, read against the proferens and thereby given their most unfavourable and restrictive meaning. After the usual canons construction were applied, as exemplified in the Securicor case, then a court would apply the

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57. [1980] 1 All E.R. 556.

58. [1982] 3 W.L.R. 1036, 1047.

59. Ibid., at p.1047.



statutory criteria of reasonableness and fairness. It is unfortunate that in two judgments, those of Kerr L.J. and Lord Denning, where such criteria are, in this writer's view, properly applied to the facts of the case, one judgment could be taken to elevate the statutory tests to a doctrine and the other judgement to place a gloss upon them that, if followed, would replace a vital canon of construction of exemption clauses.

The decision of the Court of Appeal in George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd. was confirmed on appeal to the House of Lords.<sup>60</sup> In delivering the judgment of the House of Lords, Lord Bridge of Harwich observed that the judgments of the learned trial judge and of Oliver L.J. in the Court of Appeal on the common law issue "... come dangerously near to reintroducing by the back door the doctrine of 'fundamental breach' which this House in Securitor 1 [1980] A.C. 827 had so forcibly evicted by the front."<sup>61</sup> Lord Bridge stated that Kerr L.J. in the Court of Appeal had omitted to notice the reference by Lord Fraser of Tullybelton in Ailsa Craig Fishing Co. Ltd. v. Malvern Fishing Co. Ltd. and Securitor (Scotland) Ltd.<sup>62</sup> that the very strict principles laid down in Canada Steamship Lines v. The King by Lord Morton of Heyton<sup>63</sup> as applicable to exclusion and indemnity clauses "... cannot be applied in their full vigour to limitation clauses".<sup>64</sup>

In dealing with the issue of what the court would view as "fair and reasonable" both under the modified s55(5) of the Sale of

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60. [1983] 3 W.L.R. 163.

61. Ibid., at p.168 Oliver L.J.'s judgment on this issue is dealt with fully at Chapter One.

62. 1982 S.L.T. 377 HL (Sc).

63. [1952] A.C. 192, at p.208.

64. [1983] 3 W.L.R. 163, at p.189.

Goods Act 1979 (which sub-section would be of limited and diminishing importance) and the provisions of s11 of the Unfair Contract Terms Act 1977. Lord Bridge stated what would be the appropriate approach of an appellate court to an original decision applying such provisions :

"There will sometimes be room for a legitimate difference of judicial opinion as to what the answer should be, where it will be impossible to say that one view is demonstrably wrong and the other demonstrably right. It must follow, in my view, that, when asked to review such a decision on appeal, the appellate court should treat the original decision with the utmost respect and refrain from interference with it unless satisfied that it proceeded upon some erroneous principle or was plainly and obviously wrong."<sup>65</sup>

In the fourth and most recent reported case, Stag Line Ltd v. Tyne Shiprepair Group Ltd. and Others (The "Zinnia"),<sup>66</sup> the court held that a clause in a repair tender, on its proper construction, excluded liability for economic loss.

The plaintiffs were owners of the vessel "Zinnia" which was due in February 1980 for drydocking including the four year survey of her tailshaft. The plaintiffs sent a repair specification for quotation to various shipyards, including Tyne Shiprepair Group (subsequently referred to as TSG). A wholly owned subsidiary of the defendants, Wallsend, submitted a tender for repair which was accepted by the plaintiffs. The vessel entered Wallsend's yard for repair on February 24 1980. Among the work to be done was the relining of the stern tube for which the owners had specified a laminate called "Tufrol" which was made by Tufrol Ltd. Six and half sheets of this material were required but in fact only one and a half sheets of Tufrol and five sheets of at least one and possibly more than one other type of material was used. On March 15, 1980 the

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65. Ibid; at p.171.

66. [1984] 2 Lloyd's Rep 211 (Q.B. Commercial Court); reported as The 'Zinnia'.

vessel left the yard, the work having been completed.

On June 12 1980, while the vessel was crossing Lake Erie with a grain cargo en route to Tilbury, she had a major breakdown in her engine room. It was found that the tailshaft and stern gland had overheated, although the ship's engineers succeeded in cooling them. After the vessel had discharged her cargo at Tilbury, she proceeded to a yard in Rotterdam for drydocking examination and repairs.

The owners sought to recover the loss they had suffered as a result of the breakdown. The issues for decision, included inter alia, first, whether the breach or breaches of contract or duty caused the casualty at Lake Erie and thus the owners' loss, second, whether the conditions printed on the back of Wallsend's tender excluded or limited the liability of TSG or Wallsend for all or part of the claims third, whether the conditions of contract or any of them were not available to TSG or Wallsend by reason of the Unfair Contract Terms Act 1977.

In the Queen Bench Division (Commercial Court) Staughton J. found, on the evidence that the expansion of the non-specified material used by Wallsend to line the stern tube had not caused the overheating in question; it was more likely that it was caused by blockage of the lubricating system by silt from the muddy water in the United States port of Toledo. However, Wallsend was in breach of the contractual duty which a shiprepairer owed to exercise reasonable skill and care by himself or his employees or anyone else to whom he delegated the task, to ensure that proper materials were used. Wallsend were under a duty to inform the owners that part of the material used was not "Tufrol".

The conditions of contract included, inter alia, the following terms which were considered to be relevant :

"8 (3) Subject to sub-clause (9), the Contractor does not exclude liability for direct physical damage to the tangible property of the Customer to the extent that it is caused by the negligence of the Contractor or its employees.

8(9) Except as provided in sub-clause (2) in no event shall the Contractor be liable for the following loss or damage howsoever caused and even if foreseeable by or in the contemplation of the Contractor. 1. Economic loss which shall include loss of profits business revenue goodwill and anticipated savings. 2. Damages in respect of special indirect or consequential loss or damage (other than direct physical damage to tangible property caused by the negligence of the Contractor or its employees). 3. Any claim made against the Customer by any other party."

The owner's counsel accepted that cl.8(9)(1) excluded economic loss and also excluded the claims for loss or hire and related losses associated with the drydocking of the vessel in Rotterdam. Staughton J. held that the conditions, on their true construction did exclude liability for economic loss but did not otherwise exclude or limit Wallsend's liability. The defendants' counsel had contended that the owners had no remedy in respect of the remaining claims as they did not return the vessel to Wallsend's yard, or to a yard specified by Wallsend, for repair. Staughton J. accepted the argument of the plaintiff's counsel that whether or not that was so, the owners were not precluded in this case as their claim could be based upon negligence.

This was dealt with in cl.8(3) and was subject only to the limit in cl.8(9) (see supra). Staughton J. made<sup>67</sup> the following observation concerning the issue of reasonableness under the Unfair Contract Terms Act :

"I would have been tempted to hold that all the conditions are unfair and unreasonable for two reasons: first, they are in such small print that one can barely read them; secondly, the draftsmanship is so convoluted and prolix that one almost needs an LL.B. to understand them. However, neither of those arguments was advanced before me, so I say no more about them."

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67. [1984] 2 Lloyd's Rep. 211, at p. 222.

This statement is surprising for two reasons. First, the Unfair Contract Terms Act provides that the burden of proving that a contract term (or notice), satisfies the requirement of reasonableness is upon the proferens.<sup>68</sup> Second, if small print and convoluted draftsmanship alone raise the issue of unreasonableness, then many standard form inter-business contracts would be struck down on Staughton J.'s criteria. It might, it is suggested, have been appropriate if the learned judge had suitably qualified his remarks by reference to a prior course of dealings between the parties.<sup>69</sup> Although the observations quoted above were obiter, since neither argument was advanced by counsel, they demonstrate a disturbingly simplistic approach to commercial contracts.

On the issue of the strength of relative bargaining positions of the parties Staughton J. found these to be, broadly, equal. The defendants occasionally relaxed their standard terms if requested by a particular customer, but this had only happened at the request of customers with more financial influence than the plaintiffs. Wallsend had never relaxed the exclusion in cl.8(9) of economic loss, nor modified cl.8 other than by extending the period of the guarantee. However, they had never been requested to do so. This did not surprise Staughton J. :-

"Commercial men negotiating a contract for the future are not too concerned about the small print if they can secure a guarantee clause which seems to them satisfactory. It is only after a breach has occurred that they may take a different view"<sup>70</sup>

This comment, which appears to show an understanding of the realities of commercial bargaining, contrasts with the previous extract criticised earlier. Staughton J. went on to observe that

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68. Section 11(5).

69. See Chapter One.

70. [1974] 2 Lloyd's Rep. 211, at p.223.

when the contract was made between Stag Line and Wallsend, the defendant company, were very busy and therefore would have been reluctant to make any concession, whereas when they were short of work they would have been much more ready to do so. However the judge was not prepared to take that factor into account in the circumstances of the case, or give it much weight. In Staughton J.'s words :-

"It can scarcely have been the intention of Parliament that a clause in a shiprepairer's standard terms would be fair and reasonable one week - when the yard was willing to make concessions if asked - but unfair and unreasonable the following week, when the yard was busy"<sup>71</sup>

Section 11(1) of the Unfair Contract Terms Act makes it clear that any judgement as to whether the term is fair and reasonable to be included in the contract is based on "... the circumstances which were, or ought reasonably to have been, known to or in contemplation of the parties when the contract was made" (emphasis added). It follows that if the circumstances of business change over time, so that a firm has less work, and, in consequence, be more prepared to relax the provisions of the contract, then it may be that, as a result, a clause or contract term could become unreasonable at the time when the relevant contract is made. Staughton J. may well have been correct in not taking the issue of the level of Wallsend's business commitments into account on the facts which were available to him. However, his observations, discussed earlier, although obiter, cannot be taken as representing what is clearly expressed in s.11(1).

As already noted, Staughton J. did not find the exclusion of economic loss unreasonable<sup>72</sup>. However, he would have taken a

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71. Ibid., at p.223.

72. Citing, with approval, Lord Wilberforce in Photo Production Ltd. v. Securicor Transport Ltd. [1980] 1 All E.R. 556, at p.561.

different view of the clause limiting liability for the replacement of defective work and materials,<sup>73</sup> if it had provided that the owner had no remedy unless he returned his vessel to the yard for repair or to such other places as the yard might direct. In that situation Staughton J. thought that the conditions did not exempt for negligent breach of contract then the remedy was not so limited. He did note that the clause in question did not have an alternative provision, found in many other similar contracts, that the yard would bear the cost to the owner of repair up to the amount which that repair would have cost the yard. Staughton J. found such a result "capricious", since the apportionment of risk was made to depend upon where a vessel incurred damage, and whether the owner happened to find it convenient and economic to return his vessel to the yard. If the clause had deprived the owners of all remedy because they did not return the vessel to Wallsend's yard, the judge said that he would have held that the clause was unfair and unreasonable.<sup>74</sup> As the conditions on their true construction excluded liability for economic loss, but did not otherwise exclude or limit Wallsend's liability, it was not necessary for his honour to decide this point.

Two recent unreported cases have seen the application of the principles in George Mitchell (Chesterhall) Ltd v. Finney Lock Seeds Ltd.<sup>75</sup> In the first, Rees Hough Ltd. v. Redland Reinforced Plastics Ltd.<sup>76</sup>, the plaintiffs, who were tunnelling and pipe-jacking contractors, ordered a quantity of pipes for Redland Ltd, who were manufacturers of concrete pre-cast jacking pipes. The pipes were delivered to the plaintiffs, who used them in the building of a

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73. Clause 8(4).

74. [1984] 2 Lloyd's Rep. 211, at p.223.

75. [1982] 3 W.L.R. 1036.

76. (1984) 134 N.L.J., 706; Queens Bench Division, Judge J. Newey Q.C., see note in [1984] J.B.L. 454, unreported.

tunnel. Some of the pipes cracked and the tunnel had to be completed by sub-contractors using a pipe-jacking method of their own. The plaintiffs brought an action against Redland Ltd claiming damages on the ground that, first, they were in breach of an express term of the contract that the pipes should be capable of being jacked at about four hundred tonnes evenly distributed around the full profile of the pipe, in the shaft or at the inter-jack and with angles of up to one and a half degrees deflection between pipes in the drive; and, second, they were in breach of the implied conditions as to fitness of purpose and merchantable quality under the Sale of Goods Act 1979 (s 14).

Redland Ltd. denied liability relying, inter alia, on cl.10 of their standard terms and conditions which provided :

"The Company warrants that the goods shall be of sound workmanship and materials and in the event of a defect in any goods being notified to the Company in writing immediately upon discovery thereof which is the result of unsound workmanship or materials, the Company will at its own cost at its option, either repair or replace the same provided always that the Company shall be liable only in respect of defects notified within three months of delivery of the goods concerned. Save as aforesaid, the Company undertakes no liability, contractual or tortious, in respect of loss or damage suffered by the customer as a result of any defect in the goods ... and all terms of any nature, express or implied, statutory or otherwise, as to correspondence with any particular description or sample, fitness for purpose or merchantability are hereby excluded."

The defendants were held to be in breach of the express conditions and those implied by the Sale of Goods Act 1979 s14. Those conditions were effectively excluded by the defendant's standard terms of sale, but it was held that they had failed to prove that those terms were reasonable for the purposes of s3 of the Unfair Contract Terms Act 1977. In coming to this conclusion the judge applied the principles laid down by the House of Lords in George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd. with reference to an appellate court treating an original decision with the



utmost respect and not interfering with such a decision unless the appellate court were satisfied that it had proceeded on an erroneous principle or was plainly and obviously wrong.<sup>77</sup>

In Phillips Products Ltd. v. Hyland and Another<sup>78</sup> the Court of Appeal applied the Unfair Contract Terms Act 1977 to a contract for the hire of plant so as to render ineffective a condition excluding the owner's liability for negligence.

The Phillips company were carrying out extensions to their factory. They arranged with a builder, Pritchard, to undertake the building work, but the company was itself to be responsible for buying materials and arranging for the provision of plant. However, they gave permission to Pritchard to place an order with a firm called Hamstead Ltd for the hiring of a JCB excavator and Pritchard made arrangements by telephone with Hamstead Ltd. for the hire of a JCB excavator and driver. The first defendant, Hyland, arrived at Phillips' premises with the machine. It was found as fact, at first instance, that Hyland had made it clear to Pritchard that he, Hyland, would have sole control of the operation of the machine. During the course of operating the excavator Hyland drove it into collision with part of the plaintiff company's buildings, doing considerable damage to them as a consequence. Phillips sued Hyland and Hamstead claiming damages against both defendants.

Both defendants conceded that Pritchard had driven the excavator with less than reasonable care and that the cost of repairing the premises was £ 3,043. The judge at first instance gave judgment for Phillips for that sum. At the trial the argument centred on the liability or otherwise of Hamstead Ltd. in tort. They

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77. [1983] 3 W.L.R. 163, per Lord Bridge of Harwich at p.171; see supra.

78. Unreported; The Times, December 24 1984; before Slade L.J., Neil and Sir John Megaw JJ.

conceded that, apart from any special terms in the contract of hire they would have been liable for the negligence of Hyland as their employee, so as to entitle Phillips to judgment against them for the same sum as that awarded against Hyland. However, it was contended on behalf of Hamstead Ltd that cl.8 of Hamstead's general conditions incorporated in the contract gave them a complete defence to the claim. This provided :

"When a driver or operator is supplied by the owner to work the plant, he shall be under the direction and control of the hirer. Such drivers or operators shall for all purposes in connection with their employment in the working of the plant be regarded as servants for all the claims arising in connection with the operation of the plant by the said drivers or operators. The hirer shall not allow any other person to operate such plant without the owner's previous consent to be confirmed in writing."

The plaintiffs, on their part, submitted that if, on its proper construction, the wording of condition eight did operate to provide such an exemption, the Unfair Contract Terms Act 1977 would preclude Hamstead from relying on it.

The trial judge concluded that this argument was well founded. He therefore found it unnecessary to reach any decision as to the proper construction of condition eight and gave judgement for Phillips against both defendants.

On appeal to the Court of Appeal the sole question in issue was whether or not cl.8 was rendered ineffective as a defence by reason of the Unfair Contract Terms Act 1977. The relevant section was s2 which provides

"(1) A person cannot by reference to any contract term ... exclude or restrict his liability for death or personal injury resulting from negligence.

(2) In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness."

The court had, therefore, to determine whether the condition quoted, on the evidence and in the context of the contract as a whole, satisfied the requirement of reasonableness.

In delivering the judgement of the Court of Appeal Slade L.J. held that the onus fell on Hamstead, under s11(5), to show that the condition was satisfied and, in accordance with s11(1) they had to show that it was "... a fair and reasonable one to be included having regard to the circumstances which were, or ought to have been, known to or in contemplation of the parties when the contract was made."

At the time that the contract was made, all the relevant circumstances were known to both parties. The task which the trial judge had, therefore, set himself was to examine all the relevant circumstances and, then, ask himself whether, on the balance of probabilities, he was satisfied that the condition, in so far as it purported to exclude Hamstead's liability for negligence, was a fair and reasonable term. He had concluded that he was not so satisfied.

The question for the court was not a general question as to whether or not the condition was valid or invalid in the case of any and every contract of hire entered into between a hirer and a plant owner who used that condition. The question was whether the exclusion of Hamstead Ltd's liability for negligence satisfied the requirement of reasonableness imposed by the Act, in relation to the particular contract.

Slade L.J. stated that it was necessary to bear in mind, and strive to comply with, the clear and stern injunction issued by Lord Bridge of Harwich, in regard to the issue of reasonableness, in George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd. where it was said:

"... the appellate court should treat the original decision with the utmost respect and refrain from interference with it unless satisfied that it proceeded upon some erroneous principle or was plainly and obviously wrong."<sup>79</sup>

On the facts and available evidence, their Lordships were not persuaded that the trial judge proceeded upon some erroneous principle or was plainly and obviously wrong in his conclusion that Hamstead Ltd had not discharged the onus of showing that the condition satisfied the requirement of reasonableness in the context of the particular contract of hire.

In Rees Hough Ltd. v. Redland Reinforced Plastics Ltd.,<sup>80</sup> and in Phillips Products Ltd. v. Hylands and Another<sup>81</sup> on the facts of both cases, the learned judge and the Court of Appeal were stricter in applying the reasonableness test than was the House of Lords in George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd<sup>82</sup> and in the approach taken to the construction of exemption clauses in standard form contracts by the House of Lords in Photo Production Ltd. v. Securicor Ltd.<sup>83</sup>. Since both judgements are currently unreported it is difficult to make a realistic criticism of either of them. However, certain issues would appear to be raised. In the Rees Hough case the expertise of the contractor was clearly central to the contract and on the evidence a breach of s14 of the Sale of Goods Act 1979 was proved. However, what is not demonstrated in that case is whether the issues of equality of bargaining power, the reality of negotiation between the parties, including previous dealings, and the availability of insuring against the risk were addressed by the court. Similarly, in the Phillips Products case these same issues appear to have been left aside.

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79. [1983] 3 W.L.R. 163, at p.171.

80. (1984) 134 N.L.J. 706.

81. [1983] 3 W.L.R. 163.

82. [1980] 2 All E.R. 556; see Chapter One.

83. The Times, December 24, 1984.

The approach of the Court of Appeal in this case contrasts with its detailed examination, earlier discussed, of a clause in a standard form excluding negligence in a plant hire contract in British Crane Hire Corporation Ltd. v. Ipswich Plant Hire Ltd.<sup>84</sup>

### The Trade Practices Act and the Reasonableness Test

The Trade Practices Act 1974 contained no provisions relating to the reasonableness test until the amendment of s68 by the Trade Practices Amendment Act (No. 2) 1977. This provided, in s68A, as follows :

- "(1) Subject to this section, a term of a contract for the supply by a corporation of goods or services other than goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption is not void under section 68 by reason only that the term limits the liability of the corporation for a breach of a condition or warranty (other than a condition or warranty implied by section 69) to -
  - (a) in the case of goods, any one or more of the following:
    - (i) the replacement of the goods or the supply of equivalent goods;
    - (ii) the repair of the goods;
    - (iii) the payment of the cost of replacing the goods or of acquiring equivalent goods;
    - (iv) the payment of the cost of having the goods repaired; or
  - (b) in the case of services -
    - (i) the supplying of the services again; or
    - (ii) the payment of the cost of having the services supplied again.
- (2) Sub-section (1) does not apply in relation to a term of a contract if the person to whom the goods or services were supplied establishes that it is not fair or reasonable for the corporation to rely on that term of the contract.

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84. [1974] 1 All E.R. 1059, for commentary on this case see N.E. Palmer [1974] 24(3) N.I.L.Q. 338.

- (3) In determining for the purpose of sub-section (2) whether or not reliance on a term of a contract is fair or reasonable, a court shall have regard to all the circumstances of the case and in particular to the following matters;
- (a) the strength of the bargaining positions of the corporation and the person to whom the goods or services were supplied (in this sub-section referred to as "the buyer") relative to each other, taking into account, among other things, the availability of equivalent goods or services and suitable alternative sources of supply;
  - (b) whether the buyer received an inducement to agree to the term or, in agreeing to the term, had an opportunity of acquiring the goods or services from any source of supply under a contract that did not include that term;
  - (c) whether the buyer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing with the parties); and
  - (d) in the case of the supply of goods, whether the goods were manufactured, processed or adapted to the special order of the buyer".

This section, which was inserted as a result of pressure from suppliers,<sup>85</sup> enables a corporation, in the supply of goods or services of a kind not ordinarily acquired for personal, domestic or household use or consumption, to limit its liability for breach of an implied term.<sup>86</sup> A corporation will be liable for only (a) the replacement or repair of the defective goods, or (b) the re-supply of the services, or (c) alternatively the payment of the cost of replacing, repairing or re-supply of the goods or services.

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85. The suppliers in question were mainly in the computer industry. The background to this successful lobbying is usefully documented by K. McGregor 'Protest at Trade Practices Act: Computer Industry "Shutdown"' The Australian Financial Review 15 July 1977, 'Consumer Warranties: Supplier "Strike" Widens' The Australian Financial Review 6 July 1977.

86. Except that relating to title, quiet possession and freedom from encumbrance (s69).

The chief result of this amendment is that a supplier of goods or services of a commercial nature may be able to limit the amount recoverable by a person who is injured by a defect in the goods or services rendering them unmerchantable or unfit for a particular purpose. Take, as an example, an accounting business supplied by a computer firm with a \$15,000 computer partly on the basis of the following terms:

"The machine (as described in Cl.1) is sold subject to the following conditions and warranties. The machine is subject to a twelve months servicing guarantee under which the company undertake to replace the machine if unsatisfactory and to supply all parts and labour free of charge. This guarantee is in exclusion of all other conditions and warranties, both statutory and common law and the company are not liable for any damage to property (including consequential loss), injury to, or death of, any person consequent upon the use, operation or malfunction of the machine whether such use, operation or malfunction is due to or arising from negligence on the part of the company in respect of assembly, servicing, components or howsoever caused".

If an employee of the accounting firm were fatally electrocuted because the console of the machine became "live" due to defective wiring in the computer itself, what would be the legal position under s68A? Presumably, the accounting firm would have accident insurance cover and therefore the dependants of the employee would be compensated.<sup>87</sup> The computer suppliers would only be liable to the accounting firm on the basis of the terms above and of s68A. In other words, the defective wiring would be repaired as part of the servicing agreement at no cost to the firm supplied. Even if a fire in the example had been more serious and the firm's building so severely damaged that its operations were interrupted, insurance for fire and loss of profits would be available and a prudent firm would have had such cover protecting it. If the instances given above are

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87. For reasons of brevity, the issue of suing in tort, on the basis of negligence, is not considered.

typical, and insurance cover can be provided at a reasonable cost (given that in relation to accident insurance the English Working Party understood such premiums to be low), one wonders whether it was necessary to enact a provision in s68A that added confusion to an already difficult Act. Was protection, both to the supplier and by way of the reasonableness test to a supplied business, really required? In other words, the possibility exists that s68A, in both of its aspects, was not needed as businesses ought to be able to look after themselves. Insurance can more appropriately cover the liability when it is apportioned by the use of a suitably worded exemption clause.<sup>88</sup>

(B) The Issue of Unconscionability

The reasonableness test provides no innovation of judicial practice. In the United States s.2-302 of the Uniform Commercial Code (UCC) has set guidelines for the courts to strike down or modify contracts in whole or in part that are unconscionable.<sup>89</sup> A number of cases within the last ten years, have further clarified the principles on which the courts will interfere with the terms of a contract which are held to be unfair.

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88. It should be noted that there has been no reported litigation on s68A.

89. UCC article 2-302 reads:

'(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.'

For a useful and recent commentary on article 2-302 see J.R.Peden The Law of Unjust Contracts Butterworths 1982, Chapter Two. For particular reference to the economic and behavioural background of unconscionability see L.A.Kornhauser 'Unconscionability in Standard Forms' 64 Cal L.R. 1151 (1976)



## Judicial Views of Unconscionability

There exists authority, even though slight, indicating that the courts are prepared to declare an agreement unenforceable on the grounds that it is harsh and unconscionable.<sup>90</sup> In the case of A.Schroeder Music Publishing Co. Ltd. v. Macaulay<sup>91</sup> the plaintiff, a young and unknown song writer, entered into an agreement with the defendants whereby they engaged his exclusive services for five years under a standard form agreement. By this contract the plaintiff assigned to the defendants the world copyright in each original work he produced during the duration of the agreement and such work prior to it that he still owned and controlled. If, during the five year period the plaintiff's royalties and advances equalled or exceeded £5,000, the agreement would be automatically extended for a further five years. The defendants were under no obligation to publish any of the plaintiff's compositions and could terminate the agreement with month's notice. The plaintiff sought a declaration that the agreement was in restraint of trade; in response the defendants argued that the doctrine did not apply to standard form contracts which were generally accepted in the business world. The House of Lords held that a distinction had to be made between standard contracts freely made between parties on equal bargaining terms and the instant case. No presumption could be made on the

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90. For an examination of the history of the equitable doctrine relating to relief from unconscionable bargains see M. Cope 'The Review of Unconscionable Bargains in Equity'. (1983) 57 A.L.J. 279. See a discussion of the cases in P.H. Clarke 'Unequal Bargaining Power in the Law of Contract' (1975) 49 A.L.J. 229; see generally S.M. Waddams 'Unconscionability in Contracts' (1976) 39 M.L.R. 369; M.P. Ellinghaus 'In Defence of Unconscionability' (1969) 78 Yale L.J. 757; S.M. Waddams 'Unconscionability in Contracts' (1976) 39 M.L.R. 369.

91. [1974] 3 All E.R. 616. See also F. Wooldridge 'Inequality of Bargaining Power in Contract' [1977] J.B.L. 312; V. Sinnadurai 'Exemption Clauses v. Public Policy and Inequality of Bargaining Power' (1978) Mal.L.J. 130; K.L. Fletcher 'Review of Unconscionable Transactions' (1973) 8 U.Q.L.J. 45.

facts of the case that the terms were fair and reasonable. There was no obligation on the part of the defendants to publish the plaintiff's work and he could earn nothing during the contract if the defendants decided not to publish. As Lord Diplock stated :

"The terms of this kind of standard form contract have not been the subject of any negotiation between the parties to it ... They have been dictated by the party whose bargaining power ... enabled him to say : 'If you want these goods and services at all, these are the only terms on which they are obtainable. Take it or leave it.'"<sup>92</sup>

An early Tasmanian case, Harrison v. National Bank of Australasia Ltd.<sup>93</sup> provides an interesting example of the potential authority of the courts to open up a bargain. In that case, an elderly woman gave a bank security over land to raise money to assist her son-in-law in business, who was himself, and to the bank's knowledge, already considerably overdrawn. Her action was made without legal advice and without any personal knowledge of business, although she knew she would be liable should the business fail. In setting the agreement aside, Crisp J. held that the bank in the circumstances had a duty to the plaintiff which it had broken and the agreement would be set aside on the ground that it had been entered into "... without due deliberation, without independent advice and not knowing its true effect".<sup>94</sup> This Tasmanian case foreshadowed the much later English case of Lloyds Bank Ltd. v. Bundy<sup>95</sup>. The English Court of Appeal held that where a confidential relationship existed between the bank and its customer, the court would interfere to redress abuse of that relationship.

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92. Ibid., at p.622. The Court of Appeal followed Schroeder's case in Clifford Davies Management Ltd. v. W.E.A. Records Ltd. [1975] 1 All E.R. 237 where it refused to enforce a standard form publishing agreement with a musical group; see Lord Denning at p.240.

93. (1928) 23 Tas. L.R.1.

94. Ibid., at p.8. See Peden Report comments at p.7.

95. [1975] 1 Q.B. 326.

Account was taken of the fact that the plaintiff had mortgaged his sole remaining asset, his property, to raise money to support his son's business. The bank foreclosed and sought possession of the land. Evidence showed that the plaintiff, an elderly man without any head for business, had received no independent advice. The bank was held to have broken their fiduciary duty of care and the guarantee and charge were set aside on the grounds of undue influence. Lord Denning, in the course of his judgment, laid down a general principle (which was not required for the case to be resolved and may have been too widely stated) to be drawn from the cases which allowed the courts to interfere in harsh contracts :

"They rest on 'inequality of bargaining power'. By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other."<sup>96</sup>

The general principle which can be gathered from all these cases cited is that the courts will relieve a party of the burden of a harsh or oppressive contract if, due to the harshness or oppression resulting from the other party exercising his superior bargaining power, the contract is considered unconscionable.<sup>97</sup> The above principle is narrower than that enunciated by Lord Denning in that the former view requires an actual exercise of inequality of bargaining power, while the latter appears based only on the existence of inequality.

In Commercial Bank of Australia Ltd v. Amadio and Anor.<sup>98</sup> the High Court of Australia had to consider the position of two

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96. Ibid., at p.339.

97. See note (1977) 51 A.L.J. 232.

98. (1982-83) 151 C.L.R. 447; an appeal from the Supreme Court of South Australia.

elderly migrants (both in their seventies), who were unfamiliar with written English, and who had been asked by their son to execute a mortgage in favour of a bank, over land which they owned, to secure the overdraft of a company which the son controlled. The son had told his parents that the mortgage was to be limited to \$50,000 and to be for six months. The bank and the company had been selectively dishonouring the company's cheques in order to preserve the company's appearance of solvency. The bank and the company agreed that the overdraft which the mortgage was to secure ought to be reduced and cleared off within a short time, but these matters were not disclosed to the prospective mortgagors. The mortgage instrument which the bank submitted for execution contained a guarantee. The mortgage and the guarantee secured all amounts owing to the bank on the company's account. The mortgagors executed the deed mistakenly believing it to be limited to \$50,000 and to be for six months. The bank was aware that it had been misinformed about the contents of the mortgage and the guarantee.

On appeal by the bank from the Supreme Court of South Australia the High Court held that the instrument should be set aside unconditionally.<sup>99</sup> The first ground<sup>1</sup> was that the bank owed a duty to the mortgagors to disclose unusual features relating to the overdrawn account. The non-disclosure amounted to a misrepresentation which was sufficient to entitle the mortgagors to have the deed set aside. The second ground<sup>2</sup> was that the mortgagors were under a special disability when they executed the deed containing the guarantee. The disability was sufficiently

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99. Gibbs C.J., Mason, Wilson and Deane JJ.; Dawson J. dissenting.

1. Per Gibbs C.J., applying Goodwin v. National Bank of Australia Ltd. (1968) 117 C.L.R. 173.

2. Per Mason, Wilson and Deane JJ., applying Blomley v. Ryan (1956), 99 C.L.R. 362.

evident to the bank to make it prima facie unfair or unconscientious for it to be allowed to rely on the guarantee. The onus lay on the bank to show that the guarantee should not be set aside, and it had not been satisfied.

In Gibbs C.J.'s view the instrument should not be set aside on grounds of unconscionability :-

"In my opinion it should not be held that this was the case of an unconscientious bargain of the kind which equity would set aside, even in the absence of fraud, misrepresentation or undue influence. Of course, the bank did not meet on equal terms, but that circumstance alone does not call for the intervention of equity, as Lord Denning M.R. clearly illustrated in Lloyd's Bank v. Bundy[3]. A transaction will be unconscientious within the meaning of the relevant equitable principles only if the party seeking to enforce the transaction has taken unfair advantage of his own superior bargaining power, or of the position of disadvantage in which the other party was placed. The principle of equity applies whenever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands Blomley v. Ryan[4], per Kitto J., and see at pp. 405-406, per Fullagar J. In the present case it is true that the respondents were elderly, did not have a complete mastery of the English language and had had no formal education. However, the bank did not take unfair advantage of any of these disabilities, if disabilities they were. The evidence shows, as Wells J. found, [5] that the bank relied on Vincenzo Amadio to explain the transaction to his parents, and he in fact persuaded them to enter into it. He was experienced in business matters, and well able to understand and explain the effect of the memorandum of mortgage. Of course, he did not give his parents a true explanation of the effect of the guarantee, and the bank did not disclose those matters which it should have disclosed. If one ignores the effect of the misrepresentation by Vincenzo Amadio and the non-disclosure by the bank there is simply no evidence that the bank made unfair use of its position. In other words, if misrepresentation (whether express or by non-disclosure) is established, there is no need to

3. [1975] Q.B. 326, at p.336.
4. (1956) 99 C.L.R. 362, at p.415.
5. In the Supreme Court of South Australia.

resort to the rules as to unconscientious bargains, and if misrepresentation is not established the bank made no unfair use of its position."<sup>6</sup> (emphasis added)

In the view of the Chief Justice, the bank should fail only because of its failure to disclose to the respondents matters it was under a duty to disclose.

In the view of the majority, Mason, Wilson and Deane J.J., the bank had been guilty of obtaining the execution of the mortgage and guarantee by the elderly couple when they had limited use of English and they relied on their son in business matters. The bank had not discharged the obligation of showing that the transaction was fair just and reasonable. In tracing the equitable grounds upon which the courts had, historically, exercised jurisdiction to set aside contracts, Mason J. stated the broad principle on which relief on the ground of conduct would be granted as follows :

"Relief on the ground of unconscionable conduct will be granted when unconscientious advantage is taken of an innocent party whose will is overborne so that it is not independent and voluntary, must as it will be granted when such advantage is taken of an innocent party who, though not deprived of an independent and voluntary will, is unable to make a worthwhile judgement as to what is in his best interest."

Citing Fullagar J. in Blomley v. Ryan, Mason J. declared that it is impossible to definitively describe all the situations in which relief will be granted on grounds on unconscionable conduct :

"The circumstances adversely affecting a party, which may induce a court of equity either to refuse its aid or to set a transaction aside, are of great variety and can hardly be satisfactorily classified. Among them are poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary. The common characteristic seems to be that they have the effect of placing one party at a serious disadvantage vis-a-vis the other."<sup>8</sup>

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6. (1982-83) 151 C.L.R. 447, at pp.458-459.

7. Ibid., at p.461.

8. (1956) 99 C.L.R. 362, at p.405.

Mason J. maintained that the situations listed by Fullagar J. were, in the latter's view "...exemplifications of an underlying general principle which may be invoked whenever one party by reason of some condition of circumstance is placed at a special disadvantage vis-a-vis another and unfair or unconscientious advantage is then taken of the opportunity thereby created."<sup>9</sup>

In Mason J.'s view, because times had changed new situations had arisen in which it might be appropriate to invoke such an underlying principle. So, for example, where entry into a standard form contract had been dictated by a party of much superior bargaining power.<sup>10</sup>

In such situations, the plaintiff seeking relief must establish unconscionable conduct, that is, that unconscionable advantage had been taken of his disabling condition or circumstances. The relationship between the bank and the elderly couple was one of the situations to which the general principle could apply. A bank's duty of disclosure does not require it to give information regarding matters affecting the credit of the debtor or of any circumstances connected with the transaction which the debtor is about to enter which will make his position more hazardous. The fact that the bank's duty of disclosure is so limited, however, in Mason J.'s view had no bearing on the availability of equitable relief on the ground of unconscionable conduct. "A bank, though not guilty of any breach of its limited duty to make disclosure to the intending surety, may none the less be considered to have engaged in unconscionable conduct in procuring the surety's entry into the

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9. Citing the discussion of such a relationship by Lord Reid and Lord Diplock in Schroeder (A) Music Publishing Co. Ltd. v. Macaulay [1974] 3 All E.R. 616, at pp.622, 624 respectively, and by Lord Denning in Clifford Davis v. WEA Records [1975] 1 All E.R. 237, at p.240.

10. (1982-83) 151 C.L.R. 447, at pp.463-464.

contract of guarantee."<sup>11</sup>

Particular factors in the case at issue established that there was a gross inequality of bargaining power between the bank and the elderly couple. The latter's ability to judge whether their entry into the transaction was in their own best interests, due to their desire to assist their son, was sadly lacking. The special disadvantage in which they were placed was their reliance on their son, who, to aid his own interests, urged them to provide the mortgage guarantee required by the bank as a condition of increasing the approved overdraft limit of the son's company. The couple's reliance on their son was largely due to their age, then having a limited command of written English and no experience of the type or level of business engaged in by their son and his company. They believed that the company's business was sound and prosperous, though with temporary financial needs. In fact, as the bank well knew, the company was in a dire financial condition.

Deane J., in his judgement, noted that the equitable principles relating to relief against unconscionable dealings and those relating to undue influence were closely related. However, he regarded the two doctrines as distinct. Undue influence, like common law duress, looked to the specific quality of the agreement made by the weaker party.<sup>12</sup> Unconscionable dealing looked to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so. In most cases, Deane J. noted, where courts of

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11. Ibid., at p.464.

12. At p.474 ibid. citing Union Bank of Australia Ltd. v. Whitelaw [1906] V.L.R. 711, at p.720; Watkins v. Coombes (1922) 30 C.L.R. 180, at pp.193-194; Morrison v. Coast Finance Ltd. (1965) 44 D.L.R. (2d) 710, at p.713.



Equity had granted relief against unconscionable dealing there had been an inadequacy of consideration, moving from the stronger party.<sup>13</sup> However, it was not essential that that should be so.

In summing up his judgement Deane J. observed :

"Ultimately, I have come to the view that Mr. and Mrs. Amadio are entitled to have the whole transaction set aside unconditionally. It is true that it is not ordinarily incumbent upon a bank to bring to the attention of a potential guarantor of a customer's account details of a type which are ordinarily to be expected[14] ... In the present case however, it was, as has been said, evident to the bank that Mr. and Mrs. Amadio stood in need of advice as to the nature and effect of the transaction into which they were entering. It is apparent that any such advice would have included the importance to a guarantor of ascertaining from the bank the state of the customer's account which was being guaranteed and any unusual features of the account. If such information had been obtained by Mr. and Mrs. Amadio, they would not, on the evidence and in the light of the learned trial judge's finding, have entered into the guarantee/mortgage at all. The whole transaction should properly be seen as flowing from the special disability which was evident to the bank and as being unfair, unjust and unreasonable."<sup>15</sup>

The majority decision in the Amadio case clearly demonstrates that the High Court of Australia is prepared to embrace the doctrine of unconscionable conduct which broadly follows the developments in England following Schroeder's case.<sup>16</sup> However, the restrictive approach by the Chief Justice to the doctrine in Amadio's case indicates the need for legislative guidance in the development of criteria of unconscionability.

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13. Ibid., at p.475.

14. Citing Goodwin v. National Bank of Australia Ltd (1968) 117 C.L.R. 173, at p.175.

15. (1982-83) 151 C.L.R. 447, at p.481.

16. [1974] 3 All E.R. 616.

## Unconscionability and Standard Form Contracts

Accepted contract theory makes little or no allowance for the peculiarities of standardized form contracting.<sup>17</sup> In the Butler Machine Tool Case<sup>18</sup> Lord Denning made the following observation in a judgement which had a classic 'battle of the forms' background:

"... in many of our cases our traditional analysis of offer, counter offer, rejection and so forth is out of date ... The better way is to look at all the documents passing between the parties and glean from them, or from the conduct of the parties, whether they have reached agreement on all material terms, even though there may be differences between the forms and conditions printed on the back of them".<sup>19</sup>

The tendency of American courts, it has been observed, is to subsume all problems of enforceability under the heading of unconscionability.<sup>20</sup> This has been criticised as not only befogging basic contract principles and policy considerations but also blocking the orderly development of the relationship between s2-302 and concepts such as good faith, trade usage and specific restraints.<sup>21</sup>

Standard form contracts and the contracting processes associated with them depart from the comparable processes and rules associated with traditional contract law. The traditional rules mirror a world in which the parties exchange alternative sets of negotiable terms, the contract arising when and if the proposals correspond.

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17. In the U.S. context this is explored by R.Dugan 'Standardized Form Contracts - An Introduction' 24 Wayne L.R. 1307 (1978). See G.Gluck 'Standard Form Contracts : the Contract Theory Reconsidered' (1979) 28 I.C.L.Q. 72; J.N.Adams 'The Standardization of Commercial Contracts', on the Contractualization of Standard Forms' 7 Anglo Am.L Rev 136 (1978).

18. Butler Machine Tool Co Ltd v. Ex-Cell-O Corporation (England) Ltd (1979) 1 A11 E.R. 965.

19. (1979) 1 A11 E.R. 965, at p.968. See also Lord Wilberforce in New Zealand Shipping Co Ltd v AM Satterthwaite (1974) 1 A11 E.R. 1015, at pp.1019-1020.

20. See R.Dugan 'Standardized Forms - An Introduction' 24 Wayne L.R. 1307 (1978), at p.1314.

21. Ibid.

The standard form contract represents, by contrast, a unilateral imposition of completely generalized terms. In addition such contracts negate the assumption of freedom of contract both in respect to the particular terms and so far as those terms are important features of the subject matter of the transaction, the entire contract. If a party cannot negotiate the particular terms of an equipment warranty it would appear that he has not freely agreed to those terms or the transaction as a whole. The generally accepted division of a standard form contract into terms subject to negotiation and terms not so subject rests on the doubtful premise that the two sets of terms are unrelated. However, both in theory and practice the standard terms define the legal rights and duties associated with the terms subject to negotiation.

The Second Restatement of Contracts distinguishes between negotiated and standardized terms.<sup>22</sup> Para 237 states:

- "(1) Except as stated in Subsection (3) where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.
- (2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.
- (3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement".

The UCC both in its text and official Comments, indicates a considerable awareness of the problems involved in standardized form contracting. Significantly, s2-307 and s2-311 regulates incorporation of the standardized terms with little reference to agreement, real or assumed. UCCs 2-311(1) links incorporation of terms to the

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22. See Restatement (Second) of Contracts para's.229(d), 237.

existence of a specification agreement (presumably subject to negotiation) and with incorporation of subsequently specified terms dependent on commercial reasonableness and good faith. Under UCC s2-207(2) incorporation depends primarily on the concept of material alteration. However, it has been observed that American courts have yet to adopt a unified theory of incorporation of standard terms.<sup>23</sup> The chief weakness of article 2-302 has been the inadequacy of the guidelines provided.<sup>24</sup> There have been shown to be considerable divergencies and inconsistencies between the cases. To overcome these Deutch has recommended enumerating the elements of unconscionability, rather than defining:

"The elements will serve as guidelines and illustrations, not as rigorous definitions. But since the courts did not establish a general formula for this doctrine, it is the legislature's duty to formulate and<sup>25</sup> enumerate the essential elements of unconscionability".

The requirement in s2-302(2) that the court afford the parties reasonable opportunity to present evidence as to the commercial setting was introduced as a response to the concern expressed by businesses that commercial contracts might be made uncertain because courts would ignore their commercial circumstances. The official Comment 1 to s2-302 rejects the argument that the section is aimed at the "...disturbance of allocation of risks because of

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23. R.Dugan 'Standardized Form Contracts - An Introduction' 24 Wayne L.R. 1307 (1978).

24. See notably A.A.Leff 'Unconscionability and the Code: The Emperor's New Clause' 115 U. Pa. L. Rev. 485 (1967); J.C.Fort, 'Understanding Unconscionability: Defining the Principle' 9 Loyola L.J. 765 (1978), at p.766; D.Yates Exemption Clauses in Contracts Sweet & Maxwell, 2nd edition (1982), at p. 271. California dropped s2-302 from its commercial code due to s2-302's impreciseness and ambiguity. For a defence of the broad drafting of s2-302 see M. Ellinghaus 'In Defense of Unconscionability' 78 Yale L.J. 757 (1969); for a comparison with the provisions of the 1976 West German Law on Standard Contract Terms see A.H.Angelo and E.P.Ellinger 'Unconscionable Contracts - A Comparative Study' (1979) 4 Otago L. R. 300, at p.328.

25. S.Deutch Unfair Contracts Lexington (1977), at pp. 276-7. This recommendation is of considerable interest in Australia in that the Contracts Review Act 1980 (New South Wales) in s9(2) lays down a list of twelve factors that require consideration by the courts in determining the issue of unconscionability; see infra.

superior bargaining power".

Instead, the principle underlying s2-302 is stated to be "one of the prevention of oppression and undue surprise". As a result, in instances of presentation of evidence under s2-302(2) the provisions of a contract apparently harsh on an abstract view have been commercially justified seen in their commercial context. Such evidence has been most frequently used in inter-business standard form contracts where only a small percentage of contracts have been found by the courts to be unconscionable.<sup>26</sup>

### Desirability of Legislation on Unconscionable Contracts

Statutory provisions within Australia already contain powers which courts and tribunals may use to review individual contracts and to ensure these conform to a basic concept of fairness.<sup>27</sup> In 1976 the Peden Report dealt with a reference from the New South Wales Minister of Consumer and Cooperative Affairs and made recommendations concerning legislation on harsh and unconscionable contracts.<sup>28</sup> New South Wales has now brought down legislation

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26. See Fargo Machine Tool Co v. Kearney & Trecker Corp (1977) 428 F Supp 364, at 381; Jamestown Farmers Elevator Inc v. General Mills Inc. (1976) 413 F Supp 764, at 722. Cases in which evidence of a commercial setting did not preclude a finding of unconscionability include Majors v. Kalo Laboratories Inc (1975) 407 F Supp 20 (contract requiring farmer to give notice of defect in an inoculant within 120 days of sale), Ashland Oil Inc v. Donahue (1976) 223 SE 2d 433 (dealership contract terminable on 10 days notice but associated lease only terminable at the end of the year). See R.C.Griffin 'Standard Form Contracts' 9 N.C.Cen.L.J. 158 (1978)

27. Such statutes include the s 30(1) Hire Purchase Act 1941 (New South Wales), (now repealed) s 33(1) Hire Purchase Act 1959 (Tasmania), Industrial Arbitration Act 1940 (New South Wales) s88F, s22 Consumer Transactions Act 1972 (South Australia). For an example of judicial power given by statute to reopen a consumer credit bargain see s137 Consumer Credit Act 1974 (U.K.).

28. Report on Harsh and Unconscionable Practices 1976 (Peden Report); see (1977) 51 A.L.J. 232. I am grateful to Professor Peden for sending me a copy of his Report.

covering this area in the form of the Contracts Review Act 1980<sup>29</sup> which is discussed later.

If a solution was to be left to the courts alone, doubt has been expressed whether a wide doctrine of unconscionability is likely to develop in a short period of time. The Working Party on Consumer Protection Laws in the A.C.T. endorsed the proposal to introduce the doctrine by legislation but noted:

"... generally speaking in the purely commercial sphere it may be positively undesirable to interfere with the freedom of contract".<sup>30</sup>

It might be argued, therefore, that there is no need to apply the doctrine to contracts of a commercial nature between businesses. Certainly, it has been earlier suggested that the reasonableness test (s68A) may not be needed. Would it, then, be inconsistent to urge the introduction of legislation embodying the unconscionability doctrine to apply to such contracts?

The distinction between the reasonableness test and the concept of unconscionability is essentially that, whereas unconscionability is a subjective test, that of reasonableness is objective, determined by the conduct and attitudes expected from a reasonable man. As has been observed:

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29. See J.R.Peden The Law of Unjust Contracts Butterworths (1982) for a detailed commentary on the Act. For a critical review see A.L.Terry 'Unconscionable Contracts in New South Wales: The Contracts Review Act 1980' (1982) 5 A.B.L.R. 311.

30. Working Party 1975, at p.21; cited in the Peden Report, p.11.

"A test of unconscionability can cater for the susceptibilities of the particular parties to the agreement in a way that the more objective criterion of reasonableness does not ... Also, by having regard to a test of conscience, the court can have regard to the conduct of both parties, not just the party against whom relief is sought. Conduct after the making of the agreement does not seem to play any part in the test of reasonableness".<sup>31</sup>

The point has been made that, in the majority of commercial contracts which contain exemption clauses, insurance arrangements can be made to apportion loss and risk without undue cost to those insuring. However, it is recognized that there may exist circumstances where the terms of a commercial contract can bear unfairly upon another party. Such an instance was provided where a government instrumentality imposed terms on a contractor through a standard form contract; in the High Court's decision South Australian Railways Commissioner v. Egan, Menzies J observed:

"The contract is so outrageous that it is surprising that any contractor would undertake work for the Railways Commissioner upon its terms. It is, of course, a contract to which the doctrine of contra preferentem applies. The employment of such a contract tempts judges to go outside their function and attempt to relieve against the harshness of, rather than give effect to, what has been agreed by the parties. Courts search for justice but it is justice according to the law; it is still true that hard cases tend to make bad law."<sup>32</sup>

#### The Peden Report and Aftermath

The Peden Report (1976) which prepared the ground for the enactment of the New South Wales Contracts Review Act 1980, took note of the argument that all unconscionable contracts should be open to review as to do otherwise would introduce an undesirable and confusing division in the law. On the other hand, the point

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31. D.Yates Exclusion Clauses Sweet & Maxwell, 2nd edition (1982), at p.277. Although the comment cited is made on the basis of applying s.2-302 of the Uniform Commercial Code to consumer agreements in English contract law, the distinction between the two criteria are adopted for this argument.

32. (1973) 47 A.L.J.R. 140, at p.141.

was taken that the great majority of ordinary commercial transactions which were not oppressive should be unaffected by the uncertainty of discretionary judicial powers. Although a submission was made by the Australian Federation of Contractors on allegedly one-sided contractual terms laid down by Government Departments and Authorities in their general conditions of contract and tender, the arguments of the Federation were felt to involve issues of competition and public interest under the Trade Practices Act rather than those of harshness and unconscionability. The position of partnerships and small proprietary companies, on the other hand, were regarded in this context as similar to that of an individual consumer. Large corporations and government bodies, by contrast, would be relatively sophisticated in commercial matters and have easily accessible legal advice.

The Peden Report came down in favour of striking a balance between provisions covering all transactions and limiting them to consumer transactions only. This could be done by:

- (a) not excluding any class of contract from review;
- (b) precluding any public corporation or its subsidiary, government department or instrumentality from obtaining relief under the provision;
- (c) producing a greater degree of certainty and efficacy in the test for determining the types of contract requiring review by specifying factors which, to the extent they are relevant to the circumstances, should be taken into account in making such determinations. These should include "the commercial or other setting, purpose and effect of the contract" and "whether or not and when independent legal advice was obtained by the party seeking relief".



## The Contract Review Act 1980

The Contracts Review Act 1980 sets out at s9(2) twelve factors that require consideration by the courts in determining the issue of unconscionability. They are:

- "(a) whether or not there was any material inequality in bargaining power between the parties to the contract;
- (b) whether or not prior to or at the time the contract was made its provisions were the subject of negotiation;
- (c) whether or not it was reasonably practicable for the party seeking relief under this Act to negotiate for the alteration of or to reject any of the provisions of the contract;
- (d) whether or not any provisions of the contract impose conditions which are unreasonably difficult to comply with or not reasonably necessary for the protection of the legitimate interests of any party to the contract;
- (e) whether or not -
  - (i) any party to the contract (other than a corporation) was not reasonably able to protect his interests; or
  - (ii) any person who represented any of the parties to the contract was not reasonably able to protect the interests of any party whom he represented, because of his age or the state of his physical or mental capacity;
- (f) the relative economic circumstances, educational background and literacy of -
  - (i) the parties to the contract (other than a corporation); and
  - (ii) any person who represented any of the parties to the contract;
- (g) where the contract is wholly or partly in writing, the physical form of the contract, and the intelligibility of the language in which it is expressed;
- (h) whether or not and when independent legal or other expert advice was obtained by the party seeking relief under this Act;
- (i) the extent (if any) to which the provisions of the contract and their legal and practical effect

were accurately explained by any person to the party seeking relief under this Act, and whether or not that party understood the provisions and their effect;

- (j) whether any undue influence, unfair pressure or unfair tactics were exerted on or used against the party seeking relief under this Act -
  - (i) by any other party to the contract;
  - (ii) by any person acting or appearing or purporting to act for or on behalf of any other party to the contract; or
  - (iii) by any person to the knowledge (at the time the contract was made) or any other party to the contract or of any person acting or appearing or purporting to act for or on behalf of any other party to the contract;
- (k) the conduct of the parties to the proceedings in relation to similar contracts or courses of dealing to which any of them has been a party; and
- (l) the commercial or other setting, purpose and effect of the contract".<sup>33</sup>

#### Litigation under the Contracts Review Act

In Beaumont v. Helvetic Investment Corporation Pty Ltd<sup>34</sup>

Lusher J., in the New South Wales Supreme Court, indicated that the provisions of the Contract Review Act could not be raised by

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33. For comment on these factors see J.R.Peden The Law of Unjust Contracts Butterworths (1982), at pp.123-140 and A.L.Terry 'Unconscionable Contracts in New South Wales : The Contracts Review Act 1980.' (1982) 5 A.B.L.R. 311, at pp.336-349. For comment on cases under the Act 1980 : W. Guild 'A Shield or A Sword?' (1983) 21 Law Soc. J. (N.S.W.) 48; 'The Contracts Review Act 1980 (N.S.W.) Scotching Beaumont, and other Developments' (1983) 21 Law Soc.J. (N.S.W.) 304. A Green Paper, The Trade Practices Act Proposals for Change Canberra (1984), which is discussed later, proposes amendment of the Trade Practices Act under an exposure draft Trade Practices Amendment Bill. Clause 20 of the Bill would insert a new provision, s.52A, prohibiting corporations, in trade or commerce, from making or varying unconscionable contracts on engaging in unconscionable conduct in relation to contracts.

34. (1982) Australian Sales and Credit Reporter (subsequently referred to as A.S.C.) para. 55-194. See W. Guild 'The Contracts Review Act 1980 : A Shield or a Sword?' (1983) 21 Law Soc.J.(N.S.W.) 48.

way of a defence to an action<sup>35</sup>. In his Honour's view the Act could only be raised by way of a substantive application in proceedings arising out of contract.<sup>36</sup> However, this view was not accepted by Rogers J. in Commercial Banking Company of Sydney Ltd. v. W.W. & C.A. Pollard<sup>37</sup> in which he said :

"In my respectful view, insofar as Lusher J. could be taken to be suggesting that the Act could not be relied upon and relief could not be sought by way of defence to an action on the contract claimed to be unjust, that approach should not be followed."<sup>38</sup>

In Pollard's, case the bank on several occasions during 1978 advanced moneys by way of a bridging loan to the first defendant, who was carrying on a business under the name of Sportair Aviation, for the purchase of aircraft. In the same year, the first defendant also successfully applied to the plaintiff for a bill acceptance discount facility, in the sum of \$65,000 for the acquisition of two aeroplanes. On 18 July 1979 the first defendant applied for further advances on behalf of "Warwick Pollard Holdings Pty Ltd trading as Sportair Aviation". Five days later the application was approved with an overdraft limit of \$40,000 to be secured by guarantees of the first and second defendants. Both defendants made application to the plaintiff on 20 October 1980 for a personal loan of \$55,000. The occupation of each was shown as a director of Sportair Aviation. The application was approved and on 29 October 1980 the amount of the loan was credited as follows : \$45,016.83, at the defendants' request, to an account held by the plaintiff with "Warwick Pollard Holdings Pty Limited trading as Sportair Aviation"; \$9,157.17 to the defendants' personal account, the balance (\$826) being paid in ancillary expenses.

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35. A.S.C. para. 55-194, at pp.56, 846- 56,847.

36. Ibid.

37. (1983) 1 N.S.W.L.R. 74.

38. Ibid., at p.77.

The bank subsequently sued the defendants for \$59,777.81, being moneys advanced to the latter by way of personal loan and interest payable thereon. The defendants denied that they were indebted to the bank.

The bank sought an order on 11 October 1982 that the defence be struck out and, on the same day, the defendants filed an amended defence, claiming inter alia that they had not received any loan moneys from the plaintiff and had no knowledge as to whether the loan moneys were credited to their personal account and further, or in the alternative, that they did not authorise the plaintiff to distribute the loan moneys.

The amended defence raised against the bank's claim was as follows:-

- (a) there was a material inequality in bargaining power between the defendants and the plaintiff arising, inter alia, from the economic circumstances of the defendants.
- (b) Prior to the alleged contract of loan, its provisions were not the subject of negotiation between the defendants and the plaintiff.
- (c) It was not reasonably practical for the defendants to negotiate any alteration of or to reject any of the provisions of the alleged contract of loan.
- (d) Unfair pressure and unfair tactics were exerted on the defendants by the plaintiff, viz, the defendants overdraft account was cancelled.

The defendants then proceeded to file a cross-claim, seeking repayment of \$16,534.44 which they claimed to have paid, presumably as partial repayment of the loan which they now denied existed.<sup>39</sup>

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39. Rogers J. expressly assumed this in his judgment : (1983) 1 N.S.W.L.R. 74, at p.76.

On 25 January 1983, these cross-claimants amended their cross-claim seeking relief pursuant to the New South Wales Contracts Review Act 1980 (NSW), that any loan found to exist was void and, alternatively, an order varying the loan (if found to exist) by virtue of s.7.

Counsel for the bank primarily submitted that on the authority of Beaumont's case<sup>40</sup> a substantive application for relief was required from the applicant and that the provisions of the act would not be raised by way of defence. Lusher J. in Beaumont's case had based his approach upon his interpretation of s.11 of the Act which provides :

"(1) The Court may exercise its powers under this Act in relation to a contract on application made to it in accordance with rules of court, whether in :

- (a) proceedings commenced under subsection (2) in relation to the contract; or
- (b) other proceedings arising out of or in relation to the contract.

(2) Proceedings may be commenced in the Court for the purpose of obtaining relief under this Act in relation to a contract."

Considering the identical section, Rogers J. was equally convinced that Lusher J.'s approach should not be followed.<sup>41</sup> In so deciding, his Honour found guidance from similar provisions contained in ss 30 and 30A of the Money Lending Act 1941 (NSW). The first of these sections gives the Court power to re-open money lending transactions which are found to be harsh or unconscionable; the second gives the Court power to validate transactions which would otherwise be unenforceable by reason of non-compliance with provisions of the Money Lending Act. Rogers J., in referring to

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40. (1982) A.S.C. Para. 55-194.

41. (1983) 1 N.S.W.L.R. 74, at p.77.

Castles v. Freidmann<sup>42</sup> indicated that s.30 of the New South Wales Money Lending Act (1941)<sup>43</sup> could be relied upon by way of defence to an action to recover the principal sum lent plus interest.

Rogers J. determined that the Contracts Review Act was properly pleaded in the amended defence. It is submitted that his Honour correctly refused to follow the Beaumont decision. The relevant provisions in the Money Lending Act 1941 are similar to those contained in the Contracts Review Act. Accordingly, while it was perfectly open to a defendant in an action to institute separate proceedings claiming relief under the Contracts Review Act it would appear that it is not imperative that he should do so, but rather he could rely upon the provisions of the Act as a defence.

Counsel for the bank in Pollard's case, also argued that, by virtue of s.6(2) of the Contracts Review Act, the transaction in the instant case fell outside the Act's ambit. This sub-section excludes the Act's operation if the transaction was entered into the course of or for the purpose of a trade, business or profession carried on by a borrower. The plaintiff argued that the defendants carried on the business or aircraft sales and, alternatively, that their business was controlling the corporate entity of Warwick Pollard Holdings Pty Ltd. On this matter his Honour was far from satisfied, in terms of proof, with the plaintiff's claim. Refusing, in his own words, to "speculate" his Honour found no evidence that the defendants were carrying on business in their personal capacity.<sup>44</sup> Indeed, the available evidence left open the very real possibility that the defendants borrowed in their personal capacity and then lent it to

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42. (1910) 11 C.L.R. 580; citing also Abraham v. Dimmock [1915] 1 K.B. 662; Harrison v. Gremlyn Holdings Pty Ltd. (1961) 78 W.N. (N.S.W.) 711

43. Since repealed; Moneylending Repeal Act 1981 (N.S.W.)

44. (1983) A.S.C. Para 55-244, at p.56,239. (1983) 1 N.S.W. L.R. 74, at pp.79-80.

the abovementioned corporate entity.<sup>45</sup>

The approach of Rogers J. in not following Beaumont's case should be supported in that his judgment provides a less restrictive interpretation of the procedural operation of the Contracts Review Act, but the matter has yet to be authoritatively decided judicially.

By contrast, the case of Partyka v. Wilkie<sup>46</sup> dealt with the reasonable clear issue of relief available from the court under the Contracts Review Act.

In the Partyka case, the plaintiff, a Polish immigrant who had been in Australia little over a year noticed an advertisement in The Sydney Morning Herald on 7 July 1982 as follows : "Self-employment builder, painter, landscaper, handyman etc. Self-employed position in California. Free air tickets and accom. Ph. 29 1563".

Upon meeting the persons who placed that advertisement - who represented themselves as Andy and Eva - the plaintiff was subsequently introduced to the defendant Wilkie. Andy told the plaintiff that if he wanted the job, as a tiler at a motel in California at \$300 per week, he would first have to invest \$6,900 in that motel. having only \$6,600 the plaintiff procured a bank cheque in the defendant's favour for that amount and arranged that he would pay the balance form his first payment as a tiler in California. The plaintiff was then asked by the defendant to sign a document which, according to the former, he read and signed but did not understand. The document purported to be a declaration of trust by the defendant, the trust property being a 1% share in the motel. The beneficiary was given the right to have his title to the trust

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45. Rogers J. dismissed the bank's motion for summary judgement but made no orders as to cost.

46. (1982) A.S.C. Para. 55-213.

property transferred, which Needham J. presumed was to himself. The trustee's obligation was to hold title to the trust property.

On 14 July 1982 the plaintiff's solicitor wrote to the defendant requesting repayment of \$6,600 to the plaintiff. The plaintiff sought relief under s.7 of the Act which provides that where the Court finds a contract or a provision in a contract to have been unjust in the circumstances relating to the contract at the time it was made, the Court may, inter alia if it considers it just to do so and for the purpose of avoiding as far as practicable an unjust consequence or result, declare the contract void in whole or in part.

The plaintiff's argument was that the contract was unjust principally in the fact that, in answering the advertisement for work in California, he was met with a request to pay \$6,900. Accordingly, the argument proceeded, the accommodation and air tickets, as advertised, were not free. Needham J. believed that in judging this matter one had to take into account the plaintiff's limited knowledge of English in order to gauge the justice of requiring him to pay over such a considerable sum especially when : "One would think any realistic person would become suspicious when seeing the offer being made."<sup>47</sup>

Upholding the plaintiff's submission, Needham J. declared under s.7(1) of the Act that the contract was void and ordered under s.8 of the Act and Schedule 1., that the defendant repay to the plaintiff the sum of \$6,600 with interest calculated at 10% per annum from the date of payment until the date of his Honour's order. The defendant was also ordered to pay the plaintiff's costs of the proceedings.

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47. Ibid., at p.57,004.



In Cain v. Layfield<sup>48</sup> the defendant denied the validity of a contract for the sale of land pleading, inter alia, sale at gross undervalue, inequality of bargaining power, lack of independent advice and relief under the Contract Review Act 1980, s.7(1). In dealing with the case at issue Rath J. in the Supreme Court of New South Wales referred to the elements of Lord Denning's test of an unconscionable bargain in Lloyds Bank Ltd v. Bundy<sup>49</sup>. Rath J. conceded the plaintiff had no independent advice, but was of the view that it was questionable as to whether this would have provided any useful guidance, having regard to the evidence as to the value of his land. The terms of the contract were not unfair, neither was the consideration grossly inadequate; there were no undue influences or pressures brought to bear on the defendants by the plaintiff or Mr Cain. Accordingly, the transaction was held to be not unconscionable according to the principles of equity.

The defence based on the Contracts Review Act 1980 was then examined. Section 9(1) provides that, in determining whether a contract is unjust in the circumstances relating to the contract at the time it was made, the court shall have regard to the public interest and to all the circumstances of the case. The guidelines for the court, to the extent they are relevant are included in s.9(2)(a)-(l). The defence under para. (a) (inequality of bargaining power), had previously been rejected; there were no terms of the contract of an unusual kind or contrary to the interests of the defendant. Thus there was no valid defence under para.(d), "provisions unreasonably difficult to comply with or not reasonably necessary for the protection of any party to the contract". There was no evidence that, if the contract was at a gross undervalue,

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48. [1983-84] A.N.Z. Conv.R. 180.

49. (1975) 1 Q.B. 326; see supra.

which Rath J. held was not the case, that this fact was known to the relevant party. There was no particular difficulty in the special conditions concerning the date of settlement. Therefore the defence failed under para.(g), S.7(1) and the physical form of the contract and the intelligibility of the language in which it is expressed.

Section 9(2) is not exhaustive. It was a question for the court whether the contract was unjust in the circumstances relating to the contract at the time it was made. There was, in Rath J.'s view, no evidence of any circumstances which seemed to support a finding of injustice, however broadly the definition was interpreted. Accordingly there was no basis for the court to exercise its power under s.7 of the Act, and the cross claim was consequently dismissed.

It would appear from the litigation under the Contracts Review Act that the courts are capable of exercising their discretion in applying the statutory criteria to cases before them.<sup>50</sup>

#### A Critique of the Contracts Review Act

The Contracts Review Act 1980 departs from the Peden Report recommendations in one important respect. The draft Bill on introduction in the New South Wales Parliament in December 1979 received hostile reaction primarily because it sought to cover commercial transactions. As a result of this lobbying, essentially by the larger corporations, the Act, as passed, does not provide for relief to be given to a person in relation to a contract entered into in the course of or for the purpose of a trade, business or profession. An exception is made in the case of a person carrying

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50. For a recent case see Toscana v. Holland Securities 1 March 1985 Equity Division (New South Wales) 3588/85. See also A.C.L.D. [1985] 35.114, 35.283.

on or proposing to carry on an undertaking wholly or principally in New South Wales which includes, (but is not limited to) an agricultural, pastoral, horticultural, or viticultural undertaking.<sup>51</sup>

This section clearly represents an important break with the policy of the Peden Report and the 1979 draft Bill. Obviously representations made by a part of the business community had this effect. By the same token, the agricultural lobby in the State was sufficiently influential in securing that the terms of the Act covered farmers in general.<sup>52</sup> To the extent that the section represented a compromise, it is clear that the small businessman (aside from the category provided for) who finds himself confronted by a standard form contract the terms of which are clearly unequally balanced in favour of the presenter is still unprotected.

At the time when the draft Contracts Review Bill 1979 was about to be considered by the New South Wales Parliament the South Australian Parliament was dealing with its own draft Contract Review Bill. This Bill subsequently lapsed following a resolution by the Legislative Council of South Australia referring it to the Law Reform Committee of South Australia for its report and recommendations. The Law Reform Committee (subsequently referred to as the 'Committee') duly published its Report.<sup>53</sup> The Bill as passed by the

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51. Contracts Review Act s6(2).

52. For instances of successful farm lobbies in Canada to secure seller's obligations relating to quality and fitness of goods see Farm Implement Act 1970 (Alberta) Agricultural Implements Act 1968 (Saskatchewan) Farm Machinery and Equipment Act 1968 (Prince Edward Island). Restriction of relief available under the Contracts Review Act to a narrow class of reviewable contracts is regretted by A.L.Terry (1982) 5 A.B.L.R. 311, at p.321 (see note 63 supra) who also criticises the legislation as bringing about an arbitrary and unnecessary division in the law of contracts.

53. Forty Third Report of the Law Reform Committee of South Australia Relating to Proposed Contracts Review Legislation, Parliamentary Paper 160; subsequently referred to as the Forty Third Report, laid before the Legislative Council, 14 November 1978. The concern of the Council was principally with the effect of the proposed Bill on foreign contracts.

House of Assembly applied to all contracts which were subject to the law of South Australia and contained detailed criteria for determining whether a contract was unjust.<sup>54</sup> The Committee made the supposition that since the Bill had passed the House of Assembly following a report of a select committee of the House and given the terms of resolution of reference by the Legislative Council the objects of the Bill were acceptable to both Houses. The Committee stated:

"... the law should be altered to enable the courts to reform contracts which are unjust and to modify the application to particular situations of unjust contractual terms so as to avoid the injustice which would otherwise ensue. Judges in the past have done their best to avoid or at any rate mitigate the harsh consequences of unjust contracts and have resorted to interpretations and distinctions which, we fear, at times have been little better than subterfuges in order to avert injustice. That judges should feel impelled to resort to such devices is no credit to the law. All too often, in spite of all efforts, courts have been compelled by existing law to enforce contracts in the knowledge that the result was manifest injustice. In our view this is a reproach to the law and ought to be remedied. We have considered the difficulties and arguments which have been raised against legislation of this kind. The acceptance of the objects of the Bill by both Houses of Parliament makes it unnecessary for us to canvass the arguments. We content ourselves with stating that we have considered the arguments that legislation of this kind may create uncertainty as to whether apparently binding contracts will be enforceable, and that such legislation may be used by the unscrupulous as the basis of litigation in order to delay the enforcement of obligations against them, but that we cannot regard those arguments as decisive. The same arguments could be raised in varying degrees against many of the existing rules of the Law of contract including those relating to mistake, misrepresentation, undue influence and, in certain areas, relief against harsh or unconscionable contracts. All rules which protect contracting parties against injustice may produce some uncertainty and may be used unscrupulously for purposes of delay".<sup>55</sup>

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54. Contracts Review Bill 1978 (South Australia) cl.8.

55. Forty Third Report, at p.1.

The Committee<sup>56</sup> was particularly impressed by the experience of the United States with UCC s2-302. In the view of the Committee it had gathered from the literature that loss of confidence of businessmen and others in the binding force of contracts predicted by some as a consequence of the enactment of s2-302 had not occurred. Nor was there anything in the literature, according to the Committee, to suggest that abuse of s2-302 in order to delay enforcement of contracts was greater than the abuse of other rules of law for that dishonest purpose.<sup>57</sup>

The approach of the South Australian Law Reform Committee in the comments selected above is in marked contrast to other views expressed concerning the desirability of controlling the terms of inter-business contracts.<sup>58</sup> In putting forward the view that unconscionable contract legislation such as the Contracts Review Act should be confined primarily to consumer contracts Professor Peden has advanced the following reasons:

1. There was little evidence of unequal bargaining power leading to one-sided unconscionable terms between large corporations or government instrumentalities;
2. Small businesses (including sole traders, partnerships or proprietary companies) are likely to require protection because they lack sophistication in commercial matters and ready access to legal advice. This is less likely to be the case with large corporations;

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56. The Committee consisted of King and White J.J., Howard Zelling (now Zelling J.), J.F. Keeler, B.C. Cox and D.W. Bollen. D.F. Wicks produced a minority report which argued that the proposed Bill did not, "strike a reasonable balance between the need for justice and the need for certainty".

57. Forty Third Report, at p.4.

58. Note the approach of the draft ACT Ordinance on Harsh and Unconscionable Contracts (1976) and the Trade Practices Act Review Committee (Swanson Report) (1976), at para's 9.56-9.62.

3. There is consequently a clear distinction to be made between purely commercial transactions where freedom of contract remains meaningful and dealings with consumers and small business here greater protection is required.<sup>59</sup>

On the first point, it can be argued that although the standard form contract can be justified in modern commercial practice on grounds of reduction of transaction costs alone<sup>60</sup> it represents, in contrast with the contracting processes associated with traditional contract law, a unilateral imposition of completely generalized terms. Such contracts negate the assumption of freedom of contract which is supposed to remain meaningful within commercial transactions.<sup>61</sup> The UCC, both in its text and Official Comments, as earlier discussed, indicates a special awareness of the problems involved in standard form contracting. The Second Restatement of Contracts specifically covers standard form contracts. By it a person is presumed to have adopted his agreement to it, and has reason to believe that the form in question is used to frame conditions governing the performance of similar agreements.<sup>62</sup> A party agreeing to the form is allowed to escape the application of one or more questionable clauses. He must show that the other party to the form had reason to believe that something in the form would prompt the assenting party to withhold

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59. Peden Unjust Contracts Butterworths (1982), at pp.84-85.

60. See M.J. Trebilcock 'The Doctrine of Inequality of Bargaining Power in the Law of Contract: Post Benthamite Economics in the House of Lords' 26 U Toronto L J 359 (1976), at p. 364; G.Gluck Standard Form Contracts : The Contract Theory Reconsidered (1979) 28 1.C.L.Q. 72.

61. R.Dugan 'Standardized Form Contracts. An Introduction' 24 Wayne L.R. 1307 (1978), at p.1320.

62. Restatement (Second) of Contracts para. 237(1) (1973).

his consent.<sup>63</sup>

The second and third points put forward by Professor Peden for confining unconscionable contracts legislation primarily to consumer contracts make a distinction between small businesses which may need protection and large businesses which do not. Already the Contracts Review Act contains two anomalies. First, by virtue of s5 the Act binds the Crown in all its capacities. Egan's case has already been cited as an instance where the Crown and its instrumentalities have imposed unjust terms in standard form contracts on weaker parties.<sup>64</sup> Section 5 will not remedy situations akin to Egan's case and the majority of contracts between businesses and the Crown in New South Wales will be unaffected. Excluded from s.5 will be a range of businesses such as from small builders to large construction companies.

This is due to the second anomaly; s6(2) does not provide for relief to be given to a person who entered into the contract in the course of or for the purpose of a trade, business or profession other than a farming undertaking (or strata title and home unit corporation).<sup>65</sup> It appears inconsistent on policy grounds to protect farmers and, at the same time, leave small businesses as such outside the scope of the legislation. If, despite a desire by the New South Wales government to give relief to small businesses, this aim was defeated by an inability to find a workable definition of small business<sup>66</sup> then the approach of the defunct South Australian

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63. Ibid., at para. 237(3).

64. (1973) 47 A.L.J.R. 140; J.R.Peden Unjust Contracts (1982), at p.113. Note earlier evidence given by the Australian Federation of Construction Contractors in the Peden Report. See also Bright J. 'Contracts of Adhesion and Exemption Clauses' (1967) 41 A.L.J. 261 and in particular the commentary by the then President of the Law Council of Australia, H.E.Zelling, at p.272.

65. Contracts Review Act 1980 (New South Wales) s4(2).

66. See J.R. Peden Unjust Contracts (1982), at p.115.

Contracts Review Bill 1978 would seem to produce a more satisfactory result in this matter than the comparable Contracts Review Act of New South Wales.

The view expressed above is confirmed by the proposals concerning unconscionable contracts outlined in a Green Paper, published by the Federal government in 1984, The Trade Practices Act : Proposals for Change. The Green Paper proposes to amend the Trade Practices Act 1974 by adding a new section, s52A. This section would prohibit corporations in trade or commerce from making or varying unconscionable contracts or engaging in conduct in relation to contracts.<sup>67</sup> The proposed s52A(1), in guidelines set down as to what constitutes unconscionable conduct, closely follow those provided by the New South Wales Contracts Review Act 1980. However, the proposed s52A contains fifteen separate guidelines, as opposed to the twelve under the New South Wales Act.<sup>68</sup> The three additional guidelines under the draft s52A are "(e) whether, in the case of a contract, any party to a contract, prior to the relevant time, failed to disclose information of a material kind to any other party to the contract"; "(n) if in the case of a contract for the acquisition of goods and services, at the relevant time a contract for the acquisition of identical or equivalent goods or services could have been made with another supplier, the difference (if any) between the price of the identical goods or services that would have been payable under the last-mentioned contract and the price of the goods or services under the first-menioned contract"; "(p) whether, and if so to what extent the contract

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67. Green Paper (1984) Canberra, p.50, cl 20 of the exposure draft termed the Trade Practices Amendment Bill 1984, but see Postscript infra.

68. Contracts Review Act 1980 s 9(2). See Postscript infra.



or proposed contract as a whole favours any party to the contract or proposed party to the proposed contract even if no single provision of the contract or proposed contract is unreasonable."<sup>69</sup>

The proposed new section 52A breaks new ground not only in the context of the Trade Practices Act but of Australian law in general. If the proposal is given legislative form all contracts made by corporations <sup>70</sup>, both with consumers and between business, will be subject to tests laid down to judge whether a corporation has engaged in unconscionable conduct in relation to a contract, or made or varied an unconscionable contract. Clearly the Law Council of Australia in 1979 felt no qualms about the effect of a section similar to the proposed s52A. In its submission to the Trade Practices Consultative Committee on Small Business and the Trade Practices Act the Law Council stated :-

"Business generally would benefit from a general prohibition of harsh, unconscionable or unfair conduct which may or may not involve injury to competition or abuse of market power. This may be achieved by reference to such conduct in section 52."<sup>71</sup>

With the exceptions that the proposed s52A does not use the words "harsh" and "unfair" and ties the term "unconscionable" to contracts and deals with "conduct" relating to a contract rather than dealing with conduct as such, the government's proposals in the Green Paper cover the recommendations of the Law Council of Australia.

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69. Draft 52A(2); the remaining guidelines are essentially similar to those in s9(2) of the New South Wales Contracts Review Act 1980.

70. Subject to the exceptions in ss52A(4) and 52A(7) Trade Practices Act 1974.

71. The Trade Practices Consultative Committee on Small Business and the Trade Practices Act AGPS Canberra (1980), at p.307.

Although the proposed section might be readily accepted by consumer groups and small businesses, larger corporations using standard form contract could regard the innovation as creating uncertainty. Given that attitude, review and rewriting of standard forms will be needed should s52A be made law. One suggestion made by the Chairman of the Trade Practices Commission in order to obtain a period for such adjustment is that comments on the draft Bill in the Green Paper should include a recommendation that the commencement date for s52A be put back for a designated period. This would permit companies to review their internal policies with their legal advisers and for discussion with the Trade Practices Commission.<sup>72</sup>

### Conclusion

The bulk of standard form contracts used in inter-business transactions with exemption clauses forming an integral part of their content, deserve more suitable treatment than to be subjected to classical and outmoded concepts of freedom of contract.<sup>73</sup> Nor is it satisfactory to leave their adjudication to the vicissitudes of the doctrine of fundamental breach, albeit tamed to a rule of construction.<sup>74</sup>

The United Kingdom Unfair Contract Terms Act 1977 provides the most recent instance of statutory control of exemption clauses in

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72. R.M. Bannerman in a paper commenting on the Green Paper, Sydney 22 March, Melbourne 23 March, 1984; at p.19.

73. For a defence against modern attacks on freedom of contract see R.A.Epstein 'Unconscionability: A Critical Reappraisal' 18 J.Law & Econ. 293 (1975). See Lord Denning's vivid account of the trials and torments of freedom of contract in George Mitchell (Chesterhall) Ltd v. Finney Lock Seeds Ltd [1982] 3 W.L.R. 1036, 1043-1045. For a general critical review see J.H.Baker 'From Sanctity of Contract to Reasonable Expectation?' (1979) 22 Curr.Leg.Prob 17 et seq and see the references there cited.

74. Photo Production Ltd v. Securicor Transport Ltd (1980) 1 All E.R. s56; see now George Mitchell (Chesterhall) Ltd v. Finney Lock Seeds Ltd [1981] Lloyd's Rep. 476; [1982] 3 W.L.R. 1036.

standard form contracts by means of a reasonableness test<sup>75</sup>. This statutory test has been invoked with sufficient frequency by the English courts to appraise that test's effectiveness in controlling exemption clauses in standard form contracts.

In R.W. Green Ltd. v. Cade Bros. Farm<sup>76</sup> it was held by the Court of Appeal to be fair and reasonable for seed potato merchants to rely on a limitation clause which limited their liability to the contract price of the seed potatoes sold. However, the merchants contract required that complaints had to be made within three days of delivery. This was held by the court to be unreasonable in respect of a defect, such as virus infection, which was not discoverable on inspection, within the time allowed by the contract. By contrast, George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd<sup>77</sup> Lord Denning distinguished the R.W. Green case from the one before him. In the latter case, the contract terms had been evolved over twenty years and the trial judge regarded the conditions as a set of trading terms on which both sides were content to do business. By contrast, Lord Denning regarded the present case as "borderline". The price of the cabbage seed in the George Mitchell case was small, but the damages claimed were high. The clause was not negotiated between persons of equal bargaining power but inserted by the seed merchants in their invoices without any negotiation by the farmers. In addition, the buyers had no opportunity of finding out if the seed was not cabbage seed while the sellers could and should have known this. Such a mistake could not have occurred without serious negligence by the seed merchants or their suppliers. As to risk, the buyers were not covered by

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75. Unfair Contract Terms Act 1977, Schedule 2.

76. [1978] 1 Lloyd's Rep. 602.

77. [1982] 3 W.L.R. 1036, affirmed by the House of Lords, [1983] 3 W.L.R. 16.

insurance and, indeed, appropriate cover was not available. By contrast, it was possible for the seedsmen to insure against this risk and the cost of the premium would not materially have raised the price of the seeds. The protection of the clause for guarding against the very rare case, as instant in the present litigation, was not reasonably required. In the George Mitchell case Lord Denning applied the criteria in the statutory test for judging fairness and reasonableness - namely negotiability of the term or terms, equality of bargaining power and availability of insurance to cover the risk allocated by the exemption clause or clauses.

In the most recent cases, Stagline Ltd. v. Tyne Shiprepair Group Ltd<sup>78</sup>, Rees Hough Ltd. v. Redland Reinforced Plastics Ltd<sup>79</sup> and Phillips Products Ltd. v. Hyland<sup>80</sup> it could be said that the detailed and careful application of the reasonableness test by the Court of Appeal in the George Mitchell case was lacking. For example, Staughton J.'s observation in the Stagline<sup>81</sup> case, where a clause excluding economic loss was held not to be unreasonable, that small print and convoluted draftsmanship in the contract at issue could have tempted him to hold all the conditions unfair and unreasonable<sup>82</sup> was contradicted by his own finding that the relative bargaining positions of the parties were broadly equal and additionally noting that commercial men were less concerned with the small print if they could secure a satisfactory guarantee clause.<sup>83</sup> Another point of criticism of Staughton J.'s judgment is his observation (obiter) that when the contract was made between the plaintiffs and the defendants the latter were very busy and thus

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78. [1984] 2 Lloyd's Rep 211.

79. Unreported, (1984) 134 N.L.J. 706.

80. Unreported, The Times December 24 1984.

81. See note 73 supra.

82. [1984] 2 Lloyd's Rep. 211, at p.222.

83. Ibid., at p.223.

reluctant to make any concession, whereas had they been short of work the defendants might have been much more ready to do so. In Staughton J.'s view it could not have been Parliament's intention that a clause in a shiprepairer's standard terms would be fair and reasonable one week - when the yard would be willing to make concessions - but unfair the following week, when the yard was busy.<sup>84</sup> No doubt Staughton J. was correct in not taking the issue of the level of the defendant's business commitments into account on the facts which were available to him. However, his observations, although obiter, cannot be taken as representing what is clearly expressed in s11(1) of the Unfair Contract Terms Act 1977.

The other two cases, Rees Hough and Phillips Products<sup>85</sup> raise certain important issues in relation to the reasonableness test. In the Rees Hough and Phillips cases the learned judge and the Court of Appeal respectively were less well directed in their application of the reasonableness test than were the House of Lords in George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd.<sup>86</sup> and in the approach taken to the construction of exemption clauses in standard form contracts by the House of Lords in Photo Production Ltd. v. Securicor Ltd.<sup>87</sup> In the Rees Hough case the expertise of the contractor was clearly central to the contract and on the evidence a breach of s14 of the Sale of Goods Act 1979 was proved. However, the court in Rees Hough did not appear to have addressed the issues of equality of bargaining power, the reality of negotiations between the parties, including previous dealings, and the availability of insurance to cover the risk allocated by the

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84. [1984] 2 Lloyd's Rep. 211, at p.223.

85. (1984) 134 N.L.J. 706; The Times, December 24 1984 respectively, discussed supra.

86. [1985] 3 W.L.R. 164.

87. [1980] 2 All E.R. JS6; see Chapter One.

exemption clause or clauses. The Court of Appeal in the Phillips Products case also seems to have left these matters aside. It is regrettable that these two cases indicate a departure from the careful and rigorous application of the reasonableness test by the Court of Appeal in the George Mitchell<sup>88</sup> case.

There would appear little doubt that the statutory reasonableness test embodied in the United Kingdom Unfair Contract Terms Act 1977 will be invoked more frequently by the English courts now that the Securicor<sup>89</sup> case has restricted the operation of fundamental breach. The similarly worded test in s.68A(3) of the Australian Trade Practices Act, by comparison, seems unlikely to provide a suitable means of examining commercial bargainings. Section 68A(1) itself is a statutory exemption clause<sup>90</sup> (in that it limits the liability of a supplier in a commercial contract of \$15,000 or under) and the reasonableness test contained in s68A(3) has never been the subject of litigation. Additionally, should the Trade Practices Act be amended as proposed, to include a new unconscionability section (s52A) the continued existence of a separate reasonableness test in the same Act would be anomolous. In that situation it can be argued that s68A(3) should be excised. In the light of these two facts it can be argued that in order to construct a statutory test for the control of exemption clauses in inter-business contracts the unreasonableness test should not serve as a suitable model for Australian legislation.

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88. [1982] 3 W.L.R. 1036.

89. [1980] 2 All E.R. 556.

90. See G.Q. Taperell, R.B. Vermeersh, D.J. Harland Trade Practices and Consumer Protection 3rd. edition Butterworths (1983), para. 1753, for a discussion of s68A see supra.

The main distinction between the reasonableness test and the concept of unconscionability is that, whereas reasonableness is objective, determined by the conduct and attitude expected from a reasonable man, unconscionability is a subjective test. A test, or tests, of unconscionability, is more flexible than the reasonableness test in that unconscionability can take account of the position the particular parties in a way that the objective criterion of reasonableness cannot. A test of unconscionability allows the court to have regard to the conduct of both parties, not merely the party against whom the relief is sought.<sup>91</sup>

The writer endorses the approach of the proposed amending s52A to the Trade Practices Act 1974 which would prohibit corporations, in trade or commerce, from making or varying unconscionable contracts or engaging in unconscionable conduct in relation to contracts. The application of the proposed s52A section to all contracts, including inter-business contracts, however, raises the issue as to whether such a proposal will not lead to uncertainty in business transactions.

It has been noted that the experience of the American courts and the commercial community is that s2-302 of the U.C.C. has not led to a loss of confidence of businessmen in the finding force of contracts nor to uncertainty.<sup>92</sup> The main criticism of s2-302 would appear to be the lack of guidelines and its ambiguity. Given the relatively small proportion of inter-business contracts that have been struck down by the section there appears to be no reason to believe that applying unconscionability tests to such contracts in Australia would produce a different result.

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91. D. Yates Exclusion Clauses Sweet & Maxwell, 2nd edition (1982), at p.277.

92. See J.R. Peden The Law of Unjust Contracts Butterworths (1982), at p.47.

The main advantage which the proposed amending of s52A to the Trade Practices Act (and, by implication s9(2) of the New South Wales Contracts Review Act 1980) has over s2-302 is a more precise formulation of the criteria of unconscionability. If those provisions, as set out in the Green Paper,<sup>93</sup> were applied equally to commercial contracts it would seem that abuses existing in inter-business transactions could be specifically isolated and remedied.

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93. The Trade Practices Act : Proposals for Change Canberra (1984), at p.17.



## CHAPTER FIVE

### PROBLEMS OF TITLE AND STATUTORY WARRANTIES

#### Introduction

A seller has no right to sell goods under the Sale of Goods Act where he has no title to the goods and can pass none to the buyer.<sup>1</sup> The problems that stem from this general rule will be dealt with in the first half of this chapter by examining the issue of transfer of title by a non-owner, the "feeding" of title and the position of mercantile agents under the Sale of Goods Act and related case law. Voidable title will then be considered with reference to the "nemo dat" rule, the Twelfth Report of the English Law Commission<sup>2</sup> and the recent proposals of the Law Commissions of England and Scotland in their Working Paper Sale and Supply of Goods (1983)<sup>3</sup> concerning title, encumbrances and quiet possession. Specific solutions to the issue of voidable title will be illustrated in discussing the provisions of the Victorian Chattels Securities Act 1981. In conclusion to the topic of title to goods limited title will be dealt with.

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1. Section 36(1) (New South Wales); s27 (Victoria); ss21(2), 24(1) (Queensland), (South Australia), (Western Australia); s26(2) (Tasmania), (A.C.T.); s35 (N.T.); ss33 SGA (1979) (U.K.); see K.C.T. Sutton Sale of Goods (1974) Chapter Fourteen; Benjamin Sale of Goods (1981) Sweet & Maxwell, at paras 262-265.

2. Twelfth Report (Transfer of Title to Chattels) (1966) Cmd. 2958.

3. Working Paper No 85 Scot. Law Com. Consultative Memorandum No. 58.

The second half of this chapter deals with statutory warranties, particularly those relating to supply by manufacturers. The first part deals with manufacturer's liability under Division 2A of the Commonwealth Trade Practices Act 1974 and the second part examines the corresponding State provisions in South Australia, the Australian Capital Territory and New South Wales. The third part considers the statutory warranties provided by the second-hand motor vehicle legislation in particular States.

(1) Problems of Title under the Sale of Goods Act

(a) Introduction

A seller has no right to sell goods under the Sale of Goods Act where he has no title to the goods and can pass none to the buyer.<sup>4</sup> As a general rule this is expressed in the form that only the owner is capable of passing a good title to a buyer - nemo dat quod non habet - no one can give what he has not got. No one can give a better title than he himself possesses.<sup>5</sup>

The usual application of this rule is to cases where a person, obtains possession of the goods or documents of title, to them from the owner, disposes of them fraudulently to an innocent third party

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4. See note 1, supra.

5. See on the proposed modification of the rule Twelfth Report of the English Law Reform Committee (1969) Cmnd. 2958, noted K.C.T. Sutton Sale of Goods Law Book Co. (1974), at pp.431-433.

for value, and then disappearing with the price. Even if the culprit is found he may often turn out to be incapable of being sued successfully. In addition to the common law exception of sale in market overt, further exceptions to the nemo dat rule have been made by statute.<sup>6</sup> As noted by Lord Denning in Bishopsgate Motor Finance Corporation v. Transport Brakes Ltd:

"In the development of our law, two principles have striven for mastery. The first is for the protection of property; no one can give a better title than he himself possesses. The second is for the protection of commercial transactions; the person who takes in good faith and for value without notice should get a better title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute to meet the needs of our times".<sup>7</sup>

These exceptions referred to are based on convenience and commercial necessity.

The Sale of Goods Act contains the basic statement of the nemo dat rule in s26(1),<sup>8</sup> at the same time it protects the ability of a mercantile agent in possession to give good title to an innocent third party for value<sup>9</sup> as in (s26(2):

"Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell".

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6. See infra.

7. [1949] 1 K.B. 332, at pp. 336-337.

8. Section 26(1) SGA (New South Wales); ss26, 27 SGA (Victoria); s21 SGA (South Australia), (Western Australia); s46 SGA (Queensland); s26 (SGA) (Tasmania), (A.C.T.) s25 SGA (N.T.); s21 SGA (UK).

9. Section 26(2) SGA (New South Wales); see note supra.

It is also made clear that nothing in the Act is to effect the provisions of the Factors (Mercantile Agents) Act 1923 (s26(2)).<sup>10</sup>

The Sale of Goods Act specifically lists, as exceptions to the nemo dat rule, sales under voidable title,<sup>11</sup> sales by a seller or buyer in possession after sale,<sup>12</sup> sales in market overt,<sup>13</sup> bona fide purchases of goods bound by a writ of execution<sup>14</sup> and provision for the revesting of stolen property on conviction of the thief.<sup>15</sup> It is the first two exceptions - sales under voidable title and sales by a seller in possession after sale - that will be examined because these provide particular problems.

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10. Factors (Mercantile Agents) Act 1923 (New South Wales); Factors Act 1891 (Tasmania); Mercantile Law Act 1936 (South Australia); Factors Act 1892 (Queensland) Goods Act 1958 (Pt II) (Victoria); Mercantile Law Ordinance 1962 (ACT) Factors Act 1889 (UK). In Western Australia the English Acts of 1823, 1825, 1842 and 1877 appear to be in operation but there is no Act based on the consolidating English Factors Act of 1889, see K.C.T. Sutton Sale of Goods (1974), p.249.

11. Section 27 SGA (New South Wales), (A.C.T.); s29 SGA (Victoria); s23 SGA (South Australia), (Western Australia); s25 SGA (Queensland); s28 SGA (Tasmania); s23 SGA (UK).

12. Section 28 SGA (New South Wales); ss30, 31 SGA (Victoria); s25 SGA (South Australia), (Western Australia), s27 SGA (Queensland); s30 SGA (Tasmania); s29 SGA (A.C.T.); s25 SGA (UK).

13. Not provided for in SGA (New South Wales), (Queensland), (A.C.T.), s28 SGA (Victoria); s22 SGA (South Australia), (Western Australia); s27 SGA (Tasmania); s26 SGA (N.T.); s22 SGA (UK).

14. Section 29 SGA (New South Wales); s82 SGA (Victoria); s26 SGA (South Australia), (Western Australia); s28 SGA (Queensland), (N.T.); s31 SGA (Tasmania); s30 SGA (A.C.T.); s26 SGA (UK).

15. Not provided for in SGA (New South Wales); s83 SGA (Victoria); s24 SGA (South Australia), (Western Australia) s26 SGA (Queensland); s29 SGA (Tasmania); s28 SGA (A.C.T.); s27 SGA (N.T.); s24 SGA (UK).

(b) Transfer of Title by a Non-Owner

The owner may be precluded by his conduct from denying the seller's authority in a number of ways.<sup>16</sup> He may actually represent in so many words, that the seller is the owner of the article or has the authority to sell. Again he may, by conduct, allow the seller to appear as the owner or have authority to sell. In other words, there may be estoppel by representation or by conduct. Linked with the doctrine of estoppel are the related doctrines of apparent ownership and that of apparent authority arising from the law of agency. Sutton regards the concepts as being different aspects of the same notion; apparent ownership and authority have regard to the third party's relationship with the transaction, whereas estoppel is concerned with conduct by the owner of the goods.<sup>17</sup> The distinction may, thus, be of little significance, because the liability of the principal may be based both on apparent ownership or authority and separately on estoppel. In one respect the distinction is of significance in that the general view is that title by estoppel to personal property is available only against the true owner and individuals who are parties to his representation on which the estoppel is based.<sup>18</sup> Thus, outsiders, such as bona fide purchasers for value from the person estopped, are not bound by the estoppel.

In Eastern Distributors Ltd v. Goldring<sup>19</sup> the English Court of Appeal did make a distinction between estoppel and apparent authority. In that case, A, the owner of a van, entered into a scheme with a motor dealer, B, to enable him to finance the purchase

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16. See note 16 supra.

17. K.C.T.Sutton Sale of Goods Law Book Co. (1974), at p.231.

18. See Bank of England v. Cutler [1908] 2 KB 208, 234.

19. [1957] 2 Q.B. 600. Ruled as wrongly decided by the Privy Council in Motor Credits (Hire Finance) Ltd v. Pacific Motor Auctions Pty Ltd [1965] A.C. 867; see infra.

of another vehicle from B. B, abetted by A, pretended to C, a hire purchase finance company, that he, B, was the owner of the van and sent C documents signed by A whereby he offered to take the van and the other vehicle on hire purchase from C. C accepted the offer concerning the van but declined the second proposal. Exceeding his actual authority from A, B concluded the transaction on this basis. B purported to sell the van to C who, then, hired it back to A, A believed the whole transaction to have been cancelled and at all times remained in possession of the van. A then sold the van to D, from whom C sought possession.

If the van had not been sold by A to D, C could have recovered possession either on the basis that A was a party to B's representation that B owned the van, or because A had given B apparent authority to dispose of the van by signing documents which represented that B was the owner. Since B had never been in possession of the van C could not raise the statutory provisions.<sup>20</sup> Complications arose when A sold to the bona fide purchaser for value, D was not a party to A's representation he was not estopped as he was a purchaser for value without notice.

Therefore, the Court of Appeal was obliged to fall back on the distinction between the doctrines of estoppel and apparent authority. In contracts for the sale of goods, the courts had dealt with the problem of unauthorized sales on the basis of apparent authority and that of mercantile convenience had established that a buyer, who bought in good faith from a person who had apparently been given the right to dispose of goods by the true owner, acquired a title which was good against all the world.<sup>21</sup> This concept differed from that of "equitable estoppel" in that it transferred a legal title.

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20. See note 10 supra.

21. [1957] 2 Q.B. 600, at p.606 per Devlin J.

Thus, B had been empowered by A to use documents which enabled B to represent to C that he was to the owner of the van and had the right to sell it. As a result C acquired a good title to the vehicle.<sup>22</sup>

It has been suggested that the above case could have been disposed of on the simpler ground that C had B's apparent authority to sell, even though B had exceeded that authority.<sup>23</sup> The decision is authority for the proposition, that, in the case of representation of apparent ownership or ostensible agency in relation to goods, a bona fide purchaser for value from the apparent owner or the ostensible agent acquires good title. In the case of an owner of goods entrusting possession of them to a dealer with authority to sell, or to obtain offers, the owner would normally be estopped from denying the dealer's authority to sell if the dealer sold without, or in excess of, his authority. But this form of estoppel is now of little practical importance as it has been largely superseded by the statutory protection given to innocent purchasers under the Factors Acts.<sup>24</sup>

(c) Feeding of Title

A seller who has no title to goods which he purports to sell but afterwards acquires a title before the buyer rejects the goods, may hold the buyer to the transaction. The buyer is estopped from denying the validity of the transaction and the subsequently acquired title of the seller goes to "feed" the previously defective title of the buyer. This "feeding of title" can be usefully illustrated by reference to particular leading cases involving hire purchase transactions.

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22. [1957] 2 Q.B. 600 per Devlin J., at pp. 606-611.

23. See P.S.Atiyah The Sale of Goods Pitman (Sixth edition) 1980, at p.227.

24. See P.S.Atiyah ibid., see note 7 supra; ss5, 6 Factors (Merchantile Agents) Act 1923 (New South Wales); ss67, 68 Goods Act 1958 (Victoria); Merchantile Law Act 1936 s4 (South Australia); Factors Act 1892 s3 (Queensland); Factors Act 1891 s5 (Tasmania); Merchantile Law Ordinance 1962 ss6, 7 (A.C.T.); s2 Factors Act 1889 (UK).

In a hire purchase agreement, there is an implied condition that the owner does, in fact, own the goods.<sup>25</sup> In Karflex Ltd v. Poole<sup>26</sup> it was held that an implied condition of title required the owner to have legal property in the goods at the time of execution of the hire purchase agreement. In Mercantile Union Guarantee Corporation Ltd v. Wheatley<sup>27</sup> the court, by contrast, held that such a condition did not require the owner to have title to the goods at the time of execution of the contract, but it would be sufficient if he gained it before delivery. In Butterworth v. Kingsway Motors Ltd,<sup>28</sup> A took delivery of a car under a hire purchase contract dated January 3 1951 and purported to sell it to B on August 1 of that year under the mistaken belief she had the right to sell it subject to her continuing to pay the instalments. B sold to C and C, in turn, sold to the defendant, who then sold to the plaintiff. The plaintiff, then, after eleven months use of the car, received notice on July 11 1952 from the original owners, the hire purchase dealers, requiring that the car be delivered to them. The plaintiff's solicitors then wrote to the defendant's solicitors claiming the return of the whole of the purchase price, £1,275, which had been paid on July 17 1952. About July 25 A paid off the balance of the hire purchase price to the original owners. The payment vested the title in the car in A and this title went to feed the defective title of the subsequent purchasers. The plaintiff then brought an action against the defendants for recovery of the purchase price. It was held, however, that the plaintiff was entitled to recover the full purchase

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25. Section 9, Hire Purchase Act 1959 (Tasmania).

26. [1933] 2 K.B. 251.

27. [1938] 1 K.B. 490.

28. [1954] 1 W.L.R. 1286.



price, £1,275, as the defendants were in breach of s12(1)(a).<sup>29</sup> As the market had dropped in the meantime the car was worth only about £800 on July 17, the date when the plaintiff repudiated the contract. The plaintiff was thus enabled by the Act to make a profit of £475, which may explain the view of the judge, Pearson J. that "... the plaintiff's position was somewhat lacking in merits".<sup>30</sup>

The letter of July 17, 1952, from the plaintiff's solicitors to the defendant's soliditors constituted a rescission of the contract of sale and on that date the plaintiff was entitled to rescind and recover the purchase money from the defendants. The plaintiff was also entitled to maintain that he had no claim to possession of the car but a right to recover the purchase price from the defendants although when the writ was issued the plaintiff was in undisturbed possession of the car and there was no adverse claim against him. The hirer, A, having completed the payment to the owners in full about July 25, and having induced them to relinquish any claim which they had to the car, then acquired title to the car. The title acquired by A then went to feed the previously defective titles of the subsequent purchasers and accordingly, about July 25, the ownership of the car vested in the defendants.

In Patten v. Thomas Motors Pty Ltd,<sup>33</sup> a hirer in possession of a motor car under a hire purchase agreement purported to sell it to a dealer who resold it to a third party. Thereafter, it changed

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29. Sale of Goods Act (1893) (UK); see now s12(1)(a) SGA 1979 (UK); s17 SGA (New South Wales); (Tasmania) (A.C.T.); s16 Goods Act (Victoria); s12 SGA (South Australia), (Western Australia); s16 SGA (N.T.).

30. [1954] 1 W.L.R. 1286, at p.1291. Pearson J. left open the question as to whether the plaintiff would have succeeded if he had not claimed the return of the money before A paid off the owners.

31. [1965] N.S.W.R. 1457.

hands several times until, eventually, it was bought by the defendant and sold to the plaintiff. All the transactions except the initial one were bona fide. The hire purchase company repossessed the car, but, subsequently, it transpired that, some time after the plaintiff had bought the car from the defendant, the hirer had borrowed money on the security of the vehicle to pay out the owner under the hire purchase agreement. The plaintiff sued the defendant for damages for the breach of warranty of title. The essential issue was whether the payment by the hirer in discharge of the owner's interest under the hire purchase agreement had fed both the contract between the hirer and the dealer and the subsequent transactions, so as to pass the property in the car from the hirer along the line of succession to the plaintiff.

The Full Court of the Supreme Court of New South Wales decided that the hirer acquired title to the car on paying out the owner and that this acquisition "fed the estoppel" so that the legal estate passed along the chain of succession and vested in the plaintiff. Accordingly the plaintiff failed in his action.<sup>32</sup> The Court rejected the argument that the doctrine could not apply where a title, even a voidable one, had passed and it could not be invoked, as in the instant case, where no title at all passed originally from hirer to dealer. The Court did, however, place one limitation on the doctrine. This was where the purchaser had given notice of the rescission of the contract caused by a breach of the implied condition as to title as soon as he discovers the breach and before the title is perfected by feeding the estoppel. In this case there is no contract left to feed as rescission has effectively ended it.<sup>33</sup>

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32. The Court relied upon, in support of this view, the cases of Butterworth v. Kingsway Motors Ltd (supra), Guthrie v. Motor Credits Ltd (1963) 37 A.L.J.R. 167, 168, Whitehorn Bros v. Davidson [1911] 1 K.B. 463 and Lucas v. Smith [1926] V.L.R. 400.

33. See Butterworth v. Kingsway Motors Ltd. [1954] 1 W.L.R. 1286.

(d) Mercantile Agent and the Buyer or Seller in Possession After Sale

(i) Protection of the Mercantile Agent under the Sale of Goods Act

The Sale of Goods Act, as earlier noted, specifically protects the ability of a mercantile agent to give good title to an innocent third party for value and nothing in the Sale of Goods Act may affect the provisions of the Factors Act.<sup>34</sup> The Act provides as follows:

"where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same".

A factor is defined by the Factors Act as:

"a mercantile agent having in the customary course of his business such agent authority to sell goods, or to consign goods for the purpose of sale, or to buy goods or to raise money on the security of goods".<sup>35</sup>

The mercantile agent will bind the owner where the agent has possession of goods or documents of title to goods (such as bills of lading) with consent of the owner and pledges, sells, or otherwise disposes of such goods in the ordinary course of business, with or without the owner's authorization.<sup>36</sup>

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34. See notes 9, 10 supra.

35. Section 3 Factors (Mercantile Agents) Act 1936 (New South Wales), Merchantile Law Act 1936 (South Australia), Factors Act 1891 (Tasmania); s65 Goods Act 1958 Part II (Victoria); s2 Factors Act 1892 (Queensland); s4 Merchantile Law Ordinance (A.C.T.); s1 Factors Act 1889 (United Kingdom). On mercantile agents see Benjamin Sale of Goods Sweet & Maxwell (1981), at para 491 et seq; K.C.T. Sutton Sale of Goods Law Book Co. (1974), Chapter 15, p.5; P.S. Atiyah Sale of Goods Pitman, Sixth edition (1980), at pp.235-240.

36. See ss9, 10 Factors Act 1892 (Queensland), ss11, 12; Factors Act 1891 (Tasmania), ss8, 9 Factors Act 1889 (United Kingdom).

(ii) Validity of Disposition by Mercantile Agent

The two essential requirements for the disposition to be valid are that the mercantile agent must be in possession of the goods with the consent of the owner and, second, that the agent must have acted in the ordinary course of business. Each of these will be discussed in turn.

In Folkes v. King<sup>37</sup> a car owner delivered a car to a mercantile agent for sale at not less than 575. The agent sold to a buyer who purchased it in good faith and without notice of any fraud. The agent defaulted on the purchase price and the original owner sued to recover the car from the purchaser. The court held that as the agent was in possession with the original owner's consent the purchaser had good title as against the original owner. Where a person is induced to part with goods in circumstances amounting to larceny by a trick the buyer will still obtain possession with the seller's consent. That will be the case where, under s28 of the Sale of Goods Act, a person buys or agrees to buy goods and obtains possession of them or documents of title to them and disposes of the goods or documents to a bona fide third party. In that case the third party will receive a good title.<sup>38</sup>

In Pearson v. Rose & Young<sup>39</sup> the plaintiff delivered his car to a mercantile agent, in order to obtain offers, but with no authority to sell it. The agent obtained possession of the registration book by a trick in such circumstances that the owner clearly had not agreed to parting with possession of it. The agent then sold the car as he had intended from the outset. The Court of Appeal held that the question as to whether the agent had committed the offence of

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37. [1923] 1 K.B. 283.

38. SGA (New South Wales); see note 9 supra.

39. [1951] 1 K.B. 275.

larceny by a trick was quite immaterial.<sup>40</sup> In each case, the only question to be considered was whether the goods were in the agent's possession with the consent of the owner. In the instant case, the mercantile agent had possession of the car with the consent of the owner, but not of the registration book. The Court further held that a sale without a registration book would not have been a sale in the ordinary course of business, and, therefore, the defendants were not protected by the Factors Act. From the judgments in the Pearson case, it appears that Denning L.J. was prepared to hold that "goods" for the purpose of the Factors Act, in the present context, referred to the car together with its registration book.<sup>41</sup> The basis of the decision, arguably, is not that the sale was outside the ordinary course of business of a mercantile agent, but that the agent did not have possession of the goods (i.e. the car and the log book) with the owner's consent. An alternative interpretation of the decision is that the sale of a car with its log book obtained without the owner's consent is a sale outside the ordinary course of business of a mercantile agent.<sup>42</sup> In Stadium Finance Ltd v. Robbins<sup>43</sup> this alternative view was accepted by the Court of Appeal and the opinion of Lord Denning rejected. In the Stadium Finance case the owner of a car left it with a dealer for display with a view to sale but as the owner wished to deal with the sale himself, he removed the ignition key but inadvertently left the log book in the locked glove

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40. The Theft Act 1968 (U.K.) has abolished the offence of larceny by a trick. In England where goods are stolen or obtained by fraud or other wrongful means, the title to that or any other property will not be affected by the conviction of the offender, despite any contrary enactment (s31(2) Theft Act 1968 (U.K.), repealing s24 Sale of Goods Act 1893). On conviction of an offender a court can order the restitution of goods to the owner (s28, Theft Act 1968).

41. Vaisey J. and Somervell L.J. seem to have reached this position also; [1951] 1 KB 275, 284, 290, 291. See K.C.T. Sutton Sale of Goods (1974), at p.266.

42. See criticism of Pearson's case in note in (1951) 67 L.Q.R. 3.

43. [1962] 2 Q.B. 664.

compartment of the car. The dealer obtained keys, took possession of the log book, and sold the car to a finance company. Ormerod and Danckwerts L.JJ. regarded "goods" for the purposes of the Factors Act as simply including the car, without keys and log book<sup>45</sup> and they regarded the vehicle as being in possession of the dealer with the owner's consent. Willmer L.J. took the contrary view and regarded the dealer, whether he was or was not in possession of either the key or the log book, as not being in possession of the car in his capacity as a mercantile agent. His Lordship saw retention of the key by the owner as meaning that the owner retained a power of disposal.<sup>45</sup>

The Court, however, was unanimous that the sale by the dealer to the finance company was not in the ordinary course of business of a mercantile agent, because the log book did not come into the possession with the owner's consent.<sup>46</sup> The Court of Appeal appeared to overlook the fact that at the time of the sale to the finance company the hirer who took possession of the car, in accordance with normal practice, also received an ignition key and saw, but did not examine, the registration book produced by the dealer; therefore the transaction appeared to be valid.<sup>47</sup> The combined effect of both the Pearson and Stadium Finance cases is to limit the protection given to a bona fide purchaser under the Factors Act.<sup>48</sup>

### (iii) Effect of Pearson and Stadium Finance in other Commonwealth Jurisdictions

However, it is doubtful that the Stadium Finance or Pearsons

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44. [1982] 2 Q.B 664, at pp.670, 676.

45. [1962] 2 Q.B. 664 at p.674.

46. [1962] 2 Q.B. 644, per Willmer J. at p.675.

47. See criticism of the decision K.C.T.Sutton Sale of Goods (1974) 267; note by J.A.Hornby (1962) 25 M.L.R. 719, 772-723; (1962) 78 L.Q.R. 468.

48. K.C.T.Sutton Sale of Goods Law Book Co. (1974), at p.267.

decisions would be followed in either Australia or New Zealand. In both jurisdictions less importance is attached to the certificate of registration. The certificate is not an exact equivalent of the log book, in that the certificate of registration is renewed each year and does not "run with" the vehicle during its life. In Victoria, New South Wales and Western Australia certificates of registration do show details relating to title, including particular encumbrances.<sup>49</sup> In Canada the case of Durham v. Asser<sup>50</sup> it was decided that the English decisions had no application to sales by mercantile agents of a motor vehicle without a certificate of registration.

(iv) Effect of the Pacific Motor Auctions Case

Until 1965, it could be asserted that for a third party to obtain good title under s28 of the Sale of Goods Act<sup>51</sup> a seller must not be simply in possession of the goods when resold but the seller must be in possession as seller, and not in some other capacity, as a bailee for example.<sup>52</sup> In that year the Privy Council handed down its decision in Pacific Motor Auctions Pty Ltd v. Pacific Motor Credits (Hire Finance) Ltd.<sup>53</sup> There, a motor dealer, A, a finance company B, which was the plaintiff, and a third party purchaser, C, which was the defendant, (also a car dealer) were involved. The course of

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49. See J.R. Peden 'Title Problems in Relation to Chattels - Proposals for a Registration System for Motor Vehicles in Australia' (1968) 42 A.L.J. 239. See now Chattels Securities Act 1981 (Victoria); discussed infra.

50. (1968) 67 D.L.R. (3d) 574, 583, 584.

51. Sale of Goods Act 1923 (New South Wales); see note 21; the section in the Sale of Goods Act is similar to ss8 and 9 Factors Act 1889 (UK), ss9 and 10 Factors Act 1892 (Queensland), ss 11 and 12 The Factors Act 1891 (Tasmania), the words 'or under any agreement for sale, pledge or other disposition thereof' being omitted in the equivalent section of the Sale of Goods Act.

52. Staffs Motor Guarantee Ltd v. British Wagon Co Ltd [1934] 2 KB 305; Eastern Distributors v. Goldring [1957] 2 QB 600.

53. [1965] AC 867; followed in Worcester Works Finance Ltd v. Cooden Engineering Co Ltd [1971] 3 All E.R. 708 (CA).

dealer A's business was for it to purchase cars on its own behalf and then offer them to B to finance on a "floor plan" or "display plan" arrangement. If the offer were accepted, the property in the vehicles passed to finance company B but they remained on display at A's premises. All the sales of display plan cars were made by A in its own name and an assurance was given to the buyer that A was the owner of the car with the knowledge of B. In other words, B was a party to A's representation of ownership. A was in debt to C, the third party purchaser (the defendant), and C, consequently, purchased twenty nine cars from A, which constituted the initial debt. It was arranged that the cars would be sold back to A if the cheques representing payment were met within a week. C obtained from A declarations that C was the sole owner of the vehicles which had been sold, but those declarations transpired to be false in respect of sixteen of the twenty nine cars which were owned by B under the display plan arrangement. Before that transaction, B had cancelled A's authority to handle its cars held on the display plan. C was unaware of this and further, had acted bona fide throughout. When C refused to hand the vehicles over to B an action was brought.

The trial judge in the Supreme Court of New South Wales held that the plaintiff B, by its conduct in clothing A with apparent authority or apparent ownership to sell, was estopped from denying A's authority to sell. In addition, it was immaterial whether the transaction was in the ordinary course of business or not, since the limitation applied where the only basis of the apparent authority is the possession of goods, and where the Factors Act is applicable; but is not an essential requirement for the application of the common law principle of estoppel, as had been expounded in Eastern Distributors v. Goldring.<sup>54</sup>

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54. [1957] 2 Q.B. 600.



In the High Court, the decision was reversed by a majority, Taylor and Owen JJ. holding that the case was one involving ostensible agency rather than ownership, since the defendant C knew that A had obtained "floor plan accommodation" from the plaintiff B, and that it was clear that A was dealing in vehicles of which it had possession but were not its property. The ostensible agency extended no further than authorizing A to sell in the ordinary course of business. Hence, there was no estoppel against the plaintiff.

On appeal to the Privy Council, the Judicial Committee found it unnecessary to consider what it termed the "... difficult question of estoppel", instead it based its decision to allow the appeal on the strict provisions of s28(1) of the Sale of Goods Act.<sup>55</sup> In the High Court, the argument that under this subsection C had obtained good title to the vehicles as a bona fide purchaser from a seller continuing in possession of the goods, had been rejected on the ground that the character of A's possession had changed, and it remained in possession, not as a seller, but by virtue of its rights as a bailee. The Privy Council decided that the interpretation placed on s28(1) in Staffs Motor Guarantee Ltd v. British Wagon Co Ltd and Eastern Distributors Ltd v. Goldring<sup>56</sup> was wrong; ruling that both these decisions were wrongly decided in this respect, and that s28(1) afforded a complete defence to B's claim. In Staffs Motor Guarantee Ltd v. British Wagon Co. Ltd.<sup>57</sup> A, a motor vehicle dealer, sold a lorry to the defendant finance company which then hired it back to A, giving A permission to sub-let the lorry to a would-be purchaser on hire purchase. The lorry was not delivered to the finance

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55. (New South Wales); see note 24 supra.

56. [1934] 2 K.B. 305; [1957] 2 Q.B. 600 respectively.

57. [1934] 2 K.B. 305.

company and remained with A. A later sold the lorry to the plaintiff finance company, which let it out to B, who took possession of the vehicle. When A defaulted under his hire purchase agreement with the defendant hire purchase company, the latter repossessed the lorry from B and refused to give it up when the plaintiff finance company demanded it. The claim by the plaintiffs was based on the Factors Act and on s25(1) of the English Sale of Goods Act 1893, the equivalent of s28(1) of the New South Wales Sale of Goods Act 1923. MacKinnon J., in the English High Court, held that where goods had been entrusted to a dealer, not as a mercantile agent dealing in those goods, but as a hirer and therefore as a bailee, a purchaser from the dealer could not rely on the Factors Act to obtain a good title. On the facts of the instant case, the purpose of the hiring was not to enable the dealer to obtain the goods on terms for his own use, but to allow him to "resell" the goods by sub-letting them on hire purchase. The claim by the plaintiff under the Sale of Goods Act also failed on the ground that, although A, as seller, continued in possession after the sale of the lorry to the defendant finance company, A's continued possession was not as seller, but as bailee under a hire purchase agreement. In Eastern Distributors Ltd. v. Goldring<sup>58</sup> the English Court of Appeal were faced with the following facts. A was the owner of a van and he wished to buy a car from B, a car dealer. At B's suggestion, A authorized B to sell the van to a hire purchase finance company, C, to obtain an agreement by C to sell the van to A on hire purchase terms and to pay the proceeds of the sale to C in paying the deposits on the hire purchase of both the van and the car. B's authority to sell the van was limited to carrying out together both the sale of the van and the car to C, and

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58. [1957] 2 Q.B. 600.

B had no authority to carry out one transaction without the other. A signed four blank hire purchase documents in respect of each vehicle and gave them to B, leaving B to complete them. A sales note in the proposal form relating to the van contained a printed statement by which B certified that the vehicle was his absolute property. Without any further authority from A, B sold the van to the plaintiffs as his own and accepted A's hire purchase proposal with respect to the van as a genuine hire purchase transaction, but did not implement the agreement relating to the car. B subsequently told A that the whole of the transaction was cancelled. Shortly afterwards A sold the van, which he believed to be his own property to the defendant, D, who bought it in good faith and without knowledge of A's dealings with the van. A made no payments under the hire purchase agreement. The plaintiff, C, terminated the agreement and claimed the van or its value from the defendant, D. The Court of Appeal held,<sup>60</sup> inter alia that the plaintiff finance company, C, were entitled to recover the van from the defendant D, for the following reasons. First, although B had no actual authority to sell the van to C, A, by providing B with documents that enabled B to represent himself to C as entitled to sell the van, had given B apparent authority to sell the van and A was precluded (within s21(1) of the English Sale of Goods Act 1893<sup>60</sup>), from denying B's authority to sell. C, therefore, had acquired the title to the van which A himself had, and A was left with no title to the van that he could pass to D, the defendant. Second, s25(1) of the English Sale of Goods Act 1893<sup>61</sup> did not render the sale to D valid and effective because, if that section were to apply, it would be necessary that the seller (whom the court

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59. Lord Devlin delivering the judgment of the court; Staffs Motor Guarantee Ltd. v. British Wagon Co Ltd [1934] 2 K.B. 305 followed.

60. Section 26 S.G.A. (New South Wales).

61. Section 28 S.G.A. (New South Wales.)

assumed to be A and not B for the purposes of s25(1)) should have remained in possession as seller. Although the hire purchase agreement was unenforceable<sup>62</sup> it was not thereby rendered void and was effective to change A's possession, in his character as seller, to possession as bailee.<sup>63</sup>

The Privy Council in the Pacific Motor Auctions case<sup>64</sup> held, ruling that both the Staffs Motor Guarantee and the Eastern Distributors cases were wrongly decided in respect of s28(1) of the New South Wales Sale of Goods Act, that the words "continues .. in possession" in s28(1) of the New South Wales Sales of Goods Act referred to the continuity of physical possession, irrespective of any private agreement between the seller and the first buyer which might alter the legal title under which possession was held. Therefore, unless there is an actual transfer of physical possession the seller is to be treated as continuing in possession and is able to pass title under s28(1). Thus, the essential basis for determining whether a seller is or was in possession as a seller is whether he has remained in physical possession throughout.<sup>65</sup>

(e) Voidable Title

(i) The "Nemo Dat" Rule : The Problems Illustrated

A person who has a voidable title to goods can confer a good title to them on a bona fide purchaser for value, providing the

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62. By the terms of s2(2) of the Hire Purchase Act 1938 (now repealed).

63. P.S. Atiyah raises the question as to why the case was not disposed of on the simpler ground that B had A's agreement to sell, although B, in fact, exceeded that authority; see P.S. Atiyah Sale of Goods Seventh Edition (1985) at p.272 on the issue of apparent authority in the Eastern Distributors case [1957] 2 Q.B. 600 per Devlin L.J., at p.606.

64. [1965] A.C. 867.

65. The Privy Council approving Mitchell v. Jones (1905) 24 N.Z.L.R. 932. Contrast the result in General Distributors Ltd v. Paramotors Ltd [1962] SASR 1; K.C.T.Sutton Sale of Goods Act, (1974) at 237.

seller's title has not been avoided at the time of sale. Thus s27 of the Sale of Goods Act<sup>66</sup> provides:

"when the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title".

The main result of this section, which embodies a common law principle, is that, if a person buys goods by fraudulent means and disposes of them before the original seller avoids the contract a buyer in good faith from the defrauder will obtain a good title. However, a distinction must be made between a contract which may be void for mistake and a contract which may be voidable for fraud.<sup>67</sup> In the case of a contract void for mistake, the contract is a nullity in that the buyer acquires no title and, consequently, none can be passed to an innocent third party.<sup>68</sup> If the contract is voidable for fraud, the innocent third party purchaser must ensure that the original seller has not rescinded the contract prior to the sale to the third party and has, thus restored property in the goods to the original seller.<sup>69</sup> In Car & Universal Finance Co Ltd v. Caldwell<sup>70</sup> the English Court of Appeal held that, in general, the defrauded party could only rescind the contract by communicating with the other party to the contract, and notifying him of the rescission. However, where a defrauder, by absconding, made communication with him impracticable, the seller could rescind the contract by showing an intention to rescind the contract and by taking all possible steps to regain the goods, for example, such as informing the police of the loss. The court left open the question as to whether the contract would be rescinded

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66. (New South Wales), s25 (Queensland); s29 (Victoria); s28 (Tasmania); s23 (South Australia), (Western Australia); s27 (A.C.T.); s24 (N.T.); s23 (U.K.).

67. See Lewis v. Averay [1972] 1 Q.B. 198.

68. Ibid.

69. As in Cundy v. Lindsay (1878) 3 App. Cas. 459.

70. [1965] 1 Q.B. 525.

where the innocent party's inability to communicate with the defrauder was not due to the latter deliberately avoiding contact. The Court was agreed that, notwithstanding the general rule that election to rescind by the seller must be communicated, seizure of the goods by the seller without the buyer's knowledge, but before resale to an innocent third party, would effectively end the contract and revert the title to the seller. It should be noted that the decision in Caldwell's case is of limited practical effect because in the circumstances in which it applies the third party will get good title under s28 of the Sale of Goods Act.<sup>71</sup>

(ii) The "Nemo Dat" Rule: The Twelfth Report of the English Law Reform Committee (1966)<sup>72</sup>

In 1963, the English Law Reform Committee was asked to consider the modification or supplementation of the nemo dat rule in its application to the transfer of chattels in the interests of people who were the victims of theft, fraud, or operative mistake.

The Committee in its Report, Transfer of Title to Chattels (1966), rejected the suggestion made in Ingram v. Little<sup>73</sup> by Devlin L.J. that there should be a system of apportionment of loss between the true owner of the goods and an innocent third party purchaser. The Committee did propose the repeal of the market overt provision in the Sale of Goods Act<sup>74</sup> and its replacement by a provision enabling a

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71. New South Wales; see note 12 supra; also Newtons of Wembley Ltd v. Williams [1965] 1 Q.B. 560.

72. Twelfth Report (Transfer of Title to Chattels) (1966) Cmnd. 2958.

73. [1961] 1 QB 31, 73; this case was overruled in Lewis v. Averay, see note 67 supra. Rejected by the Committee specifically on grounds of uncertainty and procedural difficulties. For comment on the Twelfth Report see K.C.T. Sutton Sale of Goods Law Book Co. (1974) at pp.431-433.

74. Section 28 (Victoria); s22 (South Australia), (Western Australia); s27 (Tasmania); s26 (N.T.); s22 (U.K.).

person, including a financier, who purchases goods in good faith and without notice of any defect in title by retail or trade premises<sup>75</sup> or at public auction, to obtain a good title. The onus of proof of bona fides would be on the purchaser,<sup>76</sup> who would not acquire a good title "... if he had actual knowledge of any fact or circumstances which should have led him to infer the existence of some defect of title or to make enquiries which would have revealed the existence of such a defect".<sup>77</sup> Lord Donovan's reservations in the Report on this point should be noted. He considered that it would be very hard to disprove the buyer's bona fides even where there were doubts at the time of the purchase. His Lordship's conclusion was that the suggested amendment might well become a cloak for fraud, and increase, rather than diminish, the amount of unrecovered stolen property.<sup>78</sup> The Committee envisaged its proposal as covering any unauthorized disposal of goods by a trader at trade premises and including goods entrusted to him for storage and repair.<sup>79</sup> So, a motor trader with vehicles in his possession, on display plan for the purpose of attracting offers to buy or held for storage or repair, could give good title on sale to an innocent purchaser, whether or not he was in possession of the vehicles as a merchantile agent or acted in the ordinary course of business.

Good title would also be given to an innocent purchaser in this situation, whether or not the circumstances gave rise to an estoppel

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75. Defined as premises open to the public at which goods of the same or similar description were normally offered for sale by retail in the course of business carried on at those premises, but not including a street market (as in Newtons of Wembley (see note 71 supra)).

76. Effectively abrogating the decision in Whiteham Bros v. Davison [1911] KB 463.

77. Twelfth Report par.33, at p.14.

78. Ibid., at p.18.

79. Twelfth Report, paras.18, 29, at pp.9, 13.

against the owner, or the trader could be shown to be a seller who had continued in possession of the goods. For this reason, the Committee saw no reason to change the law concerning sale by a mercantile agent and that may have been the reason for it not dealing with the issue of title by estoppel and for not recommending any change in s25 of the Sale of Goods Act<sup>80</sup> in the light of the Pacific Motor Auctions<sup>81</sup> decision.

The Committee proposed that contracts which were void under the then existing law on the basis that the owner of the goods was deceived or mistaken as to the identity of the person with whom he dealt, should be treated as voidable in so far as third parties were concerned. Thus, a bona fide third party would acquire good title provided he obtained possession before the owner rescinded the initial contract of sale. This position may have been reached with the decision in Lewis v. Averay.<sup>82</sup> To ensure full protection of the innocent purchaser the Committee recommended, effectively nullifying the decision in Car and Universal Finance Co Ltd v. Caldwell,<sup>83</sup> that notice of rescission of a voidable contract ought not to be effective unless and until that rescission was communicated to the other contracting party. This proposal has been criticized as going too far in protecting the bona fide purchaser, as the suggestion has been made that a more suitable alternative would be to provide that a purported rescission by the seller shall be ineffective, unless the purchaser had notice of it, or the seller had recovered possession of the goods.<sup>84</sup>

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80. Section 28 (New South Wales); see note 12 supra.

81. [1965] A.C. 867, see supra.

82. [1972] 1 Q.B. 198.

83. [1965] 1 Q.B. 525.

84. J.R.Peden 'Title Problems in Relation to Chattels - Proposals for a Registration System for Motor Vehicles in Australia' (1968) 42 A.L.J. 239, at p.242.



The Committee also recommended the abrogation of the decision in Newtons of Wembley Ltd v. Williams<sup>85</sup> in so far that it allowed a buyer in possession of the goods with consent of the seller under a voidable contract to pass good title to a third party, even after effective rescission of the voidable contract. The Committee also urged amendment of that decision in so far as it related to s25 of the Sale of Goods Act<sup>86</sup> that the transaction should have the same effect "as if" the buyer in possession were a mercantile agent.

The Committee finally recommended a restriction of the rule in Rowland v. Divall.<sup>87</sup> That case laid down that if a seller had no right to sell the goods, in breach of the relevant provision of the Sale of Goods Act,<sup>88</sup> then there was a total failure of consideration and the buyer could recover the purchase price without any set-off for depreciation, even though the buyer may have made considerable use of the goods, since the buyer did not acquire property in the goods. The Committee proposed that the buyer, in any action for breach of the implied condition as to title, should recover no more than his actual loss, taking into account any benefit he might have received while the goods were in his possession.<sup>89</sup> It should be noted that a statutory exception to the principle in Rowland v. Divall exists under s6(3) of the United Kingdom Torts (Interference with Goods) Act 1977. Hence, if proceedings are brought by the buyer against the seller for recovery of the purchase price because of

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85. [1965] 1 Q.B. 560; Twelfth Report para.16.

86. Section 28 (New South Wales) see note 24 supra.

87. [1923] 2 K.B. 500.

88. Section 17 (New South Wales), (Tasmania), (A.C.T.); s16 (Victoria), (N.T.); s15 (Queensland); s12 (South Australia), (Western Australia).

89. Thereby preventing rescission by the buyer on discovering the true situation before the seller was given a chance to rectify the situation; see Butterworth v. Kingsway Motors Ltd [1954] 1 W.L.R. 1286.

failure of consideration then, if the seller acted in good faith, an allowance is made, where appropriate, for any improvement affected by the seller or by any person from whom the seller derived his purported "title" to the goods. The improver must be assumed to have improved the goods in the mistaken but honest belief that he had good title to them.<sup>90</sup>

(iii) Comment on the Committee's Proposals

The recommendations of the Committee indicate a general trend towards greater protection for innocent buyers by piecemeal exceptions to the nemo dat rule. It has been pointed out, in criticizing the approach of the Committee, that protecting the titles of innocent buyers does not necessarily prevent theft and, further, that the nemo dat rule should be retained and not subjected to wholesale exceptions, as proposed by the Committee, a consequence which would prejudice chattel owners and their insurers.<sup>91</sup> Against this contention it may be argued that, in the context where most such problems respecting title occur - namely in the sale of motor vehicles - the incidence of insurance against the risk of defective or non-existent title should more equitably and relatively inexpensively be borne by finance companies and dealers. However, the central problem would seem to be the provision of a means whereby a buyer can satisfy himself simply and inexpensively before purchase that the seller's title to a vehicle is unencumbered.<sup>92</sup> This matter ought to be considered in the light of recent legislation in Victoria,<sup>93</sup> which is

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90. Sections 6(1), (2) and (4) Torts (Interference With Goods) Act 1977 (United Kingdom). See Benjamin, Sale of Goods (1982) para.266.

91. J.R.Peden 'Title Problems in Relation to Chattels - Proposals for a Registration System for Motor Vehicles in Australia' (1968) 42 A.L.J. 239.

92. Ibid., at p.244. The choice appears to lie between an information register and the issue of certificates of title by a central registry, see infra.

93. Chattels Securities Act 1981 (Victoria), infra.

dealt with after noting recent proposals in this area by the English and Scottish Law Commissions.

(f) Recent Proposals Relating to Title, Encumbrances and Quiet Possession

In its recent Working Paper, Sale and Supply of Goods (1983) the English and Scottish Law Commissions made proposals, on the basis of consultation, which included reform of the law in the area relating to title, encumbrances and quiet possession.<sup>94</sup>

The Law Commission had reached the view in an earlier Working Paper published in 1975,<sup>95</sup> that it was unrealistic for the courts to take the view that there had been a total failure of consideration, as a result of the supplier being in breach of the implied condition as to title, where the customer had benefitted significantly from the use of the goods for which he contracted.

One method of solving the problem of the unjust enrichment of the customer which the Law Commission had regarded as being obvious would be to prevent him from being entitled to terminate the contract for breach of the implied term as to title or, at least, to

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94. Working Paper No. 85 Scot. Law Com. Consultative Memorandum No. 58; see Chapter Three with respect to the Law Commission's proposals concerning quality and fitness of goods.

95. Working Paper No 65 on Pecuniary Restitution on Breach of Contract (1975). The Law Commission published a Report (Law. Com. No 121 (1983)) on some of the matters examined in Its Working Paper. This Report stated that it was thought more appropriate for the problem of title to be dealt with in a later consultative document; see Report at paras. 1.9 - 1.12.

restrict that right by applying the doctrine of acceptance in contracts of sale to breaches of that implied term in all contracts of supply.<sup>96</sup> The Law Commissions, however, rejected this method because breaches of implied term were not similar, in their result, to breaches of other statutorily implied terms. The innocent party, in the former situation, might be sued by the true owner of the goods in conversion and might claim the goods from the purchaser who could either lose possession or not be able to resell safely. The Law Commissions, therefore, recommended provisionally that the statutory rules as to acceptance should not apply where there had been any breach of the implied term as to title.<sup>97</sup> Accordingly, the Law Commissions provisionally recommended that the only way to prevent unjust enrichment by a purchaser (either in contracts for sale or hire purchase) was to ensure that the customer was not automatically entitled to the return of the whole price and that the court should take into consideration any significant use or possession of the goods which the customer had enjoyed.<sup>98</sup>

In considering alternative ways of reforming the law, the Law Commissions had considered various options. In respect of the party in breach being given the opportunity to cure his defect in title where appropriate the Law Commissions regarded this as a complicated solution. Although the right to terminate on breach of title had the appearance of inflexibility, it did create certainty. The Law Commissions, therefore, provisionally recommended that for, breach of the implied term as to title, the innocent party should be entitled to

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96. Working Paper No. 85, at para 6.6.

97. Ibid.

98. Working Paper No. 85, at para. 6.7.

terminate the contract in all cases without first having to give the supplier the opportunity to remedy the breach.<sup>99</sup>

The Law Commissions considered the extent of the appropriate monetary entitlement of the innocent party once he had lawfully ended the contract. In its earlier Working Paper, the Law Commission had proposed that after rejection, the innocent party should be entitled to have his money refunded, subject to a deduction for use and possession of the goods.<sup>1</sup> There were, however, problems inherent in the valuation of use and possession, and the Law Commissions, thus regarded it as unsatisfactory to base a detailed test on the valuation of use and possession alone.<sup>2</sup> An alternative solution would have been to prevent the innocent party from claiming the return of his money and to restrict him to a remedy in damages. This would mean that, in most cases, the customer would be entitled to the cost of a replacement article in addition to damages for consequential loss.<sup>3</sup>

Another course of action would be to grant the customer, on breach of the contract, an entitlement either to damages or to the return of all the moneys paid subject to a deduction for use and possession, whichever was the greater amount.<sup>4</sup> This solution had been earlier canvassed in the Working Paper as applicable to breach of one of the other implied terms in a contract for the supply of goods other than sale.<sup>5</sup>

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99. Working Paper No. 85, at para 6.10.

1. Working Paper No. 65 (1975), at para 78.

2. Working Paper No. 85, at para 6.11.

3. Ibid., at para 6.12.

4. Working Paper No. 85, at para 6.13.

5. Ibid., at paras 5.9 and 5.13.

The Law Commissions were of the view that, if the customer still had possession of the goods he ought to be entitled to terminate the contract only those goods had been returned, even if they were not substantially in the same state as they were when possession has passed. Their state would, however, be taken into account in assessing damages or valuing the use and possession of the goods. In the case of a customer unable to return the goods, he should be entitled to terminate the contract only if the reason for that inability was that the true owner had repossessed the goods from the customer. Where the customer had voluntarily given up the goods and repossession was not regained the remedy should be damages only.<sup>6</sup>

Overall, the Law Commissions proposed that specific provision should be made that, where the supplier was in breach of the implied term as to title, the customer should be entitled to terminate the contract except where :

- (a) he is in possession of the goods but refuses to restore them;
- (b) he is unable to restore the goods for a reason other than that the true owner has repossessed them from him.<sup>7</sup>

If the customer was not entitled to terminate the contract, he should, in the view of the Law Commissions, be entitled to claim damages.<sup>8</sup>

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6. Working Paper No. 85, at para 6.16.

7. *Ibid.*, at para 6.17. In addition the common law rules as to affirmation, waiver and estoppel and personal bar should, in the view of the Law Commissions, continue to apply, but s.35 of the Sale of Goods Act 1979 (U.K.) would not (governing acceptance of the goods by the buyer). For equivalent provision in Australia see s.38 (New South Wales); s.42 (Victoria); s.35 (South Australia), (Western Australia); s.37 (Queensland), (N.T.); s.39 (A.C.T.); s.40 (Tasmania).

8. Working Paper No. 85, at para 6.17.

The Law Commissions also considered the problem, although it rarely occurred of where the true owner of the goods had not made a claim in conversion, either against the customer or the supplier, at the time when the customer rejects the goods. In an extreme case, a customer who had had possession of the relevant goods for a substantial time, he might be able to recover, perhaps, three quarters of the price from the supplier. On the other hand, the customer may subsequently be sued in conversion by the true owner and the measure of damages be likely to be equal to the price paid for the goods.<sup>9</sup> Noting earlier proposals in the 1975 Working Paper,<sup>10</sup> the Law Commission put forward a solution for consideration under which the customer should be given a statutory indemnity against the supplier, enabling him to sue the supplier on the indemnity when he himself was sued by the true owner.<sup>11</sup>

In respect of the existing terms as to encumbrances and quiet possession, the Law Commissions noted that these warranties in the Sale of Goods Act had excited little litigation. The Working Paper had earlier noted the criticism of the concept of warranty on the ground that it was undesirable that there should be any category or term for the breach of which rejection was never available. This criticism was accepted by the Law Commissions which considered that it was unsatisfactory that the law should not provide the innocent party with the right to terminate the contract, no matter how serious the breach. Unless it was specifically provided in the Sale of Goods Act itself the Law Commission doubted if a modern court would classify any term as one no breach of which gave the right to reject, except where the parties had expressly provided. Accordingly, the

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9. Ibid., at para 6.18.

10. Ibid., Working Paper No. 85, at para 6.20.

11. Working Paper No. 85, at para 2.32.

Law Commissions provisionally recommended that the remedies proposed for breach of the implied terms as to description, quality, fitness and sample<sup>12</sup> would be equally appropriate for breach of implied terms as to encumbrances and quiet possession.<sup>13</sup>

(g) Chattels Securities Act 1981 (Victoria)

An attempted solution to some of the problems posed by the nemo dat rule and its exceptions now exists in Victoria as a result of the passing of the Chattels Securities Act 1981. Part III of the Act provides for the registration of security interests in motor vehicles<sup>14</sup> and puts any purchaser of vehicles on constructive notice of the contents of that register. A system of registration is created which provides for public searches of the register and provides for compensation to either a security holder whose interest is extinguished or to a purchaser who loses entitlement to a vehicle under the Act. The register provides for the registration of names of persons who are holders of security interests (s15). Such an interest is defined to mean a security for the payment of a debt or other obligation consisting of, (a), an interest in goods or, (b), an interest in goods under a mortgage, charge, lien, pledge, trust or power. The register also provides for public search and the issue of a certificate containing particulars of entries in the register. The system thus established provides for registration by a security holder rather than an alternative method of registration of all vehicles through registration of engine number.<sup>15</sup>

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12. Ibid., at paras 4.43, 4.59.

13. Working Paper No. 85, at para 6.23.

14. The definition used is that of the Motor Car Act 1958 (Victoria) 'any vehicle propelled by internal combustion'.

15. Originally recommended by the Molomby Committee, but rejected by the Report of the Supplementary Committee as being impracticable, recommending the system now in use in Victoria. The Victorian System under the Motor Car Act 1959 was favoured by J.R.Peden, (see note 91 *supra*) who, in a 1967 survey found all vehicle registration authorities in the States and territories opposed to the introduction of a title registration system.



The system so created does not seek to provide a government guaranteed "certified title" guaranteed by government which could be a pre-condition to registration. The registration system set up by the Chattels Securities Act 1981 relies upon voluntary registration, with no penal sanctions for a failure to register (s16). However, failure to register could place a security holder at a considerable disadvantage in the event of a claim to ownership by a bona fide purchaser for value. An interest in goods held by a mortgagee, a lessee, or the owner under a hire purchase contract (ss8-10) will be extinguished where a person purchases goods (or purports to do so) for value and in good faith and without notice of the interest of the mortgagee or lessee. If the purchase is made from a dealer, the purchaser is protected from a valid challenge to his title to the goods from any security interest registered during the fourteen day period prior to the purchase of the vehicle (s23).

Registration of an interest (under s16) operates as constructive notice of the contents of the certificate to a vehicle purchaser. Where a purchaser has failed to search the register, that will be no defence to the claim of a security holder and the purchaser would have no claim for compensation from the Transport Regulation Fund (s24). A person is deemed to have notice of a security interest in goods in the following circumstances: where the purchaser had actual notice of a security interest or other interest or other interest entered on the register, or had been put on inquiry as to such interest and had deliberately failed to enquire further (s2(3), s25(3)). The following will not be regarded as a purchaser for value in good faith and for value and without notice: where the purchaser is a member of the same household as the seller, where the buyer and seller are related corporations, or where either the purchaser or seller is a body corporate and the other is a natural person who a director officer of that body corporate (s11). In the event that all of

the above tests do not apply, then the purchaser will gain priority over prior claims of a mortgagee or a lessee, whose claims will be extinguished (ss9, 10). In this event, any of the security holders can apply to the Credit Tribunal for compensation to be paid from the Transport Regulation Fund. The scheme provided for in Part III of the Chattels Securities Act 1981 thus protects the innocent purchaser and the innocent security holder is also protected by statutory compensation.

(h) Limited title

The Commonwealth Trade Practices Act 1974 provides that a seller may, by an express term of the contract, indicate his intention only to pass limited title:

"a contract of sale in the case of which there appears from the contract or is to be inferred from its circumstances an intention that the seller should transfer only such title as he or a third person may have" (s69(3)).<sup>16</sup>

It may be difficult to infer any such intention from the circumstances surrounding a contract. The view of Aitkin L.J. in Niblett v. Confectioners' Materials Co Ltd<sup>17</sup> was that the comparable qualification in the English Sale of Goods Act 1893 had been inserted to exclude sales by a sheriff under a writ of execution and to other cases where there is, by implication or express terms, no warranty of title.<sup>18</sup> In the South Australian case of Warmings Used Cars v. Tucker<sup>19</sup> it was held there was no intention to guarantee title in circumstances where the seller was virtually in the position of a commission agent purchasing goods from a third party for sale to the buyer.

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16. Section 69(3); see s12(3) Sale of Goods Act 1979 (UK).

17. [1921] 3 K.B. 387.

18. Ibid., at p.401.

19. [1956] S.A.S.R. 249.

(i) Exemption Clauses

The protection of the implied term as to title, quiet possession and freedom from encumbrances given by s69 of the Trade Practices Act essentially applies only to those goods which have been supplied to a consumer by a corporation. It is open to a partnership or other non-corporate body to exclude or vary this implied term (or the others) in a contract under the Sale of Goods Act, which provides for two parties to a contract for sale to exclude any requirements of the Act, by either express agreement or in the course of dealings between them.<sup>20</sup> Whether a particular exemption clause will effectively relieve the seller of liability depends on whether the clause, construed on the basis of its wording and on the basis of the commercial or other purpose of the contract, was intended by the parties to cover the liability it is sought to exclude or restrict.<sup>21</sup> It is likely that a court would require strong evidence that a generally worded exemption clause was intended by the parties to relieve the seller of liability for failure to pass the property in the goods to the buyer. As was rightly observed in Rowland v. Divall, "the whole object of a sale is to transfer property from one person to another".<sup>22</sup>

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20. See Chapter Two; s57 SGA (New South Wales); s61 SGA (Victoria); s54 SGA (Western Australia), SGA (South Australia); s56 SGA (Queensland); s59 SGA (Tasmania); s58 SGA (A.C.T.); s.55 SGA (U.K.). See s61(1)(a) Unfair Contract Terms Act 1977 (UK). See on this point P.S.Atiyah Sale of Goods 6th edition (1980), at p.52; Twelfth Report of the Law Reform Committee (1966) Cmnd. 2958, at para 38. Compare and contrast the convention on the Uniform Laws on the International Sale of Goods art. 52. This convention came into effect in 1972.

21. See Photo Production Ltd v. Securicor Transport Ltd [1980] 2 W.L.R. 283; see in particular Chapter One.

22. [1923] 2 K.B. 500, at p. 507 per Aitkin L.J.; see Northwest Co Ltd v. Merland Oil of Canada and Gas and Oil Products Ltd [1936] 4 D.L.R. 248. See Benjamin Sale of Goods Act Sweet & Maxwell (1981), at para.285.

(2) Manufacturer's Liability

(a) Introduction

Consumers are generally encouraged to regard manufacturers as being chiefly responsible for the safety and quality of goods they, the consumer, purchase, even though there is usually no contractual link between the two parties. Consumers are led into this assumption as a result of mass production, distribution and advertising by the manufacturer.<sup>23</sup> Moreover, because of his commanding position in the chain of distribution, the manufacturer is best placed to control effectively the flow of defective goods by recall programmes, product modification or both. Under the doctrine of privity of contract, however, only the person who directly has any rights under it can sue and then only in relation to the person with whom he made the contract.

(b) Manufacturer's Liability under Division 2A of the Trade Practices Act

Division 2A now significantly alters the doctrine of privity of contract by making the manufacturer (or importer) liable to the consumer (the supplier still remaining liable as in the past).<sup>24</sup> The Swanson Report had recommended that the Trade Practices Act be

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23. See G.Q. Taperell, R.B. Vermeesch, D.J. Harland Trade Practices and Consumer Protection 3rd edition Butterworths 1983 at p.873.

24. Trade Practices Amendment Act 1978 s14 inserting Division A in the Principal Act, ss74A-74L, *infra*. On manufacturer's liability generally G.Q.Taperell, R.B. Vermeesch, D.J. Harland Trade Practices and Consumer Protection Butterworths 3rd edition (1983), Chapter Eighteen; A.J. Duggan and L.W. Darvall (eds.) Consumer Protection Law and Theory Law Book Co. (1984), at pp.70-102; J.L. Goldring and L.W. Maher Consumer Protection Law in Australia 2nd ed. Butterworths (1983), Chapter Four; R. Cranston Consumers and the Law 2nd ed. Weidenfeld and Nicholson (1984), Chapter Five; C.J. Miller and P.A. Lovell Product Liability Butterworths (1977), Chapter Nine to Fourteen inclusive; G.L.Fricke 'Manufacturer's liability for breach of warranty' (1959) 33 A.L.J. 35; S.J.Stoljar 'The International Harvester case : A Manufacturers liability for defective chattels' (1959) 32 A.L.J. 307.

amended so that manufacturers became liable to consumers for breach of express obligations and be under duties similar to the implied obligations of suppliers in consumer contracts.<sup>26</sup> Under these proposals the consumer was to keep his existing right to sue the immediate supplier for breach of an implied term who, in turn, would be entitled to be indemnified by the manufacturer. The Trade Practices Amendment Act, 1978, which largely embodied the Committee's proposals, was largely based on the Law Reform (Manufacturers Warranties) Ordinance 1977 (ACT) and the Manufacturers Warranties Act 1974 (South Australia).

(i) Persons to Whom a Manufacturer is Liable

The class of consumers who can benefit from a manufacturer's liability is specified by s74A(2)(a) of the Trade Practices Act. This Section provides that:

"... a reference to goods shall, unless the contrary intention appears, be read as a reference to goods of a kind ordinarily acquired for personal, domestic or household use or consumption".

This is clearly a narrower definition, than the \$15,000 requirement in s4B. Thus, a consumer, as defined in 4B, may have a remedy against a supplier in Division 2 of the Act but be without remedy against a manufacturer for the purposes of Division 2A. Such a position is obviously anomalous.

Unlike the South Australian and ACT legislation on manufacturers' liability, Division 2A does not define "consumer" to include successors in title to the consumer who was originally supplied. A manufacturer is, however, liable under s74D(1) for

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25. Swanson Report, at paras 9.120-9.127.

goods that are not of merchantable quality to the original consumer and any other person deriving title from him. For instance, where a wife were injured by a blender given to her as a birthday present by her husband, she would be able to sue the manufacturer under s74D.<sup>26</sup> She would, however, in the view of authoritative authors in Australian trade practices law, be unable to rely on or enforce an express warranty or other obligations laid upon a manufacturer by Division 2A.<sup>27</sup> Conversely, a person who simply used the blender and was injured would have no claim under s74A.<sup>28</sup>

(ii) Liability of a Manufacturer to a Consumer

The liability of a manufacturer (being a corporation) to a consumer arises when goods are supplied to a consumer. "Goods" include, under s4(1), "... animals, fish, minerals, trees and crops." "Manufactured" includes "... grown, extracted, produced, processed and assembled". This wide definition, thus, covers crop growing and mining. A corporation which produces a final product from components which other firms have put together, will, by reference to those assembled goods, be treated as having manufactured that particular product. A corporation is regarded as having manufactured goods if it holds itself out to the public as manufacturer of those goods (s74A(3)(a)), or if it applies to goods it supplies, or allows to be, supplied, its corporate or brand name (s74(A)(3)(b)). The result will be the same if the corporation allows another supplier

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26. The example is taken from G.A. Taperell, R.B. Vermeesch, D.J. Harland Trade Practices and Consumer Protection Butterworths (1983), at p.882; 3rd edition but see infra regarding s74A and secondhand goods.

27. G.A. Taperell, R.B. Vermeersch, D.J. Harland op.cit., at p.882.

28. However the Trade Practices Act provides, by s82, that a person who suffers loss or damage by conduct of another person in breach of a provision of Part V (or Part IV) may recover damages against that person or any person involved in the breach.

or promoter of its goods to represent the corporation to the public as the manufacturer of the goods (s74(a)(3)(c)). Since a particular product, for the purposes of Division 2A, may be regarded as having been manufactured by two or more corporations it seems likely that a consumer could sue either the manufacturer of the component or the final manufacturer of the goods in the case of goods proving defective. Normally, a consumer would sue the final manufacturer, either because of difficulty in proving the defect was due to a component fault as distinct from incorrect assembly or other cause, or because of difficulty by the consumer in identifying the component manufacturer.

(iii) Identification of the Manufacturer

The consumer will have no right to compensation in the case of a defective product against the manufacturer unless he can identify that manufacturer. This problem may only occasionally arise, but the situation is not catered for in Division 2A of the Act. One solution, which is adopted in the Draft European Convention on Products Liability,<sup>29</sup> is to make any supplier liable as a manufacturer where the product does not indicate the identity of any of the persons liable as manufacturers, unless the supplier discloses on demand to the consumer the manufacturer (or importer, when relevant) or the person who supplied the goods to the supplier.

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29. Article 3(3) of the Convention; published 1975 and submitted for observation by governments of Member States of the Council of Europe. The Convention was opened for signature in its final form on 21/1/77. See D.J.Harland 'Products Liability and International Trade' (1977) 8 Sydney L.R. 358, 376-377; D.J.Harland 'The liability to consumers of manufacturers of defective goods - an Australian perspective' (1981) 5 Zeitschrift fur Verbraucher politik/Journal of Consumer Policy 212; S.Galitsky 'Manufacturer's Liability : An Examination of the Policy and Social Cost of a New Regime' (1980) 3 U.N.S.W. L.J. 145; G.M.Gregg and T.D.Tzovaras, 'The Liability of Manufacturers and Importers under the Trade Practices Amendment Act 1978' (1979) 10 Fed L.R. 398.

(iv) Circumstances in Which Liability Occurs

The express warranties and implied terms which Division 2A defines arise where a corporation, in trade or commerce, supplies goods it manufactures to another person who acquires them for re-supply, those goods being then supplied (not necessarily by the person acquiring them from the corporation) to a consumer. Where the consumer suffers loss or damage by failure of the corporation to observe the express warranties or implied terms the consumer may recover compensation through the courts.

Division 2A does not proceed on the basis that the manufacturer and the consumer are presumed to be in a direct contractual relationship (unlike the corresponding South Australian and ACT legislation).<sup>30</sup> A manufacturer who sells directly to a consumer is not liable under Division 2A, although he would be liable under Division 2 (ss69-72). However, Division 2A imposes obligations on a manufacturer in relation to repairs and spare parts, which are not placed on a supplier (s74F). These obligations, and those concerning express warranties, should apply both to manufacturers and suppliers. In the case of "house branded" goods purchased by a consumer from a retailer (that is, goods branded as those of the retailer), it will not be of practical assistance to the consumer that the retailer will be regarded as the manufacturer. Furthermore, the consumer may not know the identity of the manufacturer, thus debarring the consumer from exercising rights (such as those of repair and spare parts) which are obtainable against a manufacturer. It is therefore recommended that the law be reformed so that the obligations to repair and to supply spare parts should be available to the consumer against the supplier as well as the manufacturer.

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30. Law Reform (Manufacturer's Warranties) Ordinance 1977 (A.C.T.), Manufacturer's Warranties Act 1974 (South Australia), s5(1); see infra.



(c) Implied Obligations

The obligations that are imposed on the manufacturer in the supply of goods to a consumer are similar to those implied terms that apply to a supplier under ss70-72. The obligations of a manufacturer in Division 2A are those of fitness for purpose (s74B), correspondence with description (s74C), merchantable quality (s74D), correspondence with sample (s74E).

(i) Fitness for Purpose

Where a consumer makes known, either directly or by implication, any particular purpose for which the goods are to be used, the goods must be reasonably fit for that purpose whether or not goods are commonly supplied for that purpose. The obligation does not arise if it can be shown that the consumer did not rely, or it was unreasonable for him to do so, on the seller's or manufacturer's skill and judgment. There is no liability on the part of the manufacturer if goods are rendered unsuitable for a particular purpose owing to damage or alteration by another person, after the goods have left the manufacturer's control.

(ii) Correspondence with Description and Sample

Goods sold by description must comply with the description given them by the seller or manufacturer. A sale by description occurs when a consumer selects goods on the basis of the description of the goods or where goods are purchased to the specification of the consumer. If goods do not perform according to their description, (e.g. "fully automatic" applied to a washing machine), the consumer has rights against either the manufacturer or the seller. A manufacturer is not liable to a consumer for goods which do not comply with a description unless the description was applied to the goods by or on behalf of the manufacturer, or with his consent, express or implied. The manufacturer has no liability due to the goods being made unsuitable after they leave his control.

Goods sold by reference to a sample and description must conform to both. A manufacturer is only liable where he supplies the sample or it is supplied with his express or implied consent. He is not liable where, having left his control, the failure of the bulk of the goods to correspond with the sample in quality or the existence of a defect was due to an act or omission of a person other than the manufacturer, or beyond human control.

(iii) Merchantable Quality

A manufacturer will not be liable to a consumer in respect of goods not being of merchantable quality with regard to defects which have been specifically drawn to the consumer's attention before the contract of supply was made or defects which ought to have been revealed to a consumer who examined the goods before the contract was made. Merchantable quality is defined in identical terms to those in s66(1)(a) of Division 2. In determining whether goods are of merchantable quality regard is given to the description applied to them by the manufacturer, and, where the price is relevant, note must be taken of the price paid to the manufacturer as an indication of quality. A manufacturer, again, will not be liable to a consumer for goods which were not of merchantable quality due to an act or omission of a person other than the manufacturer, or which were beyond human control. As already noted (see supra (i) "Persons to whom a manufacturer is liable") this section gives rights not only to the original consumer but any person who obtains title from him. The section has the paramount effect of making the manufacturer strictly liable to a consumer (or person obtaining title from him) in situations where the only remedy previously would have been for the consumer to sue in tort for negligence by the manufacturer.

(iv) Spare Parts and Repair Facilities

The Law Reform Commission, in their Working Paper on Implied Terms in Contracts for the Supply of Goods, noted that there appeared to be no general legal requirement, under English law, for a seller, supplier or manufacturer to maintain stocks of spare parts or to provide servicing facilities.<sup>31</sup> The Commission observed that the Ontario Report had recommended that in consumer sales, there should be an implied warranty that spare parts and reasonable repairs facilities would be available for a reasonable period of time in the case of goods that normally require repairs.<sup>32</sup> For example, in California, a manufacturer of consumer durables which are covered by an express warranty must maintain sufficient service and repair facilities within the State to carry out the terms of the warranty.<sup>33</sup>

In accordance with specific recommendations of the Swanson Report, the Trade Practices Amendment Act 1978, in s74F, now gives consumers who acquire goods a right of action against a manufacturer who fails reasonably to ensure the availability of required repair facilities or spare parts to consumers.<sup>34</sup> The manufacturer's liability under this section depends on information about the availability of repair facilities or spare parts given at or before the time of purchase of the goods. The manufacturer will be liable, in the case

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31. Law Com. No. 95 (1975) at para.76. See also paras.115-122, where the Commission was of the opinion that it would be wrong to make it an additional term in contracts of supply that the supplier should maintain stocks of spares or servicing facilities. The Law Commissions, as noted earlier, confirmed this view; Sale and Supply of Goods (1983), at para 2:16.

32. Ontario Report, at p.45, recommendation (e).

33. The Song-Beverly Act (California Civil Code, ss1790-1792).

34. Inserting Division 2A in the principal Act, see Swanson Report, at para.9.127; see also Trade Practices Commission Information Circular No.26, 5/1/79 at pp.8-9. See the Irish Sale of Goods and Supply of Services Act 1980 s12.

where no information is given, if he fails to make available reasonable repair facilities and a reasonable supply of spare parts. The manufacturer's liability is restricted where the manufacturer, or someone on his behalf, notifies consumers prior to acquisition of the goods, that no repair facilities or spare parts will be available or will only be available from certain sources or for a limited time (s74F(3)). The Court, in determining whether a corporation acted unreasonably in failing to ensure facilities for repair of goods were, or a part was reasonably available at the relevant time, must take into account all the circumstances of the case, and in particular, those that prevented supply of facilities or spare parts beyond the manufacturer's control.

The restriction of liability under s74F(3) weakens the usefulness of the whole section. Although, in the case of an overseas manufacturer, there might well be difficulties in the supply of spare parts and the provision of repair facilities, the local company agent, importer or retailer could normally be expected to make arrangements for the provision of such facilities. There could be legitimate reasons for the delay of supply in those particular circumstances, which, in any case, would be caught under the provision allowing the court to take into account, in considering such a consumer complaint, circumstances beyond a manufacturer's control. In order to strengthen protection for the consumer, to encourage the adequate provision of servicing and spare parts and, thereby, give legislative encouragement to competition between suppliers, s74F(3) could profitably be removed from the Act.

(d) Express Warranties

Under s74G of the Trade Practices Act a manufacturer is liable to compensate a consumer for any loss or damage suffered because of a failure by the manufacturer to ensure that goods accord with any express warranty he has given or allowed to be given in relation to those goods. An express warranty is defined as:

"... in relation to goods, means an undertaking, assertion or statement in relation to the quality, performance or characteristics of the goods given or made in connexion with the promotion by any means of the supply or use of the goods, the natural tendency of which is to induce persons to acquire the goods".  
(s74A(1))

The understanding, assertion or statement as provided has to be linked with the, "... quality, performance or characteristics of the goods" in order to amount to an express warranty. It has been suggested that a promise by a manufacturer that servicing facilities will be available for a particular period at defined places is not a promise relating to the performance of the goods themselves. That may also be the case with an express promise that spare parts will be available for a certain period. Similarly, a promise by a manufacturer that he will repair or replace defective goods after a given period from the date of purchase, will not amount to an express warranty. If this is the case, then the consumer will only be able to enforce the manufacturer's promise if he can prove, which would be difficult, a collateral warranty. The limitation in s74A(1) is based on s3(1) of the South Australian Manufacturers' Warranties Act 1974, whereas the corresponding subsection of the ACT Law Reform (Manufacturers' Warranties) Ordinance 1977, s3(1) is not so limited. It therefore seems desirable that s74A(1) be reworded to follow the more liberal provision of the ACT Act<sup>35</sup> and so enable the consumer to enforce a manufacturer's promise to repair or provide spare parts without having to prove the existence of a collateral warranty.

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35. See G.Q.Taperell, R.B.Vermeersch and D.J.Harland, Trade Practices and Consumer Protection 3rd edition Butterworths (1983), Chapter Eighteen for a detailed survey of the topic of manufacturer's liability.

(e) Second-hand Goods

Section 74D expressly covers second-hand goods in relation to merchantable quality. It has been suggested that liability may also arise in a supply of such goods to a consumer by the effect of s74F(1)(b). Under s74F(1)(b), a manufacturer's liability is dependent on the fact that a person (whether or not the person was one who originally acquired the goods for re-supply from the manufacturer) supplies goods to the consumer. Provided that the purchaser of any second-hand goods, is a consumer s74F(1)(b) applies since it is not limited to the initial supply of the goods to the consumer. It has also been argued that s74F(1)(b) would apply even in the case of a private sale of a second-hand car (or other such goods) or by a non-corporate supplier.<sup>36</sup> However, because s74D gives a right to sue where goods are of unmerchantable quality to any person who obtains title through the consumer to whom the goods were supplied, it is thereby implied that only the first consumer has any standing to sue under the other provisions of Division 2A. The position is unclear: although, on one view, though s74D gives a right to sue to anyone who acquires the goods by way of gift, the section does not limit the effect of the wording of other provisions of Division 2A.<sup>37</sup>

(f) Indemnity Against Manufacturers

A supplier is given a statutory right to an indemnity against a manufacturer in certain circumstances. Under s74H, where a consumer has the right to a refund and/or damages from the seller for breach of a condition or warranty under the Trade Practices Act,

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36. Ibid., at p.882.

37. G.Q. Taperell, R.B. Vermeersch, D.J. Harland Trade Practices and Consumer Protection 3rd edition Butterworths (1983), at p.883.

and such breach stems directly from an act or default with the control of the manufacturer, then the seller may seek an indemnity from the manufacturer. Such an action may begin up to three years after the date on which the seller partly or wholly made payment or on which he is sued by the consumer, whichever is the earlier. Liability of the manufacturer to the consumer and the liability to indemnify the seller ceases ten years after the date when the goods were first sold to a consumer (s74J). In a case where the manufacturer is directly liable to consumers - such as where the goods are for personal, domestic or household use - the seller has a right to a full indemnity for what he has paid in discharging his own liability; including, in appropriate circumstances, that for consequential loss. Where the goods are of a commercial nature, the manufacturer cannot be directly sued by a consumer and, unless agreed otherwise, is liable to the seller for the reimbursement of the cost of replacing or repairing the goods, whichever is lower (s74L(1)). This provision is subject to a test of reasonableness, when the court must have regard to all the circumstances of the case. In particular, the court must have regard to the availability of suitable alternative sources of supply and equivalent goods and whether the goods were manufactured, processed or adapted to the special order of the seller. This section is subject to the operation of any contractual term between the manufacturer and the seller which imposes greater liability on the manufacturer than that under s74L(1).

The statutory provisions which provide an indemnity against the manufacturer should do much to allay the concern of retailers with regard to the imposition of exemption clauses upon them in contracts of supply for resale. Even though this indemnity applies only in the case of consumer goods, it is in this specific area where

The manufacturer will avoid liability in this last case if spare parts were unavailable in circumstances not reasonably foreseeable by the manufacturer (s4(4)) or if he takes reasonable steps to ensure that the consumer is notified at the place where he, the consumer, is sold the goods, to the effect that the manufacturer does not undertake that spare parts will be available (s6(2)). This apart, any attempt by the manufacturer to exclude liability for a statutory or implied warranty is an offence (s6). The Governor is further empowered to make regulations to regulate the form of written warranties and prevent any misleading practices in their use. The seller of manufactured goods to a consumer is entitled to any indemnity against the manufacturer where such seller is liable to a consumer for a breach of any condition or warranty implied by law respecting quality of the goods of the statutory warranty (s7).

The overall effect of the Act is to make the manufacturer strictly liable to the consumer where the manufacturer supplies defective goods to the consumer if the defect makes the goods unmerchantable. The liability arises on the basis that a contract is presumed between the manufacturer and the consumer, unlike the provisions of Division 2A of the Trade Practices Act.<sup>40</sup>

(b) Australian Capital Territory

The Law Reform (Manufacturers' Warranties) Ordinance 1977 imposes non-excludable warranties in respect of goods ordinarily acquired for private use or consumption. Sale includes hire for up to six months and hire purchase. A consumer includes a person deriving title to goods through a consumer (s3(3)). Manufacturer includes an importer of goods from an overseas manufacturer. A

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40. See supra.



manufacturer is liable under warranties similar to those under Division 2A of the Trade Practices Act, including when he sells directly to the consumer (s4). However, where goods are sold by description the manufacturer is only liable on the statutory warranty that the goods correspond with the description he has applied to them. Provisions governing the supply of spare parts and repair facilities are similar to those under the South Australian legislation. The manufacturer may totally exclude his liability in respect of spare parts and servicing or after a specific period. Any other attempt to exclude liability to a consumer is void and an offence (s7). A manufacturer is liable to indemnify a seller to a consumer on terms similar to the South Australian Manufacturers Warranties Act 1974 but the right may be limited or excluded by contract (s8).

(c) New South Wales

The Commercial Transactions (Miscellaneous Provisions) Act 1974 amended the Sale of Goods Act 1923 by enabling the court, in proceedings by a consumer concerning the sale of goods (not being second-hand) that these were not of merchantable quality, to bring the manufacturer into such proceedings. The power of the court is discretionary and if the court regards the manufacturer as liable to remedy the defect it may make order requiring him to pay the estimated cost of this to the buyer, to remedy the defect and in default pay the estimated cost of repair to the buyer.<sup>41</sup> Only the original consumer, not a successor in title, can bring the proceedings against a manufacturer.

(d) Queensland

The Consumer Affairs Act 1970-1974 defines those

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41. Sale of Goods Act 1923 (New South Wales) s64(5) as inserted by the Commercial Transactions (Miscellaneous Provisions) Act 1974. There are similar provisions under amendments to the Hire Purchase Act 1960 (New South Wales); now repealed by The Hire Purchase Repeal Act 1983 (New South Wales).

representations that will constitute an express warranty in a supply of goods or services to a consumer (ss36A-36G). The Act lays down the minimum information to be contained in any warranty by a person whose principal place of business is in Queensland. Any express warranty given must give a right additional to that given by general law and must not limit, restrict or otherwise affect any express or implied warranty that a person would have without the benefit of the Act. The warranty must relate to every major component of the goods.

#### (4) Second-hand Motor Vehicle Legislation

The other main area of States legislation which contain provisions in respect of non-excludable warranties in consumer transactions are the Acts dealing with the sale of second-hand motor vehicles<sup>42</sup>. Those statutes currently in force are the New South Wales Motor Dealers Act 1974, the South Australian Second Hand Motor Vehicles Act 1971, the Victorian Motor Car Traders Act 1973, the Western Australian Motor Vehicle Dealers Act 1973, the Queensland Auctioneers and Agents Act 1971<sup>43</sup>, the A.C.T. Sale of Motor Vehicles Ordinance 1977, the N.T. Motor Vehicle Dealers Act 1979. Tasmania has no separate legislation.

#### (a) Statutory Warranties

All Australian States and Territories, with the exception of Tasmania and Queensland provide statutory warranties for second-hand vehicles.<sup>44</sup> A dealer must repair or make good a defect, or arrange for this to be done, where he sells the vehicle in

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42. On second-hand vehicle legislation see P.Latimer Australian Business Law C.C.H. (1984), at pp.395-406.

43. This Act deals with auctioneers, real estate agents, debt collectors and motor dealers.

44. Section 41(1) (Victoria); s27(1) (New South Wales); s34(1) (Western Australia); s24(1) (South Australia); s23(1), (2) (A.C.T.); s20(1), (2) (N.T.). In Queensland, a motor dealer is required to provide a roadworthiness certificate on the sale of a used motor vehicle, ibid.

question. It is immaterial that the defect did not exist at the time of sale. The vehicle must be in a reasonable condition having regard to its age and the distance for which it has been driven. The above applies according to the vehicle price and the warranty period laid down.<sup>45</sup>

Under the legislation in New South Wales, South Australia and Western Australia the provisions outlined apply. In New South Wales these provisions also apply where the vehicle is new and has been driven less than 20,000 kilometres or for less than three months (whichever is first).<sup>46</sup> In New South Wales, South Australia and Western Australia the provisions outlined apply to second-hand cars the price of which is \$1,500 or over and the vehicle has been driven 5,000 kilometres or before three months after the day of sale have expired (whichever is first). In the case of similar cars the price of which is under \$1,000, the provisions apply before the car has been driven 3,000 kilometres and before the expiry of two months (whichever is first).<sup>47</sup>

The dealer will not be liable for the repair of a vehicle where the defect has been due to incidental or accidental damage after the sale of the vehicle, or is due to misuse or negligence on the part of the driver of the vehicle after sale, or where the purchaser has had the vehicle in his possession for three months before the sale. The dealer will not be liable where a defect notice has been attached to the vehicle.<sup>48</sup>

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45. See Table, P.Latimer Australian Business Law C.C.H. (1983), at p.298.

46. Section 27(1) New South Wales.

47. Section 27 (New South Wales); s24 (South Australia); s34 (Western Australia).

48. Section 28 (New South Wales); s41(3) (Victoria); s24(3) (South Australia); s34(2) (Western Australia); s23(6) (A.C.T.); s20(6) (N.T.). New South Wales, Victoria and the Australian Capital Territory also exclude liability for defects where the purchaser was a trade owner (or an employee of the dealer in Victoria). In the Northern Territory a dealer is not liable where the contract excludes statutory warranties (s20(8)).

(b) Excluded defects

A dealer is allowed to put a notice on a second-hand vehicle offered for sale particularising any defect that he believes to exist in that vehicle; and his estimate of the fair cost of repairing or making good that defect.<sup>49</sup> By attaching such a notice the dealer is then excused from complying with the statutory warranty set out in the relevant motor vehicle legislation.

If the dealer states, in his estimate, a cost which turns out to be below the actual cost of the repair, the purchaser may sue for, and recover, the difference in cost. These provisions do not apply to a defect in a second-hand vehicle which has been sold by a dealer should a notice relating to any defect be attached to the vehicle at all times when on sale and the purchaser has signed a copy of the notice before or at the time of sale; and the dealer has given the purchaser at the time of sale a true copy of the notice signed by the purchaser.

(c) Disputes

Disputes between a purchaser of a second-hand car and the dealer from whom he has purchased are dealt with by different procedures according to the relevant motor vehicle legislation. In Victoria, the Motor Car Traders Committee may make an appropriate determination if both parties agree in writing. A matter cannot be referred to the Small Claims Tribunal once it is submitted to the Committee. The Committee may make such orders as it sees fit; these orders are final and binding on both parties. Where the parties do not agree to submit the dispute to the Committee, either party may apply to a Magistrate's Court for determination of the dispute.<sup>50</sup> In New South Wales, where there is a disagreement between the

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49. Section 29 (New South Wales); s41 (Victoria); s25 (South Australia); s35 (Western Australia); s24 (A.C.T.). Since the Queensland legislation requires roadworthiness on the sale of a used car defects cannot be excluded.

50. Section 43 Motor Car Traders Act 1973 (Victoria).

purchaser and the dealer over a warranty and its related obligations the purchaser may make a written application to the Commissioner for Consumer Affairs to investigate and determine the agreement.<sup>51</sup> The Commissioner will not be empowered to determine the dispute if proceedings are pending before a court or tribunal or if the matter has already been decided. A dispute is not regarded as settled unless terms of the settlement are incorporated in a document and signed by the purchaser, the dealer and the Commissioner. Where the Commissioner is unable to settle a dispute he may refer it to a dispute committee constituted under the Act. The Commissioner is not bound to follow the recommendations in the report of the disputes committee. After investigation of a dispute the Commissioner makes a determination, the terms of which are final and binding on both parties. In South Australia, where a similar dispute arises and the dealer and the purchaser agree in writing to submit the dispute to the South Australia Prices Commissioner, the Commissioner may hear and determine the dispute or appoint another person to do so.<sup>52</sup> A determination of the dispute is final and binding on both parties. In Western Australia, the Commissioner for Consumer Protection may advise both the dealer and the purchaser in writing that he proposes to determine the dispute unless proceedings have commenced in a court of competent jurisdiction or in the Small Claims Tribunal. If neither party objects within fourteen days of the Commissioner's letter, the Commissioner may hear and determine the dispute or he may appoint another to do so.<sup>53</sup> A determination by the Commissioner is final and conclusive and there is no appeal. In the A.C.T., on a written request of either the purchaser or the dealer to the Registrar

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51. Section 31 Motor Dealers Act 1974 (New South Wales).

52. Sections 26, 27 Second-hand Motor Vehicles Act, 1971 (South Australia).

53. Sections 36, 37 Motor Vehicle Dealers Act 1973 (Western Australia).

of Motor Vehicles, the Registrar shall hold an inquiry and determine the dispute provided that proceedings are not pending or the matter has not been previously determined by a court. The Registrar may make any order that seems just, other than an order for rescission.<sup>54</sup>

The Registrar may refer the dispute to the Court of Petty Sessions for determination if, in his opinion, a rescission order is likely to be made or the matter is a complex one. An appeal is available to any person aggrieved by the order made by the Registrar to the Court of Petty Sessions within twenty one days.

(d) Roadworthiness and Title to Vehicles

The desirability of roadworthiness checks to vehicles and accompanying certificates has been canvassed in Tasmania, by various interest groups, which included the Tasmanian Consumer Protection Council, the Royal Automobile Club of Tasmania (R.A.C.T.) and particular commercial bodies, including the Tasmanian Automotive Chamber of Commerce.<sup>55</sup> The last named organization favoured a system of licensing private motor trade operators as testing centres, a pattern which currently exists in the United Kingdom. Government testing stations were regarded as providing the most thorough system of vehicle checking. Queensland legislation requires a certificate of roadworthiness on all vehicles, under the Inspection of Machinery Act 1951-1971, (s441), and in addition to yearly and half-yearly inspections by officers of the Division of Occupational Safety and

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54. Section 27 Sale of Motor Vehicles Ordinance 1977 (A.C.T.)

55. These groups and bodies gave evidence before the Select Committee of the Tasmanian Legislative Council enquiring into the desirability of proceeding with the Second-Hand Motor Vehicle Dealers Bill 1978. The Bill subsequently lapsed, despite support by the R.A.C.T. and the Tasmanian Consumer Protection Council. I am grateful to the Clerk of the Legislative Council, Mr John Chilcott, for permission to refer to the evidence given to the Legislative Council and to Mr Peter Hodgman M.H.A. for access to his copies of the Committee's files.

Weights and Measures, random inspections are made at the premises of used car dealers.

If transport licensing authorities in Australia issued vehicle documentation in the form of a registration book (as is the case in the United Kingdom) which then accompanied a vehicle as it changed hands the dealer and the purchaser may have a better protection than is now the case. The desirability of showing clear details of title, including encumbrances, on motor registration certificates<sup>56</sup> has been dealt with earlier and the solution adopted by the Chattel Securities Act 1981 (Victoria) has been noted.<sup>57</sup>

(5) Problems of Title and Statutory Warranties : Conclusions

The legislative solution of the Victorian Chattels Securities Act 1981 to some of the problems raised by the nemo dat rule, which have been examined earlier,<sup>58</sup> deserves commendation as an attempt to protect both the bona fide purchaser for value without notice and the true owner. Notably, the Act does not alter the nemo dat rule by adding further exceptions<sup>59</sup> to it, but instead provides a simple and inexpensive means of checking ownership of motor vehicles. The recommendations of the Twelfth's Report of the English Law Reform Committee<sup>60</sup> indicated a general trend towards greater protection for innocent buyers by piecemeal exceptions to the nemo dat rule. In criticizing the approach of the Committee, it has been pointed out that it would be a better policy to retain the nemo dat rule and not subject it to general exceptions as proposed by the Committee, since

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56. See supra. Such provisions apply in South Australia, Victoria and Western Australia.

57. See supra, Part (A).

58. See Part (A) supra.

59. As recommended by J.R. Peden 'Title Problems in relation to chattels - proposals for a registration system for motor vehicles in Australia,' (1968) 42 A.L.J. 239, at pp.241-244.

60. Transfer of Title to Chattels (1966) Cmnd. 2958; see Part (A) supra.

the latter course would have the result of prejudicing chattel owners and their insurers.<sup>61</sup> Against this argument can be set the contention that in the context where such problems concerning title occur - that is, in the sale of motor vehicles - the cost and incidence of insuring against the risk of defective or non-existent title should more equitably and relatively inexpensively be borne by the finance companies and dealers. Since, however, the central problem seems to be the provision of a means whereby a buyer can satisfy himself simply and inexpensively before a vehicle is purchased that the seller's title is unencumbered, the Victorian Chattels Securities Act 1981 would appear to provide a more appropriate solution than that proposed by the English Law Reform Committee in the Twelfth Report. The recent Working Paper Sale and Supply of Goods (1983)<sup>62</sup> by the English and Scottish Law Commissions came to the provisional recommendation that the only way to prevent unjust enrichment by a purchaser was to ensure that the customer was not automatically entitled to the return of the whole price and that the court should take into consideration any significant use or possession of the goods which the customer had enjoyed.<sup>63</sup> In respect of this recommendation it should be noted that under the Victorian Chattels Securities Act 1981 if a purchaser gains priority, which is confirmed, under the Act and the interest of any security holders<sup>64</sup> is extinguished as a result, these security holders can apply to the Victorian Credit Tribunal for compensation to be paid from the Transport Regulation Fund.<sup>65</sup>

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61. J.R. Peden (1968) 42 A.L.J. 239, at p.244.

62. Working Paper No. 85, Scot Law Com. Consultative Memorandum No. 58.

63. Ibid., at para 6.7.

64. The interests of a mortgagee, lessor or 'owner' under hire purchase are specifically listed; Chattels Securities Act 1981 (Victoria) ss 8-10 inclusive.

65. Ibid., s.24.



If the successful application of solutions to the problems concerning defects in title have proved difficult to obtain, then, by contrast, the legislative requirement of manufacturer's liability (and, at a more specialized level, that of motor vehicle dealers) to consumers has arguably been easier to resolve. The Trade Practices Act 1974 Division 2A has not proceeded, however, on the basis that the manufacturer and the consumer are presumed to be in a direct contractual relationship. This is distinct from the legislation on which Division 2A was modelled, the South Australian Manufacturers Warranties Act 1974 and the A.C.T. Law Reform (Manufacturers Warranties) Ordinance 1977, which founds liability on the footing that such a contract is presumed between the manufacturer and the consumer. One difference, therefore, between Division 2A of the Trade Practices Act 1974 and the preceding South Australian and A.C.T. legislation, is that unlike the latter the Commonwealth Act does not define "consumer" to include successors in title. One significant result of this distinction is that a person, such as a wife, injured by a blender given to her as a birthday present by her husband would be unable to rely on or enforce an express warranty or other obligations alid upon a manufacturer by Division 2A.<sup>67</sup> This difference between the two sets of legislation accentuates the continuing importance of the doctrine of privity of contract, despite the significant alteration to it made by Division 2A. The following chapter, Chapter Six, examines in detail the underlying problems in the doctrine of privity of contract, some of the solutions attempted in different common law jurisdictions, and the relationships of these solutions to exemption clauses.

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66. See G.A. Tapperell, R.B. Vermeersch, D.J. Harland Trade Practices and Consumer Protection 3rd edition Butterworths (1983), at p.882.

## CHAPTER SIX

### PRIVITY OF CONTRACT AND EXEMPTION CLAUSES

#### Introduction

It has already been shown that Division 2A of the Trade Practices Act has made important changes in the operation of the doctrine of privity of contract.<sup>1</sup> The desirability of further changes in this doctrine, with special reference to product liability and to third party liability in bills of lading, can only be outlined. The factors involved in any reforms concerning product liability have, however, been fully explored by the Law Commissions in the United Kingdom<sup>2</sup> and reference can also be made to experience in the United States.

The essence of privity of contract is that only a person who is a party to a contract may sue for its breach. The implications of this may be aptly illustrated by the case of Daniels v White.<sup>3</sup> There, Mr Daniels purchased a bottle of lemonade from Mrs Tabard, the landlady of a public house, the defendants being the manufacturers and bottlers of the product. As a result of carbolic acid being present in the lemonade, both Mr Daniels and his wife became ill as a result. Neither of them were entitled to sue the manufacturers in contract, although Mr Daniels might recover from Mrs Tabard. On

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1. See Chapter Five.

2. See particularly Working Paper No. 64, Liability for Defective Products (1975), at paras.119-134.

3. [1938] 4 All E.R. 258, see Working Paper, ibid., para. 120.

the above facts he did sue Mrs Tabard in contract and he recovered in respect of his illness without proof of negligence.<sup>4</sup> Whites were in apparent breach of their contract of supply with Mrs Tabard but the Daniels were not a party to this contract. They could sue Whites in tort in respect of their illness on proof of negligence. The claim, on these grounds, failed on the facts. The judge, Lewis J., found that the method of bottling the lemonade was "foolproof" and that there was a "proper supervision: of the employees engaged."<sup>5</sup> It should be noted that Daniel's case has been criticised,<sup>6</sup> particularly the failure of Lewis J. to consider whether one or other of the employees had negligently omitted to empty or clean the offending bottle.<sup>7</sup> The unwillingness of Lewis J. to infer negligence on the part of the defendant company is out of step with the general trend of cases.<sup>8</sup>

#### (A) Product Liability

##### Vertical and Horizontal Privity

In English law the advantages of strict contractual liability are offset by the requirements of privity which confine the benefits and

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4. Recovery was based on the breach of the implied condition of merchantable quality imposed by s.14(2) of Sale of Goods Act 1893 (U.K.). The plaintiff failed to establish a breach of an implied condition of reasonable fitness for purpose since reliance on the seller's skill or judgement could not be shown.

5. [1938] 4 All E.R. 258, at pp.362-363.

6. See note (1939) 55 L.Q.R. 352; note in (1939) 51 A.L.J. 387.

7. (1939) 55 L.Q.R. 352, where it is observed that Grant v. Australian Knitting Mills (1933) 50 C.L.R. 387 was not cited to Lewis J. in Daniels case. In Grant's case Evatt J. said (at p.442), '... the defence of 'inevitable accident' can seldom apply where a plaintiff is able to prove that an adequate system of manufacture has been instituted but the resulting product has become dangerous and caused injury to him solely through an omission to carry out some essential part of the processes. In such instances the inference is almost inescapable that omission is the result of carelessness on the part of some servant or other of the manufacturer.'

8. See Donoghue v. Stevenson [1932] A.C. 562 (H.L.); Donoghue v. Concrete Products (Kirkcaldy) Ltd, Chaproniere v. Mason (1905) 21 T.L.R., 633, 634 (C.A.), 1976 S.L.T. 58; Lockhart v. Barr 1943 S.C. (H.L.) 1.

liabilities to the immediate contracting parties. As a result, a purchaser may not claim under a contract of sale against anyone other than his immediate vendor (vertical privity). For example, the purchaser cannot, under the common law rules, sue a wholesaler or manufacturer in contract. Similarly, a contractual remedy is available only to the purchaser (horizontal privity). It is not available to a third party, irrespective of how close his connection with the purchaser and the product.

In the United States remedies have been provided for the consumer by the dropping of the requirement of a contractual link between the consumer and the producer. The principle was clearly established in Henningsen v. Bloomfield Motors<sup>9</sup> that manufacturers, generally, were taken to warrant that their products were of merchantable quality and reasonably fit for their purpose. In the Henningsen case a Chrysler car was purchased from authorised dealers by a husband as a gift for his wife. She was injured due to faulty steering causing the car to go out of control when she was driving it. There was no evidence of negligence by the manufacturers, but the Supreme Court of New Jersey held, on appeal, against the dealers and the manufacturers and also held that the wife was entitled to recover against them even though she was not the purchaser. The court noted:

"... an implied warranty of merchantability chargeable to either an automobile manufacturer or a dealer extends to the purchaser of the car, members of his family, and to other persons occupying or using it with his consent. ... Those persons must be considered within the distributive chain".<sup>10</sup>

Developments which have occurred in the United States have resulted from the extension of buyers' rights against manufacturers, and an extension of third parties' rights against retailers and manufacturers.

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9. 161 A 2d 69 (1960).

10. Henningsen v. Bloomfield Motors 161 A 2d 69 (1960), at p.100.

This is what is meant by dispensing with the requirements of vertical and horizontal privity. These terms can be explained as follows:

"If the manufactured product is thought of as descending a chain of distribution from the producer to the middleman and on to the retailer who sells to the public, 'vertical privity' is the privity which each of these persons has with his predecessor and successor, and 'horizontal privity' is the ensuing privity of contract between the retailer and the first domestic consumer who buys from him, and then between<sup>11</sup> that consumer and any sub-consumer if such there be".

### Vertical Privity

One way of overcoming the requirements of vertical privity is to permit an ultimate consumer to sue the manufacturer on the manufacturer's contract of sale. Once it could be established that the manufacturer was in breach of his own contract with the retailer or supplier, the ultimate consumer would have a right of action against the manufacturer. In the example of Daniels case above Whites could have been sued directly, in contract, by Mr Daniels.

Such an approach, however, does not place a direct and separate duty on the manufacturer. The consumer takes the benefit of obligations which the manufacturer has undertaken in respect of his own transaction. This approach is distinct from that of making the manufacturer liable on implied warranties similar to those under contracts for the sale of goods; the solution provided in Division 2A of the Trade Practices Act takes such a line. The essential limitations of the first solution are as follows: first, although the retailer cannot exclude his liability to the consumer, the manufacturer may well have excluded his liability to the retailer. Second, the

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11. Law Commission Working Paper No.64, at para.120. The problems of vertical and horizontal privity are dealt with in Chapter Five, 'Liability for Defective Products' Ontario, Law Reform Commission's Report on Consumer Warranties and Guarantees in the Sale of Goods Ontario (1972). See also C.J.Miller and P.A.Lovell, Product Liability, Butterworths (1977), at pp.22-31 for a clear and stimulating resume of the issues.

retailer may have taken up certain tasks or has prepared the goods before their distribution leaving the manufacturer clear of any liability for breach of contract. Third, there may be such a time difference between the manufacturer's and the consumer's contracts that limitation periods may have expired. Fourth, the buyer may have considerable difficulty in making out a case for breach of contract, as he would not know what the terms of the producer's contract with the retailer were.<sup>12</sup> If the claim related to personal injuries such a problem could be overcome by applying to the court for discovery of documents. However, this action would only be appropriate in the case of a large claim.<sup>13</sup> An additional objection to the relaxation of vertical privity in the case of consumer sales only, would be that this would separate such contracts from others, such as those for the supply of goods and services.<sup>14</sup> A uniform principle of recovery would appear desirable as between consumer and non-consumer sales, and as between sales and the supply of services.<sup>15</sup> Lastly, for those outside the immediate purchaser there would be no recovery on the original contract unless the limitations of horizontal privity were relaxed.

#### Horizontal Privity

In various situations, the requirement of privity works injustice to persons who, although obviously users or consumers, cannot recover damages for their injuries as they did not purchase the goods themselves. This would have applied in the case of gifts, as where a husband purchases a hot-water bottle for his wife, which

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12. See Law Commission, ibid., para.127.

13. Ibid.

14. Law Commission Working Paper No. 64 Liability for Defective Products (1975), at para.122.

15. C.J.Miller and P.A.Lovell, Product Liability Butterworths (1977), at p.27.

bursts and scalds her. The husband can claim for breach of merchantable quality and fitness of purpose plus any medical expenses which he might have incurred; his wife's only claim (prior to the amendment of the Trade Practices Act) against the supplier or manufacturer would have been on proof of negligence. The same situation would apply, however, if a visitor were similarly injured when staying with the household. There have been limited attempts by the common law to allow recovery by a third party by use of agency principles.<sup>16</sup> In addition, an injured party has been regarded as the purchaser, irrespective of the position between the purchasers; this has been the approach taken in cases of food purchased in a restaurant.<sup>17</sup> The extension of contractual benefits to third parties and the ambit of liability for particular loss or damage has been explored, particularly in the United States.

Article 2-318 of the Uniform Commercial Code (1966 Revision) provides three alternative remedies. Alternative A states that:

"A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section".

The provision is limited to personal injury of a narrowly defined category of persons and only horizontal privity is relaxed. A person who had received the goods as a gift would only be able to sue on the warranty if he came within 'the family or household of his buyer or ... a guest within his home'. Even then he would only be able to sue on the retailer's warranty, not on the manufacturer's.

Alternative B of Article 2-318 extends a seller's warranty more widely than under the provisions of Alternative A. Alternative B covers:

16. Twombly v. Fuller Brush Co 158 A 2d. 110 (Md. 1960) (wife as agent of husband).

17. Lockett v. A and M Charles Ltd [1938] 4 All ER 170; Wallis v. Russell [1902] 2 IR 585.

"... any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty".

Here, the person receiving the gift in the last example could sue on the seller's warranty and an action could be brought against the manufacturer or any other supplier along the line of distribution.

Alternative C extends a seller's warranty to include:

"... any person who may be reasonably expected to use, consume or be affected by<sup>18</sup> the goods and who is injured by breach of warranty".

The general trend of judicial decisions in the United States has been to move away from Alternative A of Article 2-318 and enlarge the scope of recovery. A wide range of plaintiffs have been given the benefit of strict liability, irrespective of whether the privity rules have been relaxed; implied warranties have been applied to manufacturers or strict liability in tort has been invoked. These plaintiffs have included members of a purchaser's family, his guests, employees, users and borrowers, lessees, passengers, beauty parlour patrons, rescuers, bystanders, hospital patients, repairers and visitors.<sup>19</sup> As a result of these developments two authorities have summed up the current position:

"There is little doubt that the trend is towards imposing liability without fault where any person is injured or suffers property damage through contact with a defective product".<sup>20</sup>

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18. Alternative C is close to the approach of the Restatement of Torts 2d, s402A. None of the Alternatives extends the warranty to a case of economic loss without physical damage.

19. See C.J.Miller and P.A.Lovell, Product Liability (1977), at p.30, citing Greenberg v. Lorenz 173 N.E. 2d 773 (N.Y., 1961); Klein v. Duchess Sandwich Co., 93 P. 2d 799 (1939); Conklin v. Hotel Waldorf Astoria Corporation 161 N.Y.S. 2d 205 (1957); Petterson v. Lamb Rubber Co. 5 Cal. Rptr. 863 (1960); Chapman v. Brown 198 F.Supp. 78 affirmed 304 F. 2d 149 (9th Cir., 1963); King v. Douglas Aircraft Co., 159 50 2d 108 (Fla. 1963); Garthwait v. Burgio, 216 A. 2d 189 (Com. 1965); Guarino v. Mine Safety Appliance Co., 255 N.E. 2d 173 (N.Y., 1969); Elmore v. American Motors Corporation 75 Cal. Rptr. 652 (1969); Bernstein v. Lily-Tulip Corporation 177 50 2d 362 (Fla. App., 1965), Conolly v. Hagi, 188 A. 2d 884 (Conn., 1963); Handrigan v. Apex Warwick Inc., 275 A. 2d 262 (R.I., 1971).

20. Ibid.



## Product Liabilities Remedies - Tort or Contract?

The provisional view of the Law Commission was that if additional remedies were needed for the ultimate purchaser or user of defective products, they would be more conveniently provided by imposing new statutory obligations on the producer than by altering the rules of contract law.<sup>21</sup> The Ontario Law Reform Commission noted the developments flowing from the United States case in Greenman v. Yuba Power Products Inc.<sup>22</sup> Here the Supreme Court of California had abandoned the approach of creating implied warranties on the grounds that "... the remedies of consumers ought not to depend on the intricacies of the law of sale",<sup>23</sup> and held that the liability of the manufacturer was imposed as a rule of public policy and was tortious in nature.<sup>24</sup> This view has been followed in later decisions.<sup>25</sup> However, the courts were divided as to whether the theory of strict tortious liability applies also to defects causing only economic loss. It was held to so apply in Santor v. A & M Karaghensian Inc.,<sup>26</sup> but not to do so in Seely v. White Motor Co.<sup>27</sup> In Seely's case the Supreme Court of California held that principles of sales contract law governed claims for economic losses. The courts subsequently have been divided in their approach.<sup>28</sup> The choice of theories preferred affects such matters as the extent and nature of

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21. The Law Commission, Working Paper No.64, Liability for Defective Products, para.134.

22. (1963) 377 P 2d 897.

23. Citing Kelter v. Armour and Co., 200 F. 322, 323 (1912).

24. Ontario Law Reform Commission (1972) Report on Consumer Warranties and Guarantees in the Sale of Goods, at p.68.

25. See Vandermark v. Ford Motor Co. 37 Cl Rptr. 896 (Supreme Court of California, 1964); Citrone v. Hertz Truck Leasing and Rental Service 212 A 2d 769 (N.J. 1965); Stuart v. Crestview Mutual Water Co. 110 Cal Rptr 652 (1969); Elmore v. American Motors Corporation 75 Cal Rptr 652 (1969); Sills v. Massey Ferguson Inc. 296 F. Supp 776 (1969).

26. (1965) 207 A 2d 305.

27. (1965) 403 P 2d 145.

28. See comment, 'Economic Loss in Products Liability Jurisprudence' (1966) Columbia Law Review 917; C.J.Tobin 'Products Liability: a United States Commonwealth comparative survey' (1969) 3 N.Z.U.L.R. 377.

the remedies of the ultimate buyer and the admissibility and effect of exemption clauses.

The Ontario Law Reform Commission came down in favour of the manufacturer's liability being governed by sales contract principles and not the law of tort. The Ontario Law Reform Commission accepted the argument of Chief Justice Traynor in Seely's case that there was a basic distinction between a claim for personal injuries or physical damages on one hand, and a claim for economic loss alone.<sup>29</sup> Despite situations where defective goods caused both personal injuries and economic loss the Ontario Law Reform Commission felt that the distinction could be made in the great majority of cases. It cited, in support, the fact that there were only a few claims in respect of car warranties against domestic and foreign manufacturers involving personal injury or physical damages.<sup>30</sup> The advantages of the sales contract principles approach were seen to be the following. First, it followed an approach made in respect of farm machinery legislation in the Canadian provinces and in the doctrine of collateral warranties. Second, it put the liability of both the retailer and the manufacturer on a similar footing. Third, the manufacturer was free to limit or disclaim his liability under the law of sale of goods. Fourth, provincial legislatures were given flexibility in reaching a basis for products' liability.<sup>31</sup>

The provisional view of the British Law Commissions, cited earlier, that additional remedies for the ultimate purchaser or user of defective products would be best provided without altering contract law was reiterated by the Law Commissions in their later report in

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29. Ontario Law Reform Commission (1972) Report on Consumer Warranties and Guarantees in the Sale of Goods, at p.70.

30. Ibid.

31. Ontario Report (1972), at p.70.

1977 on Liability for Defective Products.<sup>32</sup> This report stated as follows:

"... we have reached the conclusion that the advice which we received is sound and that the law of contract should not be extended to meet the problem. If additional rights and remedies are to be provided they should lie in tort or delict. We note in this context that the American law of liability for defective products went through a phase when the remedies against producers and the remedies against retailers for non-purchasers was framed in contract but<sup>33</sup> have now been generally accepted as remedies in tort".

Accordingly, the Law Commission arrived at the following recommendations on the basis of main policy considerations previously laid down:

- "(a) The loss should lie primarily on the person who created the risk. If 10,000 products are manufactured in the same run and one, being defective, causes an accident, the easiest way of spreading the loss fairly is to place it on the manufacturer, who can recover the cost of insuring against the risk in the price charged for his product.
- (b) Liability should be imposed on those in the chain of manufacture and distribution who are in the best position to exercise control over the quality and safety of the product. This gives the manufacturer the incentive to improve the safety standard of his product and reduce the risk of further accidents.
- (c) The risk of injury by defective products should be borne by those who can most conveniently insure against it. The producer is likely to be in the best position to do this.
- (d) As the producer is linked in the public mind with the product, rather than the retailer, there is an expectation that a producer should provide compensation when a defective product causes harm.
- (e) It is desirable to make it easier to bring actions in tort or delict against manufacturers of defective products by removing difficulties relating to evidence and procedure, particularly as the manufacturer may have exclusive knowledge of the product's manufacture, design and testing.

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32. The Law Commission No.82; the Scottish Law Commission No.45, Liability for Defective Products (1977).

33. Ibid., at para.33, citing Greenman v. Yuba Products Inc (1963) 377 P 2d. 897.

- (f) Litigation can be kept to a minimum by permitting a direct action by an injured person against the person ultimately responsible for causing the injury.
- (g) The recommendations are limited to claims arising out of personal injury and death. Strict liability for defective products should not extend to property damage or other heads, such as economic loss.
- (h) The number of persons in the chain of manufacture and distribution who should be liable to third parties should not exceed the number needed to ensure that adequate rights and remedies are available to injured persons. If this were not done costs, and resultant price to the ultimate consumer, would increase.
- (i) The law should not place such heavy additional liabilities on producers so as (i) to place them at an undue competitive disadvantage in the international market or (ii) inhibit technical innovation or research or (iii) cause reputable manufacturers to cease production with the country".<sup>34</sup>

The major difficulty the Law Commission found was that of assessing the cost to the producer of assuming additional liability. Strict liability in tort or delict, as recommended, might initially lead to an increase in insurance premiums. On the material available to the Commission, the likelihood of producers ceasing business or setting up abroad as a consequence of strict liability being imposed was felt to be slight and a justifiable risk on policy grounds.

This issue of calculating the cost to producers of strict liability was also tackled by the Pearson Committee in their Report in 1978. The Committee concluded in favour of strict liability in tort by producers for death or personal injury caused by defective products.<sup>35</sup> The Committee found that the number of injuries caused by products in the United Kingdom was relatively small, and the risk

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34. Law Commission, No.82, Liability for Defective Products, at para.38.

35. Royal Commission on Civil Liability and Compensation for Personal Injury (1978) Cmnd. 7054, at paras.1224, 1225, 1230-1236; referred to subsequently as The Pearson Report.

of death was lower than for other categories of injury. No published statistics existed but a personal injury survey by the Committee suggested that between 30,000 and 40,000 injuries a year (about 1 per cent of all injuries) may be caused by defective products other than drugs. Of these, over 10,000 occurred during the course of work, and a further 10,000 involved services as well as defective products. It was estimated that around 5 per cent of the 30,000 to 40,000 injuries attracted compensation through tort or contract with an average amount of less than  $\frac{1}{2}$  500 being paid (half the average for tort compensation as a whole). Claims for products and services liability made up 1 per cent of all claims on insurers, but only formed 0.3 per cent of business in the courts. This and other evidence from the Committee's survey suggested that product liability claims tended to be disposed of at an earlier stage. These figures did not give an indication of the growing nature of the problem.<sup>36</sup> Some objections to strict liability rested on the argument that in some industries premiums would have been so substantially increased as to act as a restraint on technical innovation. Additionally, in industries where catastrophic risk of the thalidomide variety existed, insurance cover to meet the potential liability might prove impossible to obtain. However, for most industries, the Committee felt that the cost of products liability insurance would be small in relation to other costs.<sup>37</sup>

The American experience is often cited as an indication of the escalation of insurance premiums in a regime of strict liability for

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36. Ibid., at paras.1201-1203.

37. Pearson Report, (1978), at paras.1228, 1229. The Committee were also influenced in their view by their recommendations for offsetting of social security benefits and a threshold on damages for non-pecuniary loss.

products.<sup>38</sup> Such a comparison is misconceived. First, in America lawyers (and even, in some cases, witnesses) may claim remuneration on a contingency basis by receiving a percentage of the damages which is a contributing factor in making litigation more expensive in the United States than other common law countries such as the United Kingdom and Australia.<sup>39</sup> Second, the cost of medical treatment in the American awards is higher than those that apply in Australia (and certainly in the United Kingdom with its National Health Service system). Third, jury trial is used to a much greater extent than in this country to assess issues of liability and the level of damages; as a result trials are longer and more expensive and the general level of damages awarded are much higher than in other common law jurisdictions.<sup>40</sup> Fourth, many high awards, have not been based on strict liability but on proof or admission of fault by the persons sued and the readiness of the American courts to award punitive damages.<sup>41</sup> For these reasons the American experience in the products liability field is not an appropriate guide.

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38. See Ontario Law Reform Commission (1979) Report on Products Liability where the products liability insurance crisis in the United States is discussed (at pp.72-73). The Commission noted that the American Interagency Task Force on Product Liability concluded that there was no foundation for public concern at the so called crisis and that there was no evidence that manufacturers could not obtain insurance or that, except in a few cases, it could not be afforded by them; United States Department of Commerce Interagency Task Force on Product Liability Final Report (1978), at pp. VI-2, p.V-17 et seq, pp. VI2 et seq.

39. Pearson Report (1978), at para 233, where it is noted that the contingency fee system may well absorb as much as 40 or 50 per cent of the damages awarded.

40. Pearson Report (1978), at para 233.

41. Ontario Law Reform Commission (1979) Report on Products Liability, at p.75; the Commission expressly referred to the judgement of \$3.5 million damages awarded against a car manufacturer for a defect in the designed location of a fuel tank in a motor vehicle, Grimshaw v. Ford Motor Co. (1978) 21 ATLA Rep. 136 (California Supreme Court). The Commission noted (at p.75) that in Canada it was unlikely that its courts would award punitive damages in a product liability case as the power to award such damages had generally been exercised in cases of deliberate infliction of damage.

### Liability in Tort or Contract?

The choice of policy lies not simply between strict liability in tort or an extension of sales contract law. The Accidents Compensation Act 1974 in New Zealand established a national scheme of compensation which circumvented both of these alternatives and introduced no fault liability over a very wide area of accidents and injuries. The Woodhouse Report<sup>42</sup> recommended that an essentially similar scheme be set up in Australia. Discussion of no fault liability is outside the area of this chapter and reference on this topic should be made to relevant authorities.<sup>43</sup>

### (B) Third Party Liability on a Bill of Lading

As earlier noted at the commencement of this chapter the doctrine of privity of contract prevents anyone who is not a party to a contract from enforcing or benefitting from its provisions. A stranger to the contract cannot claim protection of an exemption clause within the contract, unless he can bring himself within one of the exceptions to the doctrine. In the commercial context the rule often works as a barrier to the intentions of the parties and to defeat the purposes of a business agreement.

### The Problem Stated

The problem arising from the doctrine is commonly met when damage to goods occurs when stevedores are unloading a ship. A bill of lading, signed by the consignors and carriers, contains clauses limiting the amount in respect of the goods shipped, or units of the particular goods. Although the terms of a bill of lading may attempt

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42. Report of the National Committee of Inquiry on Compensation and Rehabilitation in Australia (1974) Canberra (1974) (Parliamentary Paper No.135) 3 vols; referred to as The Woodhouse Report.

43. See P.S.Atiyah Accidents, Compensation and the Law (3rd edition) Weidenfeld and Nicolson, 1980.

to extend limitations and protection from liability to the stevedores, the stevedores will not be parties to the agreement. Having been hired by the carriers the stevedores are in a contractual relationship solely with the carriers. The key issue to be resolved in numerous cases has turned on whether the stevedores can take the benefit of protection given to them in the contract between the consignor and the carrier and, if so, in what terms need the bill of lading be drafted to achieve this result.<sup>44</sup> The drafting of what is commonly known as a "Himalaya"<sup>45</sup> clause had the intended effect of granting the benefit of an exemption clause on all servants or agents (including independent contractors) of the carriers and asserting that the carrier was contracting as agent or trustee for such servants or agents, who were, thus, to be considered as contracting parties.

Midland Silicones Case and Lord Reid's Four Conditions of Exemption

In Scruttons Ltd v. Midland Silicones Ltd<sup>46</sup> the House of Lords appeared effectively to deny the protection of an exemption clause which had been claimed by stevedores. In that case, a drum of chemicals was shipped to London from New York. The contract of carriage exempted the carriers from liability above \$500 (US) per

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44. See, for a discussion of both the cases and the issue of the protection of stevedores, N.E. Palmer 'The Stevedore's Dilemma : Exemption Clauses and Third Parties' [1974] J.B.L. 101, 220; F.D. Rose 'Return to Elder Dempster' (1975) 4 Anglo Am L. Rev. 7, G. Battersby 'Exemption Clauses and Third Parties' [1975] 25 U. of Toronto L.J. 371, [1978] 28 U. of Toronto L.J. 75; A.J. Duggan 'Offloading the Eurymedon' (1974) 9 M.U.L.R. 753; D. Yates Exclusion Clauses in Contracts (1982) Chapter 5.

45. In Adler v. Dickson [1955] 1 Q.B. 158 the Court of Appeal held that the master and boatswain of the 'Himalaya' could not take advantage of an exclusion clause in a passenger ticket evidencing the contract of carriage between the plaintiff and the shipowner on the basis of the absence of privity of contract between the plaintiff and the third party. Hence the use of the term 'Himalaya' to describe a clause intended to circumvent the effect of the decision in Adler v. Dickson.

46. [1962] A.C. 446.



package. While the drum was being unloaded in the Port of London, it was damaged by a firm of stevedores employed by the carriers; the damage being assessed at three times the limit in the bill of lading. The shipowners had, for some years, contracted with the stevedores to unload their vessels and the agreement between them, provided that the stevedores should have such protection as is afforded by the terms of the bills of lading.

The stevedores admitted negligence in unloading the drum, but argued that they were entitled to rely upon the limitation provision in the bill of lading, even though they, the stevedores, were not mentioned as parties in the bill.

The House of Lords held that the stevedores could make no such claim to entitlement as they were strangers to the bill of lading. Their Lordships refused to accept that the stevedores could obtain protection from the principle of vicarious immunity. This had been established in Elder Dempster & Co Ltd v. Paterson, Zochonis & Co Ltd.<sup>47</sup> In that case, a company had agreed to carry the plaintiffs' cargo of palm oil from West Africa to England. The contract between the plaintiffs and the company to which the shipowners had not been a party, contained an exclusion clause that purported to exclude liability on the part of the charterers and also the shipowners for bad stowage. The barrels of oil were damaged by bad stowage and the plaintiffs sued both the charterers and the shipowners. The House of Lords held that the clause protected both the charterers and the shipowners against the consequences of bad stowage. The result of the decision appeared to be that where a party had employed an agent to carry out a contract, that agent was entitled to any immunity which the contract gave the principal, in carrying out the

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47. [1924] A.C. 522.

immunity  
contract. This principle of vicarious liability, although now defunct,<sup>48</sup> is arguably consistent with the doctrine of agency, that doctrine itself being a useful and long established exception to the doctrine of privity.<sup>49</sup>

In Scruttons Ltd v. Midland Silicones Ltd their Lordships criticised the decision in Elder Dempster on the basis that the principle in that case did not establish any general exception for contracts of carriage by sea. Their Lordships distinguished Elder Dempster from the case before them on the basis of two facts. The first was that the third parties seeking the benefit of the provisions in the bill of lading in Elder Dempster were shipowners and not stevedores. The second was that, in the Elder Dempster case, the bill of lading had been signed by the master of the ship. The conclusion in the House of Lords was that the Elder Dempster case was to be confined to its special facts and was not authority for the principle that agents or servants acting under a contract which contained an exemption clause could obtain benefit of that clause.

The Midland Silicones decision was, henceforth, invoked to defeat the intentions of carriers and stevedores alike to the extent that carriers now provided for an indemnity on the part of the forwarding agent for all claims losses and expenses, howsoever arising.<sup>50</sup>

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48. See N.E. Palmer Bailment, Law Book Co (1979), at p.998.

49. D.Yates Exclusion Clauses in Contracts Sweet and Maxwell (1982), at p.162-3; see the application and extension of the principle in Mersey Shipping and Transport Co Ltd v. Rea (1925) 21 Lloyd's LR 375, 377 by Scrutton L.J. but disapproved by the House of Lords in Scruttons Ltd v. Midland Silicones [1962] A.C. 446, Wilson v. Darling Island Stevedoring and Lighterage Co Ltd (1956) 95 C.L.R. 43, 69-70, 74-75, 80-81, Adler v. Dickson [1955] 1 Q.B. 158, by the Supreme Court of the United States Krawill Machinery Corporation v. Robert C Herd & Co Inc [1959] 1 Lloyd's Rep 305.

50. See Canadian General Electric Co Ltd v. The Lake Bosomtwe and Pickford & Black Ltd [1970] 2 Lloyd's Rep. 81; York Products Ltd v. Gilchrist Watt and Sanderson Pty Ltd [1970] 2 Lloyd's Rep. 3 (Supreme Court of New South Wales) affirmed on appeal to the Privy Council [1970] 3 All E.R. 825; Cabot Corporation v. Mormacscan [1971] 2 Lloyd's Rep 351.

However, the agency argument put forward on behalf of the stevedores in Midland Silicones was regarded by Lord Reid as being capable of proving successful in specific circumstances, and this view provided a basis for later attempts to provide protection for third parties. He said:

"I can see a possibility of success of the agency argument if [first] the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability, [secondly] the bill of lading makes it clear that the carrier, in addition to contracting for these provisions on his own behalf, is also contracting as agent for the stevedore, [thirdly] the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice, and [fourthly] that any difficulties about<sup>51</sup> consideration moving from the stevedore were overcome".

It must be noted that the stevedores in Midland Silicones were not referred to in the bill of lading, nor was there a clause purporting to extend protection to anyone other than the carriers nor any suggestion that this protection be shared by the servants, agents or independent contractors of the carriers. The contract did not provide that the carrier, for the purpose of such immunities, be regarded not only as contracting as principal in his own right but also as contracting as agent for anyone to whom he delegated the performance of the contract. For these reasons the stevedores had to rely almost exclusively on the Elder Dempster principle.

It should be noted that under the Carriage of Goods by Sea Act 1971 (Cwlth) it is provided:

"If an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor) [emphasis added] such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under these rules".<sup>52</sup>

However, in many cases the stevedore has acted as an independent contractor and cannot therefore be afforded protection under the

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51. [1962] A.C. 446, at p.474.

52. Article 4, rule 2 which incorporated the Hague Rules.

Act.<sup>53</sup> In Wilson v. Darling Island Stevedoring and Litterage Co Ltd<sup>54</sup> the High Court of Australia had to consider whether the stevedoring company engaged by the shipowner could be regarded as an agent of the shipowner. Fullagar J. made the following observation:

"The word 'agent' appears to me to be often misused in this connection ... It seems to me quite wrong to say that a stevedoring company engaged by a shipowner to load or unload a ship is an agent of the shipowner, just as it would be wrong to say that a builder is an agent of a building owner. If A engages B to lay out a garden for him, and B engages C to do the actual work, C is not in any intelligible legal sense B's agent. B is an independent contractor, and C is either A's servant or an independent contractor with A. Agency in the legal sense supply does not come into the matter".<sup>55</sup>

This argument does not, and did not, suggest that the carrier may never act as an agent for the stevedore. Construction of an agency contract was still possible on the basis of Lord Reid's four requirements.

#### The Eurymedon Case

In 1974 Lord Reid's four conditions were found to be met for the first time in the Privy Council's decision in New Zealand Shipping Co Ltd v. A M Satterthwaite (The Eurymedon).<sup>56</sup> In this case,

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53. As in Scruttons Ltd v. Midland Silicones [1962] A.C. 466, Adler v. Dickson [1955] 1 Q.B. 158.

54. (1956) 95 C.L.R. 43.

55. *Ibid.*, at p.70.

56. [1974] 1 All E.R. 1015; [1975] A.C. 154. For comment on the case, its background and implications, see N.E. Palmer 'The Stevedore's Dilemma : Exemption Clauses and Third Parties' [1974] J.B.L. 101, 220; B.Coote note in (1974) 37 M.L.R. 453, P.J.Davies and N.E.Palmer 'The Eurymedon Five Years On' [1979] J.B.L. 337; C.A.Ying 'The Himalaya Clause Revisited' (1981) 22 Mal.L.R. 212; note F.Dawson (1974-5) 6 N.Z.U.L.R. 161; F.M.B. Reynolds note in (1974) 90 L.Q.R. 301; P.H.Clarke 'The Reception of the Eurymedon Decision in Australia, Canada and New Zealand' (1980) 29 I.C.L.Q. 132; D.G.Powles 'The Himalaya Clause' (1979) L.M.C.L.Q. 331; S.M.Waddams note in (1977) 55 Can.Bar.Rev 327; L.J. Kovats 'Who is to pay for the Stevedore's Negligence?' (1974) L.M.C.L.Q. 121 N.E. Palmer Bailment (1979) Law Book Co., at pp.986-1007 (bailment and third parties).

drilling machinery was sent from Liverpool to Wellington by the consignor for transshipment to the plaintiff as consignee in New Zealand under a bill of lading issued by agents for the carrier. A clause in the bill of lading conferred certain exemptions and immunities on the carrier. The consignors signed the bill of lading which contained the following clause:

"It is hereby expressly agreed that no servant or agent of the carrier (including every independent contractor from time to time employed by the carrier shall in any circumstances whatsoever be under any liability whatsoever to the shipper, consignee or owner of the goods or to any holder of this bill of lading for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act neglect or default on his part while acting in the course of or in connection with his employment and, without prejudice to the generality of the foregoing provisions in this clause, every exemption, limitation, condition, and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the carrier or to which the carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the carrier acting as aforesaid and for the purpose of all the foregoing provisions of this clause the carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be, or be deemed to be parties to the contract in or evidenced by this bill of lading ... The carrier will not be accountable for any goods of any description beyond 100 in respect of any one package or unit unless ... [followed by arrangements for specifying value]".

On arrival in Wellington, the machinery was damaged by the negligence of employees of the stevedore. The consignees of the goods, who at this point had become its owners, sued the stevedores more than one year after the cause of action arose. The stevedores, who were in an unusual relationship with the carriers in that the stevedores owned the latter, admitted negligence but claimed the protection of the bill of lading; which included a provision that actions in respect of damage to the goods be brought within one

year.<sup>57</sup>

At first instance<sup>58</sup> Beattie J. rejected the argument that in signing the bill of lading the carriers were themselves acting as principals and, at the same time in respect of the benefits of the limitation clause, as agents for the stevedores. When the bill of lading was signed, the stevedores had not undertaken to perform any obligation in relation to the consignors. On this basis, the judge held the stevedores could not force the party to adhere to their part of the bargain. The agency argument, as a result, was not sustainable. Additionally, the complex provisions inserted in the bill of lading too were held to be inadequate to circumvent the doctrine of privity of contract. Beattie J. also rejected the vicarious immunity principle enshrined in the Elder Dempster decision which he regarded as overruled by the Midlands Silicones case. He also rejected the argument which had been advanced by Lord Denning (obiter) in the Midlands Silicones<sup>59</sup> case that where stevedores were specifically mentioned in the bill of lading the cargo owners may be bound to an implied consent to the risk of the stevedores negligence. He finally rejected the contention that the bill of lading in terms of the clause cited above created a trust of the consignor's promise which the stevedores could enforce as beneficiaries of the trust. However, Beattie J. was able to construe the consignor's signing of the bill of lading as an offer to whoever unloaded the goods at the final destination that they (the stevedores) should take the benefit of the immunities given to the carriers in the bill of lading. This offer, made through the agency of the carriers, was viewed by the judge as

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57. Incorporating the Schedule to the Carriage of Goods Act 1924 (U.K.).

58. [1971] 2 Lloyd's Rep 399; [1972] N.Z.L.R. 385.

59. [1962] A.C 446, at pp.489-490.

accepted and turned into a binding contract when the stevedores commenced unloading the goods in Wellington (on the basis of Carlill's<sup>60</sup> case). This unilateral contract embodied the benefits of immunity in the main contract between the consignor and the carrier. The consideration for the consignor's offer was the stevedore's unloading the goods in that performance by the stevedores of a pre-existing contractual obligation with the carriers amounted to good consideration on the part of the performer.<sup>61</sup>

The New Zealand Court of Appeal reversed Beattie J.'s decision.<sup>62</sup> They held that the device of a unilateral contract did not aid the stevedores as the facts of the case was not akin to that in Carlill's case; further, the bill of lading was not so phrased to be construed as an offer of immunity capable of acceptance. In their view the relevant clauses were drawn on the basis of relations between the parties when the bill of lading was signed not at a later date when a given event took place to supposedly turn the offer into a contract.

The Privy Council, on appeal by the stevedores from the decision of the New Zealand Court of Appeal, by a majority held that the clause at issue did protect the stevedores.<sup>63</sup> Lord Wilberforce, in delivering the majority opinion (which accepted Lord Reid's four conditions)<sup>64</sup> stated:

"There is possibly more than one way of analysing this business transaction into the necessary components ... the bill of lading brought into existence a bargain initially unilateral but capable of becoming mutual, between the shipper and the [stevedores], made through the carrier as agent. This became a full contract when the stevedores performed services by discharging the goods. The performance of these

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60. Carlill v. Carbolic Smoke Ball Ltd [1893] 1 Q.B. 256.

61. Beattie J. relying on Scotson v. Pegg (1891) 6 H & N 296; 152 E.R. 121.

62. [1973] 1 N.Z.L.R. 174.

63. New Zealand Shipping Co Ltd v. A M Satterthwaite & Co Ltd [1975] A.C. 154, Viscount Dilhorne and Lord Simon dissenting.

64. See supra.

services for the benefit of the shipper was the consideration for the agreement by the shipper that the appellant should have the benefit of the exemptions and limitations contained in the bill of lading".<sup>65</sup>

This statement appeared to approve both the bilateral and unilateral theories of analysis, without attempting to distinguish between the two, although the unilateral approach was favoured.

This latter analysis has its problems. If it is valid until there was an act of performance, such as unloading the goods at Wellington in the case at issue, no immunity would be given to the stevedores, or if they damaged the goods prior to unloading. Equally, the owners could withdraw such a unilateral offer before performance.<sup>66</sup>

The alternative approach which was suggested by Lord Wilberforce was an immediate bilateral contract having been concluded between the consignors and the stevedores through the agency of the carriers. On this basis, the agreement of the stevedores to unload the goods provided the consideration, rather than the act of unloading, even though the stevedores were under a duty to the carriers to unload the cargo. In Lord Wilberforce's view "... an agreement to do an act which the promisor is under an existing obligation to a third party to do, may quite well amount to valid consideration and does so in the present case".<sup>67</sup> The secondary contract would, therefore, come into existence contemporaneously with the main agreement, protecting the stevedores prior to the unloading of the goods (on the basis of the bilateral contract analysis).

The overwhelming consideration which was implicit in the Privy Council decision in the Eurymedon was that of commercial realities. In the words of Lord Wilberforce:

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65. [1975] AC 154, at 167-168; [1974] 1 All ER 1015, 1020.

66. See F.D. Rose and N.E. Palmer 'Return to Midland Silicones', note in (1976) 39 M.L.R. 466.

67. [1975] AC 154, 168; [1974] 1 All ER 1015, 1021 citing Scotson v. Pegg (1861) H & N 295.



"The whole contract is of a commercial character, involving service on one side, rates of payment on the other, and qualifying stipulations as to both. The relations of all parties to each other are commercial relations entered into for business reasons of ultimate profit. To describe one set of promises, in this context, as gratuitous, or nudum pactum, seems paradoxical and is prima facie implausible. It is only the precise analysis of this complex of relations into the classical offer and acceptance, with identifiable consideration, that seems to present difficulty, but this same difficulty exists in many situations of daily life, e.g. sales at auction; supermarket purchases; boarding an omnibus; purchasing a train ticket; tenders for the supply of goods; offers of reward; acceptance by post; warranties of authority by agents; manufacturers' guarantees; gratuitous bailments; bankers' commercial credits. These are all examples which show that English law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach, often at the cost of forcing the facts to fit uneasily into the marked slots of offer, acceptance and consideration."<sup>68</sup>

The United States courts had, as Lord Wilberforce pointed out, dealt with a similar clause in a case where the carrier contracted as agent for the stevedores and other independent contractors.<sup>69</sup> In their Lordships' view, there was no reason why Commonwealth law should be more restrictive and technical as regards agency contracts than in the United States. "Commercial considerations should have the same force on both sides of the Pacific".<sup>70</sup> In the view of their Lordships:

"... to give the stevedore the benefit of the exemptions and limitations contained in the bill of lading is to give effect to the clear intentions of a commercial document, and can be given within existing principles. They see no reason to strain the law or the facts in order to defeat these intentions".<sup>71</sup>

Accordingly, one might regard the Privy Council decision in New Zealand Shipping Co Ltd as upholding a commercial bargain without subjecting it to the over-narrow technicalities of the doctrine of

68. [1975] A.C. 154, at pp. 167; [1974] 1 All E.R. 1015, at pp.1019-1020.

69. Carle and Montanari Inc v. American Export Isbrandtsen Lines Inc [1968] 1 Lloyd's Rep 260; see also Tessler Bros (BC) Ltd v. Intal Pacific Line [1972] A.M.C. 937.

70. Per Lord Wilberforce [1975] A.C. 154, at p.169; [1974] 1 All E.R. 1015, at p.1021.

71. Ibid.

privity of contract.<sup>72</sup>

However, despite the tenor of the Privy Council decision, uncertainties remained, chiefly due to the obscurity of the content and interrelationships of Lord Reid's four conditions, and these were sufficient to ensure that the Eurymedon was rarely followed in Commonwealth jurisdictions, and was distinguished and disregarded more often than it was applied.<sup>73</sup>

In Herrick v. Leonard and Dingley Ltd<sup>74</sup> a consignee of a motorcar which was being carried under an automobile carriage contract sued a stevedore in respect of damage which occurred while unloading the car. The Supreme Court of New Zealand distinguished the Eurymedon as the automobile carriage contract did not make it clear that the stevedore was intended to be protected by its provisions.

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72. See N.E.Palmer [1974] 'The Stevedore's Dilemma: Exemption Clauses and Third Parties' J.B.L. 101, 117-118, where Lord Wilberforce's point is taken that the real problem is to ensure that consignors and consignees should not be helped to evade exemptions which they have knowingly accepted (and which are embodied in freight rates) by breaking their agreements and suing the servants, agents or independent contractors of the carrier. The majority of the Privy Council held that even if the Merchantile Law Act 1908 (N.Z.) s13 did not apply (by which the consignees were made subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with them) then previously established case law, principally Brandt v. Liverpool, Brazil and River Plate Steam Navigation Co Ltd [1924] 1 K.B. 575 bound a consignee to all the immunities and benefits in the bill once he had accepted it and requested delivery of the goods. Note the UK equivalent of the New Zealand statute is the Bills of Lading Act 1855.

73. See P.H.Clarke 'The Reception of the Eurymedon Decision in Australia, Canada and New Zealand' (1980) 29 I.C.L.Q. 132; P.J.Davies & N.E.Palmer 'The Eurymedon Five Years On' [1979] J.B.L. 337. The decision was not followed in The Federal Schelde [1978] 1 Lloyd's Rep 285 (Quebec), The Suleyman Stalskiy [1976] 1 Lloyd's Rep 609, Calkins & Burke Ltd v. Empire Stevedoring Co Ltd [1976] 4 WWR 337 (British Columbia), Lummus Co Ltd v. East African Harbours Corporation [1978] 1 Lloyd's Rep 317 (Kenya), the decision was distinguished in Herrick v. Leonard and Dingley Ltd [1975] 2 N.Z.L.R. 566, apparently ignored in Philip Morris (Australia) Pty Ltd v. The Transport Commission [1975] Tas.S.R. 128 (Tasmania), and exceptionally followed in Eisen und Metall AG v. Ceres Stevedoring Co Ltd [1977] 1 Lloyd's Rep. 665 but reversed on appeal to the Quebec Court of Appeal, [1977] 1 Lloyd's Rep 665.

74. [1975] 2 N.Z.L.R. 566.

In The "Suleyman Stalskiy"<sup>75</sup> [1976] the case was distinguished and as a result, the stevedore failed because the Supreme Court of British Columbia held that the carrier had no authority to contract as agent for the stevedore. Apparently, no evidence had been led in this respect and no inference was drawn. Again, in Eisen und Metall A.G. v. Ceres Stevedoring Co Ltd and Another<sup>76</sup> the case was distinguished by the Court of Appeal in the District of Montreal and the stevedore failed because in the province of Quebec, it was illegal to contract out of liability resulting from gross negligence. In Lummus Co Ltd v. East African Harbours Corporation<sup>77</sup>, the High Court of Kenya refused to follow the Eurymedon on the basis of contrary decisions of the East African Court of Appeal which ante-dated the Eurymedon but which were regarded as binding. Although there was no specific disagreement evident from these cases, the impression which emerged was one of reluctance to adopt the Eurymedon as a strong precedent.

"Salmond & Spraggon" and the "New York Star"

In Port Jackson Stevedoring Pty Ltd v. Salmond & Spraggon (Australia) Pty Ltd<sup>78</sup> a cargo of cartons of razor blades was shipped on a vessel called the New York Star. The bill of lading constituted a contract between the consignor and the carrier. A "Himalaya" exemption clause (identical to that in the Eurymedon case) in the bill purported to exempt the carrier's servants, agents, and independent contractors from loss or damage of whatsoever kind arising directly or indirectly from any act, neglect or default whilst acting in the employment of the carrier. There was also a requirement in the bill

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75. [1976] 2 Lloyd's Rep. 609.

76. [1977] 1 Lloyd's Rep. 665.

77. [1978] 1 Lloyd's Rep. 317.

78. (1978) 18 A.L.R. 333 (High Court of Australia).

that any action in respect of loss or damage had to be brought within one year after delivery. The consignor assigned its rights under the bill of lading to the consignee (Salmond & Spraggon) and the carrier employed stevedores (Port Jackson Stevedoring) to off-load the goods store them in a dockside warehouse. This was done by the stevedores, but their employees allowed a thief to take the goods from the warehouse, and drive away with them, though the thief had not got the necessary documents of ownership. It was accepted by both the consignees and stevedores in the ensuing action that the stevedores had acted negligently. In an action for damages brought by the consignee for damages the stevedore claimed that the "Himalaya" and time clauses described above protected them from liability for the loss of the goods, even in the case of any admitted negligence. The consignee argued that privity of contract prevented the stevedores from claiming the benefit of the exemption clauses in the bill of lading in that the stevedores were not a party to that bill. The stevedores, on their part, claimed that the carriers had entered into the bill of lading not only on their own behalf, but in respect of the exemption clause and the time clause, as agent for the stevedores, as that was expressly stated in the bill.

In the hearing at first instance in the Supreme Court of New South Wales,<sup>79</sup> Sheppard J. found for the stevedores. The necessary agency, in his opinion, had been established by ratification which enabled the stevedores to rely on the exemption clauses. This decision was reversed on appeal to the New South Wales Court of Appeal.<sup>80</sup> That court held that the off-loading and storing of goods by the stevedore although done as result of the agreement with the

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79. Unreported, 14/7/1975.

80. [1977] 1 Lloyd's Rep 445; see P.H. Clarke 'The Reception of the Eurymedon Decision in Australia, Canada and New Zealand' (1980) 29 I.C.L.Q. 132, 139-141.

The High Court did find, with one dissentient,<sup>86</sup> that the stevedores had provided consideration by unloading the goods, Mason and Jacobs JJ. holding that the stevedores did act in reliance on the shipper's offer.

The interpretation placed upon the relevant terms of the bill of lading by Barwick C.J. is worth noting in the light of the approval which was given to it by the Privy Council in its later decision.<sup>87</sup> Barwick C.J. was of the opinion that there was a contract between the consignor and the stevedores which became binding when the stevedores began to carry out the unloading and the stevedores had the protection of the exemption clause even after the goods were off-loaded from the ship. In Barwick C.J.'s view, the bill of lading was neither a contract nor an offer, but was a pre-contractual bargain between the consignor and the stevedores. Once the stevedores carried out services in relation to the cargo then the exemptions from liability were to apply between the parties:

"... I find no difficulty in interpreting the arrangement made by the bill of lading and its acceptance by the consignor as providing that if, in fact, the appellant stevedored the cargo, leaving aside for the moment what the stevedoring involved, the appellant should have the benefit of the clauses of the bill including the benefit of the time limitation expressed in cl.17 of the bill of lading. I am unable to treat the clauses of the bill of lading as in any respect an unaccepted but acceptable offer by the consignor to stevedore ... To agree with another that, in the event that the other acts in a particular way, that other shall be entitled to stated protective provisions only needs performance by the doing of the specified act or acts to become a binding contract. ... The performance of the contemplated act both supplies the occasion for those conditions to operate and the consideration which makes the arrangement contractual ... we have here an arrangement, a compact with agreed conditions to attend the performance of certain acts, which are not promised to be done. True enough that, until such performance, the consensus has nothing upon which to operate. But that is its essential characteristic, to provide an agreed consequence to future action should that action take

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86. Stephen J.

87. [1980] 2 Lloyd's Rep. 317, at p.322.

place: to attach conditions arising from conduct. If one desires to use the terms, it could be said that the arrangement is mutual: it is bilateral: to it there are two parties both agreeing to the terms of the intended consequence, on the one hand the consignor and on the other the stevedore<sup>88</sup> acting through its authorised agent, the carrier".

The High Court, by its decision in Port Jackson, therefore, restricted the operation of the Eurymedon. Two of the judges, Stephen and Murphy JJ. did not follow the Eurymedon in Australia for reasons of policy.<sup>89</sup> Both argued that in a country such as Australia which was dependant on foreign carriers for the movement of goods, the interests of shippers would be prejudiced to allow carriers to exclude liability for themselves and those performing services on their behalf. As Murphy J. put it:

"Australian importers have no real freedom in their arrangements; to regard these as being in the area of contract is a distortion. The bill of lading in this case shows that, although there are references to the carrier's obligations, the thrust of the document is to relieve the carrier<sup>90</sup> and its agents from virtually all responsibility".

Therefore, both Murphy and Stephen JJ. were of the opinion that Australian courts should not agree to a doctrine such as that of the Eurymedon which assisted ship-owning nations to the detriment of ship-user nations.

The Privy Council, in hearing the appeal from the High Court of Australia, unanimously reaffirmed the correctness of the decision in the Eurymedon. In relation to the matter of consideration and the construction of the contract the Privy Council did not discuss the issue of consideration but essentially approved Barwick C.J.'s examination<sup>91</sup>:

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88. (1978) A.L.R. 333, at pp. 343-344.

89. (1978) A.L.R. 333, Stephen J., at pp.355-56, Murphy J., at p.376.

90. Ibid., at p.376.

91. (1979) A.L.R. 333, at pp. 343-344.

"The provision of consideration by the stevedore was held to follow from this board's decision in Satterthwaites case and in addition was independently justified through Barwick C.J.'s analysis".<sup>92</sup>

The Board felt that any stevedores employed by the carrier would normally and typically come within the phrase "servant or agent of the carrier" in clause 2 of the bill of lading. The normal situation was that stevedores had the benefit of any arrangement between a carrier and a shipper, where it was understood that the carrier would employ stevedores to carry out work in relation to the goods and where the intention was clearly expressed that the stevedores should benefit from the terms contained in the bill of lading.<sup>93</sup> Lord Wilberforce gave the essence of the Judicial Committee's as follows:

"[The Satterthwaite] case was a decision, in principle, that the Himalaya clause is capable of conferring on a third person falling within the description 'servant or agent of the carrier (including every independent contractor from time to time employed by the carrier)' defences and immunities conferred by the bill of lading on the carrier as if such persons were parties to the contract contained in or evidenced by the bill of lading ... Their Lordships would not encourage a search for fine distinctions which would diminish the general applicability in the light<sup>94</sup> of established commercial practice, of the principle".

The argument that the bill of lading did not have any effect on the stevedore's rights and liabilities after the goods had passed over the ship's rail was dealt with by the Committee in practical fashion. The respondents had argued that the stevedores were not acting as carriers nor carrying out any duties as carriers under the bill of lading once they had unloaded the vessel and after the goods had been stored. At this point, ran the argument, the stevedores

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92. [1980] 2 Lloyd's Rep. 317, at p.322.

93. Ibid., per Lord Wilberforce, at p.321.

94. [1980] 2 Lloyd's Rep. 317, at p.321.

were not acting as carriers but were simply bailees, so that the bill of lading could not regulate the duties of stevedores as bailees. Although the High Court had based their majority decision on this argument, the Committee regarded it as unreal to suggest that the carrier's obligations ended as soon as the goods were discharged over the ship's rail, even though the bill of lading (Clause 8) provided for the termination of the carriers liability at that point. The bill of lading elsewhere (Clause 5) specifically provided that, while the carrier's responsibility as a carrier ended as soon as the goods left the ship's tackle, its liability after that was to be that of an ordinary bailee. The bill of lading, therefore, in the Judicial Committee's view, envisaged a continuing responsibility for the goods and the carriers' operating in accordance with those terms and it recognised the usual commercial practice by which the stevedores take delivery of the goods, sorting and storing them until the consignee arrived to take them. If the carrier acted as a stevedore itself, its liability would be determined by the terms of the bill of lading. Since stevedores were employed and made a party to the bill of lading their liability had been similarly governed.

The Judicial Committee regarded the argument that the stevedores could not rely on the written terms of the bill of lading since they were in fundamental breach of contract as unsound and misconceived. This was the case because of the fact that the carrier had been specifically discharged from all liability unless an action was brought within one year after the goods were, or ought to have been, delivered (Clause 17). In any case, the Committee was of the view that, that particular clause did not relate to performance, since it came into effect only after the performance of the contract had become impossible or been given up. The clause then regulated the way in which liability for breach of contract was to be established.



The Judicial Committee found it to be similar to arbitration or forum clauses,<sup>95</sup> which, on clear authority, survive a repudiatory breach. Accordingly, on construction and analysis, the clause plainly operated to exclude the claim by the respondents against the stevedores.<sup>96</sup>

The decision of the Privy Council in the New York Star underlined the commercial realities of the transactions involved. It may be argued, as it was in the High Court by Stephen J.,<sup>97</sup> that it would make greater commercial sense to hold careless stevedores liable to a shipper or a consignee who do not appoint or control them, rather than give stevedores immunity and, thus, put the risk on the shipper or consignee (or his underwriter). Although the shipper obtains the benefit of a lower freight rate if such stevedores were exempt from liability, arguably there would be no sanction available to ensure that the stevedore would take care of the goods and, thus, avert loss. Even if the stevedoring contract provided that the carrier indemnify the stevedore against all liability, the carrier might justifiably bear the risk rather than the shipper since the carrier is in a position to influence the conduct of the stevedore. However, no cargo owner is likely to drop his insurance cover simply because he has legal recourse against a wrongdoing third party, such as a stevedore, since claims can generally be settled more expeditiously against underwriters than against the wrongdoer. To leave this risk ultimately with the carrier or the stevedore therefore involves an element of double insurance, which increases cargo transport costs, as the carrier will insure his potential liability for cargo damage with

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95. [1980] 2 Lloyd's Rep 317, at p.322, Lord Wilberforce citing Heyman v. Darwins (1942) A.C. 365, (1942) 72 L.L. Rep 65, Photo Production Ltd v. Securicor Transport Ltd [1980] 1 All E.R. 556, at p.567, [1980] 2 W.L.R. 283, at p.295.

96. [1980] 2 Lloyd's Rep. 317, at p.322.

97. (1978) 18 A.L.R. 332, at p.355.

his P & I Club,<sup>98</sup> and the cargo owner will insure the same risk of damage to the cargo with his underwriters.<sup>99</sup>

### Developments Since the New York Star

Recent decisions in Australia have favourably adopted the Privy Council decision in the New York Star, and, indeed, have arguably extended it. In Broken Hill Pty Ltd v. Hapag-Lloyd Aktiengesellschaft<sup>1</sup> Toll Chadwick, an inland carrier and agent of the ocean carrier Hapag-Lloyd, negligently damaged goods in transit between Sydney and Newcastle. Clause 4(1) of the combined transport bill of lading provided that the carrier should be entitled to subcontract the carriage or any part of it. Clause 4(2) stipulated that there should be no claims made against any party by whom any part of the carriage was performed other than the carrier.

#### "Sub-contracting and Indemnity"

- 4(i) The carrier shall be entitled to sub-contract on any terms the whole or any part of the carriage.
- 4(ii) The merchant [ie. the cargo interests] undertakes that no claim or allegation shall be made against any person whomsoever by whom the carriage or any part of the carriage is performed or undertaken (other than the carrier) ... and if any such claim or allegation should nevertheless be made to indemnify the carrier against all consequences thereof. Without prejudice to the foregoing every such person shall have the benefit of all provisions herein benefiting the carrier and [sic] if such provisions were expressly for his benefit; and in entering into this contract, the carrier, to the extent of these provisions, does so not only on

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98. Protecting and Indemnity Club; an association or club of shipowners formed to insure each other against maritime losses.

99. Note the trend in current international conventions is to permit the carrier's 'servants or agents' to avail themselves of defences and limits of liability open to the carrier against a shipper; see Art IV bis, r 2 of the Hague-Visby Rules.

1. (1980) 2 N.S.W.L.R. 572.

his own behalf but also as agent and trustee for such persons".

BHP, the consignees, sued Hapag-Lloyd and Toll Chadwick for damages. Toll Chadwick cross claimed for damages against Hapag-Lloyd and Hapag-Lloyd cross claimed against BHP. In the Supreme Court of New South Wales Yeldham J. noted:

"Some of the foregoing defences ... raise squarely for consideration the application to this bill of lading, and to the circumstances of the present case, of principles enunciated in New Zealand Shipping Co Ltd v. A M Satterthwaite & Co Ltd and in Port Jackson Stevedoring Pty Ltd v. Salmond and Spraggon".<sup>2</sup>

As the stevedores had a similar provision in the bill of lading to that in The New York Star, Toll Chadwick, the inland carrier, pleaded clause 4(2) in its defence. In a notice of motion filed by Hapag-Lloyd before the hearing of the action, the ocean carrier sought to have the cargo owner's claim against the inland carrier permanently stayed on the ground that a Court of Equity would have intervened to restrain the breach of the negative provision in clause 4(2) and because of the circuitry of action. The latter instance would occur were the cargo owners to recover damages from the inland carrier, who could claim an indemnity from the ocean carrier, who, in turn, would be entitled to be indemnified by the cargo owners under the terms of the bill of lading. The cargo owner argued that the ocean carrier lacked a proper interest in bringing the motion, and was also precluded by the equitable doctrine of laches (delay in filing the motion).

The New South Wales Supreme Court held that the ocean carrier had a legal right to the performance of the contract and the shipowner had a sufficient interest in enforcing the promise, since rates of carriage and other commercial transactions between the ocean carrier and inland carriers would be affected by the inland carrier's

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2. Ibid., at p.577.

knowledge that they were protected by clause 4(2). The stay was granted as there was, in the court's view, no unjust advantage accruing to the ocean carrier as a result of delay in filing the motion. As the inland carrier was sufficiently protected by the court order permanently staying proceedings brought against it by the cargo owners the court did not pronounce on the alternative ground raised by the ocean carrier to support a stay of proceedings (that is, the circuitry of action), nor on the merits of the cross-claim by the ocean carrier against the cargo-owners.

Yeldham J. held that Hapag-Lloyd could subcontract its duties under the express terms in clause 4(1), and, by so doing, were able to transfer the indemnity in clause 4(2) to Toll Chadwick, the inland carrier and third party. Because the plaintiff, the cargo owner, had agreed not to make any<sup>3</sup> claim against the parties, including sub-contractors, a stay of proceedings would be granted, preventing the cargo owner from pursuing a claim against the sub-contractor. The exact terms of clause 4(2) of the bill of lading, which contained a promise that the cargo owner would not make a claim against the sub-contractor, was thus given appropriate effect.

In Sidney Cook Ltd v. Hapag-Lloyd Aktiengesellschaft and Another<sup>3</sup> Hapag-Lloyd had entered into an agreement with the sellers of a printing unit to carry it from Hamburg to Sydney. The seller endorsed the bill of lading over to Sidney Cooke Ltd, the purchaser. The printing unit was damaged whilst in the control of the agent of Hapag-Lloyd, the operators of an inland container terminal, before delivery to Sidney Cooke and eighteen days after discharge from the vessel. The bill of lading was identical to that in the BHP case above and contained a definition of 'carriage' which included the whole of the operation from receipt of the cargo until delivery. It

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3. [1980] 2 N.S.W.L.R. 588.

had been stipulated in the contract that the carriage could be sub-contracted, as it had been in clause 4(1) in the BHP case, and that an indemnity to the sub-contractor could be transferred as in clause 4(2) of the same case.

In the Supreme Court of New South Wales, Yeldham J. held that clause 4(1) was binding and that clause 4(2) of the bill of lading would not only be limited in its operation to the carriage by sea. The bill of lading made reference to three stages in the carriage where damage was possible; from receipt of the goods until loading, during sea carriage, and from discharge before delivery. Yeldham J. agreed with the reasoning of the Privy Council in the New York Star that a search for fine distinctions should not be made which would:

"... confine the contract of carriage to the mere sea-leg of the entire operation and preclude a stevedore or person in the situation of a second defendant from receiving the benefit of a clause such as that presently under consideration".

Accordingly, he rejected the argument advanced by the plaintiffs that the proper construction of the clause only applied to the carriage by sea and did not apply to the terminal operators who had handled the cargo more than two weeks after its discharge from the vessel. Yeldham J. also stipulated that those who had been sub-contracted part or all of the sea-leg, were not "carriers" for the purposes of Art. 3 r8 of the Hague Rules. Therefore, clause 4(2) was not, refuting the plaintiffs argument, void on the basis of Art. 3 r8 of the Rules. The Supreme Court of New South Wales, as in the BHP case, stayed the action against the terminal operators and gave them the benefit of clause 4(2).

A year later, Yeldham J. in the same court in the case of Celthene Pty Ltd v. W.K.J. Hauliers Pty Ltd and Another<sup>5</sup> applied

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4. Ibid., 596.

5. [1981] 1 N.S.W.L.R. 606 (Common Law Division).

the principles which had been outlined in the Eurymedon and The New York Star cases and also Lord Reid's four criteria in the Scruttons Ltd case outside the carriage of goods by sea and held them to additionally apply to the carriage of goods by road. The plaintiffs were the owners and consignors of goods to be sent by road from Melbourne to consignees in Sydney. The consignment note issued by the consignor to the carrier purported to give the sub-contractor(s) of a carrier the protection of certain exemption clauses in the consignment notes. These included provisions under which the carrier was empowered to sub-contract any the goods the subject of the contract, and by which the goods were carried at the consignor's risk and not of the carrier. Further, the carrier was not to be liable in tort, contract or otherwise for any loss or damage to the goods carried whether caused by the carrier or others. The actual carriage of the goods was undertaken by W.K.J. Hauliers Pty Ltd who had been hired on behalf of the consignors by Alltrans Express, a division of TNT Management Pty Ltd. In the course of the carriage to Sydney the goods were extensively damaged as a result of the admitted negligence of an employee driver of W.K.J. Hauliers.

In the ensuing action by the plaintiff against the carriers and their driver, it was common ground between the parties that the plaintiff was entitled to succeed unless the defendants could establish that they were protected by conditions 3 and 5 of the contract of carriage. These were as follows:

- "3. The Consignor hereby authorises the Carrier (if it should think fit to do so) to arrange with a sub-contractor or sub-contractors for the carriage of any goods the subject of this contract. Any such arrangement shall be deemed to be ratified by the Consignor upon delivery of the said goods to such sub-contractor or sub-contractors who shall thereupon be entitled to the full benefit of these terms and conditions to the same extent as the

carrier: in so far as it may be necessary to ensure that such sub-contractor or sub-contractors shall be so entitled the Carrier shall be deemed to enter into this contract for its own benefit and also as agent for the sub-contractor or sub-contractors ...

5. The goods are at the risk of the Consignor and not the Carrier and unless expressly agreed in writing the Carrier shall not be responsible in tort or contract or otherwise for any loss of or damage to or deterioration of goods or misdelivery or failure to deliver or delay in delivery of goods including chilled, frozen, refrigerated or perishable goods either in transit or in storage for any reason whatsoever including without limiting the foregoing the negligence or wilful act or default of the Carrier or others and this clause shall apply to all such loss of or damage to or deterioration of goods or misdelivery or failure to deliver or delay in delivery of goods as aforesaid whether or not the same occurs in the course of performance by the Carrier of the contract or in events which are in the contemplation of the Carrier and/or the Consignor or in events which are foreseeable by them or either of them or in events which would constitute a fundamental breach, of the contract or a breach of a fundamental term thereof ..."

In his judgement, Yeldham J. noted that although the problems that had arisen in past cases, particularly in the Eurymedon or The New York Star cases concerned carriage of goods by sea it did not follow that Lord Reid's four criteria in the Scruttons case<sup>6</sup> case related only to sea carriage of goods and to stevedoring operations:

"... none of the decisions to which I was referred or which I have consulted for myself lend support to the view that the principles [in The Eurymedon or The New York Star] may only successfully be applied in cases concerned, as they were, with sea carriage. It is apparent that, in the future, as in the past, that type of carriage will continue to provide most frequently the occasion where the application of the relevant principles can be considered ... But it is plain that the various cases have been decided by the application of the ordinary principles of the common law to the facts of the particular matter ...

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6. [1962] A.C. 446, at p.474.

Barwick C.J., whose judgement [in Port Jackson Stevedoring Pty Ltd] was expressly approved by the Judicial Committee, said ((1978) 139 CLR 231, at p250): 'Their Lordships decision in The Eurymedon was of great moment in the commercial world and, if I may say so, an outstanding example of the ability of the law to render effective the practical expectations of those engaged in the transportation of goods. It is not a decision of its nature to be narrowly or pedantically confined ... '

I do not think the Chief Justice, in the passage which I have set out, was intending to confine the principle to the transportation of goods, and certainly not to the transportation of goods by sea. Rather it was an acknowledgement that the result [in The Eurymedon] had been arrived at by the application of ordinary principles to a particular commercial situation which was of great importance. Perhaps it is easier, because of the intimate association between many shipowners or charterers on the one hand and stevedores on the other, for the relevant criteria to be satisfied in cases of sea carriage than in situations such as the present matter is concerned with. But it is plain that the same problems are arising and will continue to arise with greater frequency in future in the case of road transport, especially with the ever-increasing tendency for much of it to be sub-contracted, and for consignors and consignees to be given the option of insuring the goods or themselves accepting the risk of damage".

His Honour could not see any reason to confine Lord Reid's four criteria to clauses limiting the time within which claims might be made as opposed to exemption clauses which purport to displace liability. To refuse so to confine the four criteria did not, in Yeldham J's view, offend against commercial morality. The plaintiffs were aware of the conditions in the consignment note including the clauses cited above, and had in their possession a copy of such clauses which could be read at leisure. The plaintiff deliberately refrained from insuring, doubtless preferring to carry any risk which might be involved. The evidence, in the judge's opinion,<sup>8</sup> also established that the defendant hauliers had continued to sub-contract since its formation with TNT exclusively and had in their possession books of

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7. [1981] 1 N.S.W.L.R. 606, at pp.611-612.

8. Ibid., at p.613.



the relevant consignment notes and were aware of the substance of the relevant conditions which were for the benefit of the defendant and their employees. TNT would therefore be entitled to assume, in the absence of a directive from the defendant, that it had authority to contract on the defendants' behalf in relation to exemption from, or limitation of, liability. Yeldham J. was of the view<sup>9</sup> that the second defendant, the driver, had ratified the act TNT Management Pty Ltd in purporting to contract on his behalf by his defence in the present proceedings.<sup>10</sup> Nor would such ratification unfairly prejudice a third party.

Following Barwick C.J.'s analysis in Salmond & Spraggon,<sup>11</sup> Yeldham J. found that consideration was provided by the defendant haulier by its performance of the contract. The wide words of cl.5, in the judge's view, no matter how narrowly they were construed, placed the goods at the sole risk of the consignor and excluded the carrier from liability in the event that, by its negligence, they were damaged or destroyed:

"... Plainly the parties agreed that, unless the consignor required insurance, the goods should be carried at its sold risk. In the absence of any deliberate or wanton destruction or other dealing with the goods, it does not seem to me that, even upon the strictest construction of cl.5, it can be argued that they did not intend to exempt the carrier or its sub-contractors and their servants from the consequence of negligence, even if such negligence resulted in destruction".<sup>12</sup>

9. [1981] 1 N.S.W.L.R. 606, at pp.614-615.

10. [1981] 1 N.S.W.L.R. 606, 612 citing the finding of Beattie J. in A.M. Satterthwaite and Co Ltd v. New Zealand Shipping Co Ltd [1972] N.Z.L.R. 385, 394, 395 who held that it had occurred in that case. As actual authority was found the Privy Council did not have to deal with that question.

11. See supra.

12. [1981] 1 N.S.W.L.R. 606, 618.

Finally, the House of Lords decision in Photo Production Ltd v. Securicor Transport Ltd<sup>13</sup> was followed and was cited in support of the view that it was neither unfair or unjust to hold the plaintiff to its bargain and the clause should not, by any artificial rule of construction, be held not to be operative in the present circumstances:

"Here the words are clear, even making allowance for the fact that they must be read contra proferentem and that exemption from liability for negligence is not to be lightly inferred, it is plain that the clause is of sufficient width to operate upon the facts in the present case".

Accordingly the defence of each defendant based on the provisions of the consignment note succeeded.

The Court of Appeal of the Supreme Court of New South Wales approved Celthene in Life Savers (Australasia) Ltd v. Frigmobile Pty Ltd and Another.<sup>14</sup> In that case, the first respondent agreed to carry a load of chocolate from Sydney to Brisbane in a refrigerated van which was carried by lorry owned by the second respondents, and was driven by the latter's employee. The contract of carriage, evidenced by an invoice, required that the cargo was to be chilled and maintained at a required temperature. The reverse of the invoice contained various conditions, one of which provided that the carrier entered into the contract as an agent for its sub-contractor(s) and that the consignor authorized the carrier and its sub-contractor(s) to arrange for carriage of any of the contract goods. Such an arrangement was to be deemed as being ratified by the consignor on delivery of the goods to sub-contractor(s) who would then be entitled to the terms and conditions to the same extent as the carrier.

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13. [1980] A.C. 827, citing in particular Lord Diplock at p.850; see Chapter Two *supra*.

14. [1983] 1 N.S.W.L.R. 431. For a discussion of the Life Savers case see S.W.Cavanagh 'The Ultimate Exclusion Clause' (1985) 59 A.L.J. 67.

Another condition provided that the carrier would not be treated as a common carrier and, hence, accepted no liability as such, the goods being at the owner's risk. The carrier was not to be liable for loss of or damage whatsoever to any goods under the custody or control of the carrier or its sub-contractor. The carrier, additionally, was not liable for any consequential loss or damage, loss or damage to include that caused by the negligence or wilful act or default of the carrier, whether or not such loss or damage was foreseeable or contemplated by the carrier.

The chocolate was carried in excess of the required temperature and was damaged. On a finding for the respondents in the lower court, the plaintiffs appealed to the Court of Appeal.<sup>15</sup>

Hutley J.A., following the judge in the court of first instance, applied the Securicor case to the construction of the exemption clause,<sup>16</sup> noting that that case was binding on the Court of Appeal, unless there were inconsistent decisions of the High Court or the Privy Council standing in the way of its application. He rejected the argument of the appellants that exemption clause should be cut down where it would defeat the main objects of the contract. He noted Lord Denning's remarks in the Privy Council decision in Sze Hai Tong Bank Ltd v. Rambler Cycle Co Ltd<sup>17</sup> to the effect that a wide interpretation of an exemption clause would have the effect of defeating the main objects of the contract and, therefore, must be limited to give them effect.<sup>18</sup> However, in Hutley J.'s view this doctrine of the fundamental term had never been adopted by the High Court of Australia to its full extent. There was, in the judge's opinion, no bar to the Court of Appeal following the Securicor

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15. On appeal from Rogers J.

16. [1981] 1 N.S.W.L.R. 431, at p.436..

17. (1959) A.C. 576.

18. Ibid., at p.587.

decision. The House of Lords in that case had recognised that the assumption of or exemption from legal liability could not be disassociated from the costs of providing a service. Similar recognition could be given in Australian courts without this being prevented by any precedent. Therefore the contract evidenced by the invoice should be construed according to its terms. Hutley J.A. refused to accept that "wilful" did not include deliberate acts of destruction during the journey by an employee:

"As the acts leading to the claim [in Securicor] were wilful and deliberate, I cannot regard the distinction as sound. Any businessman's reading of this provision ... would know that whatever happened to the goods was at his risk and if he wished to protect himself he did so by insurance. The legal position of this carrier is precisely similar to that of the security organization in the case of [Securicor]".<sup>19</sup>

The appellants had submitted that the Celthene<sup>20</sup> case was wrongly decided in that the decisions in the Eurymedon and The New York Star were only applicable to bills of lading. Hutley J.A. could see no reason why similar terms in contracts of land carriage to the bills of lading in these cases should not have the same effect,<sup>21</sup> unless some other essential feature were omitted. The employee of the haulier must be taken to have accepted the goods on the terms of the contract which protected him and the consignor making an offer direct. The employee, in the judge's view,<sup>22</sup> was in a stronger position than that of the stevedore, as he was present at the time of the contract and also the agent by whom the contract was made. The consignor made the offer to him that if he carried the goods he would be under no liability and the offer was accepted by the haulier's employee when he took the goods into his custody. There was, in

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19. [1983] 1 N.S.W.L.R. 431, at p.436.

20. [1981] 1 N.S.W.L.R. 606.

21. Ibid., at p.437.

22. [1983] 1 N.S.W.L.R. 431, at p.437.

Hutley J.A.'s view, no need for ratification, but if this was not correct, ratification had taken place. He regarded the decision in Celthene as being correct and observed:

"The form of contract here used, patterned on provisions in favour of stevedores and other sub-contractors in bills of lading, strains doctrines of privity of contract and consideration but these difficulties have been overcome. There would appear to me to be no reason why the same form is not applicable to all forms of transportation of goods, and, if used, should be given the same effect in all cases".<sup>23</sup>

In summary, then, it appears from the BHP, Sidney Cooke, Celethene and Life Savers (Australasia) decisions that sub-contracting, and transfer of indemnity to third parties which have been specifically appointed as agents to the carrier is now acceptable under contractual arrangements. It also seems possible for the carrier and agents to obtain a promise that the cargo owner will not make a claim against the sub-contractor or sub-contractors, (see clause 4(2) in the BHP case). The "Himalaya" clause need not refer solely to sub-contractors, but to any persons performing services covered in the definition of carriage. The cargo owner will have a much more difficult task in claiming against the sub-contractor. Not only has the cargo owner agreed in the contracts discussed above not to make claims against the sub-contractor or other agents, but he has agreed to indemnify the carrier as well. The carrier in turn must indemnify the sub-contractor in a user contract. This brings in what is commonly referred to as the circular indemnity, the merchant, in the end, meeting his own claim. Not surprisingly, therefore clause 4(2) has been described as "the ultimate Himalaya clause."<sup>24</sup> These

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23. Ibid., at p.438. Glass and Mahoney J.A.'s gave concurring judgements, pp.438 et seq.

24. A.T. Scotford 'Current Status of the Himalaya Clause' Insurance Broker (1981) June, at p.15.

developments may be regarded as an important evolutionary stage - in that the principle of the Eurymedon has been applied by the courts to a contract of land carriage.

### Conclusion

The cases discussed in the previous pages concerning third party liability in a bill of lading need to be set in the context of the commercial practicalities of insurance and freight costs. It has been suggested that the extension of protection to third parties under "Himalaya" clause provisions, is dangerous, because it neglects the proposition that, it would only be fair and equitable for persons causing damage to cargo, to be held responsible or liable for the damage or loss which had been caused by their negligence, otherwise they may continue to be irresponsible in the course of their duties.<sup>25</sup> There is also the contrary argument that it would be commercially unreal to suggest that warehousemen, hauliers, and stevedores, are going to be negligent in their practices in a competitive environment, for the reasons of having protection under exemption clauses, which have been designed so that the apportionment of the risk can be properly dictated by way of insurance.<sup>26</sup>

Many sub-contractors will attempt to exclude their liability in their user contracts. Some state that if they are negligent, they will only be liable up to a certain amount in respect of damage or loss. Such exemption or exclusion clauses which protect the sub-contractor, may be taken into consideration by the carrier when setting freight

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25. C.R. Carruthers' The Impact of the Decision in Port Jackson Stevedoring Pty. Ltd. v. Salmond Spraggon Pty Ltd. (The New York Star) New Zealand Shipping Co. Ltd. v. A.M. Satterthwaite & Co. Ltd. (the Eurymedon) Maritime Law Association of Australia and New Zealand Conference Christchurch, 1978, at p.2.

26. A.T. Scotford 'Current Status of the Himalaya Clause' The Insurance Broker June 1981, at p.15.

rates. However, if the carrier finds the sub-contractor often negligent in providing his services, the carrier himself will end up meeting the claims of his clients, or if the carrier has exempted himself and the sub-contractor, thereby claiming immunity, the carrier will eventually lose his credibility in an open market. This situation would be unlikely where the carrier has a wide choice of sub-contracting services at his disposal. Also, in the case where a carrier sub-contracts to a road haulier, he will often find that it is an owner/driver operation, where the due diligence and care of the owner is extended, for the purposes of widening clientele and business contracts. Even if an owner/driver could not be held accountable for acts of negligence, loss of credibility in a competitive environment would eventually force his services out of the market.

Therefore, it would seem that the carrier should bear the responsibility of providing clauses of limitations and exclusions in the main contract of carriage, and arranging for the proper channels of transport by way of sub-contracting, as opposed to having several individual contracts covering each leg of the journey. As an Australian insurance authority has argued:

'... in the modern world of combined transport the regime of risk that has been adopted is that the carrier, consistent with his accepting responsibility to move the goods from point A to point B, says: 'I will be responsible for them during that entire operation, subject to some agreed exemptions, and if you have any complaint you should direct it to me and not to one of my sub-contractors'.'<sup>26</sup>

If sub-contractors are having to continually honour claims and arrange for protection through insurance policies and employ the necessary clerical branches to cope with claims for damage or loss, not only will freight rates increase, but the additional bureaucracy needed for the expanded operation will decrease its efficiency. The sub-contractor's only duty is to execute that portion of the carriage

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26. Ibid., at p.15.

which he has contracted for, with the specialized services and staff under his jurisdiction. Therefore, there is no need to discourage negligent acts, by making the sub-contractor strictly liable for damage or loss, as he undertakes his duties with as much care as he can reasonably exercise, as his services are already subjected to the competition of other specialists, in the same field.

Thus, it seems clear, that the decision of the Privy Council in the New York Star emphasized the commercial realities of the transactions involved. Even if the stevedoring contract provided that the carrier indemnify the stevedore against all liability, it might be justifiable for the carrier to bear the risk rather than the shipper since the carrier is in a position to influence the stevedore's conduct. However, as has previously been noted,<sup>27</sup> no cargo owner is likely to dispense with his insurance cover solely because he has legal recourse against a wrongdoing third party, such as a stevedore, since claims can be more expeditiously settled against underwriters than against the wrongdoer. Further, freight rates are established with respect to insurance costs and the apportionment of risk. Contractual agreements with express exemptions are arranged between the carrier and the cargo owner. It would appear to be a reasonable supposition that the less risk the carrier assumes, the lower the cost of carriage. This was recognized by Yeldham J. in Sidney Cook Ltd. v. Hapag-Lloyd Aktiengesellschaft when he observed:

"... The bill of lading is to give effect to the clear intentions of a commercial document ... the effect of damaging validity to the clause would be to encourage actions against servants, agents and independent contractors in order to get round exemptions (which are almost invariably compulsory) accepted by shippers against carriers, the existence, and presumed efficacy, of which is reflected in the rates of freight."<sup>28</sup>

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27. See supra.

28. [1980] 2 N.S.W.L.R. 588, at p.594.



The three decisions of the New South Wales Supreme Court; the B.H.P., Sidney Cook and Celthene<sup>29</sup> cases, underline the validity of the above statement besides significantly extending Lord Ried's four conditions<sup>30</sup> for third party protection under a contract of carriage to subcontractors undertaking the land transportation in a contract involving sea carriage. Although neither of these decisions, nor that of the Privy Council in The New York Star<sup>31</sup>, are binding on the High Court of Australia it is to be hoped that, for the reasons given above, they would be followed by that court and in other Commonwealth jurisdictions.

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29. [1980] 2 N.S.W.L.R. 572, (1980) 2 N.S.W.L.R. 588, [1981] 1 N.S.W.L.R. 606 respectively.

30. [1982] A.C. 446, at p.474.

31. [1978] 18 A.L.R. 333.

## CHAPTER SEVEN

### EXEMPTION CLAUSES IN INTER-BUSINESS CONTRACTS

#### - THE EMPIRICAL WORK

##### Introduction

Exemption clauses are an integral part of contracts which regulate dealings between businessmen. Where these agreements fall into the category of standard form contracts they can be regarded as a formalised system of delineating rights and duties, with exemption clauses (as in other contracts) performing the role of assigning understood and recognisable risks or defining the duties of the promisor or also acting as a deterrent to other parties should they seek to break the bargain. It, therefore, becomes important to know what emphasis is given to exemption clauses by businessmen in contracting between themselves.

The utilization of the legal process by businessmen to plan aspects of their commercial dealings has been characterized by Professor Summers as the "grievance remedial technique" and the "private arranging technique".<sup>1</sup>

The grievance remedial technique is used when the parties invoke legal remedies following on the breach of a commercial agreement. Those remedies would include repudiation of contracts, out of court settlements, actions for damages and the use of commercial arbitration. The private arranging technique requires the parties who are using the contract to regulate their current relationship and future dealings. In a contract of supply; for

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1. R.S. Summers 'The Technique Element in Law' (1971) 59 Calif L Rev 733.

instance, the parties might detail terms concerning description of the goods supplied, delivery, payment, servicing and cover eventualities such as delay, strikes, and apportionment of risk in the event of non-performance, part-performance or modified performance of the obligations of the contract. Both the grievance remedial and private arranging techniques come together where a given contract specifies remedies or procedures if something should go wrong with the agreement, for instance, an arbitration clause, a liquidated damages clause or an automatic termination provision.

Exemption clauses will be incorporated in contracts both as part of the private arranging and grievance remedial techniques. Lord Diplock in the Photo Production Ltd. v. Securicor Transport Ltd.<sup>2</sup> case provided an analysis of the situation arising on a breach of what he termed a primary contractual obligation compared with a resultant and consequent secondary obligation then owed by the party in default.<sup>3</sup> A primary contractual obligation, for example, would be that property and possession of goods are transferred. A secondary contractual obligation would be the liability for the payment of damages in the event of a breach of the primary contractual obligation. Both parties' primary obligations remain unchanged, so far as they have not been fully carried out, unless the innocent party is entitled to, and elects to, treat himself as discharged from his obligations because of the guilty party's breach. This will also occur where the event resulting from the failure of one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit which it was intended by the parties he should obtain from the contract. It would also occur where the contracting parties have agreed, expressly or by implication of law, that any failure by any one party to perform a

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2. [1980] 1 All E.R. 556.

3. Ibid., at pp.566-567; see Chapter 1, supra.

particular primary obligation, irrespective of the gravity of the event that has in fact resulted from the breach, entitles the other party to elect to put an end to all remaining, unperformed primary obligations. If a party makes such a lawful election, a secondary obligation is discharged to pay monetary compensation to the innocent party for the loss sustained as a result of the future non-performance of the primary obligations of the innocent party. Both the primary and secondary obligations, can be excluded or modified by a suitably worded exemption clause.

In the context of inter-business contracts, Lord Diplock's following observation highlights one key role that the commercial world has come to expect exemption clauses to perform:

"In commercial contracts negotiated between businessmen capable of looking after their own interests and of deciding how risks inherent in the performance of various kinds of contract can be most economically borne (generally by insurance) it is, in my view, wrong to place a strained construction on words in an exclusion clause which are clear and fairly susceptible of one meaning only even after due allowance has been made for the presumption in favour of the implied primary and secondary obligations".<sup>4</sup>

It is, therefore, of practical importance to discover what role businessmen themselves assign to exemption clauses in their commercial contracts as distinct from the view that the courts have taken of them.

#### Research on Exemption Clauses

Research into the attitudes of businessmen to the procedural role of provisions in commercial contracts has been undertaken in the United States, Britain<sup>5</sup> and, more recently, Tasmania.

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4. [1980] 1 All E.R. 556, at p.568.

5. See D.Yates Exclusion Clauses in Contracts Sweet & Maxwell (1982) 2nd edition, at pp.16-33 and see note 8.

(i) U.S.A.

In the United States Professor Macaulay in 1963 carried out research among 48 companies and six law firms in Wisconsin.<sup>6</sup> He analysed contracts, in a manner similar to Summers,<sup>7</sup> as involving two distinct elements: "(a) rational planning of the transaction with careful provision for as many future contingencies as can be foreseen, and (b) the existence or use of actual or potential legal sanctions to induce performance of the exchange or to compensate for non-performance". Macaulay isolated the four categories which might be appropriately so predicted as: (a) description of primary obligations, (b) contingencies, (c) defective performance (d) legal sanctions, in which exemption clauses might play a key role. Macaulay's conclusions were that, although each category might be given detailed consideration in many inter-business dealings, in others there would be little or none, particularly in relation to legal sanctions and the effects of defective performance. He also discovered that contractual practices were very little used in post-contractual adjustment of relationships between the parties, even though tacit reliance on contractual rights was evidenced. The grievance procedures of the courts were equally little utilized by businessmen.

(ii) Britain

Confirmation in Britain of Macaulay's conclusions was obtained in the published research of Beale and Dugdale in Bristol in 1973 and

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6. S. Macaulay 'Non-contractual Relations in Business' (1963) 28 Am. Sociological Rev. 45; See also S. Macaulay 'Changing a continuing relationship between a large corporation and those who deal with it : automobile dealers, and the legal system' (1965) Wis L. Rev. 740; S. Macaulay 'Private legislation and the duty to read - business run by IBM machine, the law of contract and credit cards' (1966) 19 Vanderbilt L. Rev. 1051; S. Macaulay 'Elegant Models, Empirical Pictures and the Complexities of Contract' (1977) 11 Law and Society Rev. 507.

7. See supra.

1974.<sup>8</sup> This involved interviews of nineteen engineering firms, mainly in Bristol.<sup>9</sup> However, unlike Macaulay, their survey found a considerable awareness that an exchange of conditions, which might be in conflict in a typical "battle of the forms"<sup>10</sup> situation, would not necessarily lead to an enforceable contract. Those firms contracting by this method were concerned to reach a clear understanding on particularly important points or on ones where difficulty was anticipated. The conclusion was that legal enforceability appeared secondary to reaching a common understanding. Provided that the two sets of relevant conditions contained terms commonly found in the trade there would be a sufficient basis for any dispute to be settled without difficulty; thus, even such common understanding did not have to be very precise.<sup>11</sup> Overall, the Beale and Dugdale survey concluded that businessmen steered clear both of contractual remedies as being too inflexible and lawyers as not being sufficiently understanding of commercial problems.<sup>12</sup> Similarly, there was a general reluctance to use the law in the general planning of business operations, except where a clear risk justified careful planning, tough bargaining and detailed legal drafting.

A detailed study was carried out in England during 1974-1976

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8. H.Beale and T.Dugdale 'Contracts between Businessmen : Planning and the Use of Contractual Remedies' [1975] 2 B.J.L.S. 45.

9. The researchers indicated that manufacturing engineering contracts of purchase and sale were chosen because of their relative simplicity and that their findings might have no validity outside that area; ibid., p.46.

10. See Butler Machine Tool Co. Ltd. v. Ex-Cell-O Corporation (England) Ltd [1979] 1 All ER 959 where the defendant's acceptance differed significantly from the plaintiff's offer, both being contained in standard form documents.

11. [1975] 2 B.J.L.S. 45, at p.50; the survey noted tightening up of procedures showing itself as a result of the entry of younger managers.

12. H. Beale and T.Dugdale 'Contracts between Businessmen'. (Planning and the use of Contractual Remedies) [1975] 2 B.J.L.S. 45, at p.59.

and the results subsequently incorporated in Yates' published work.<sup>13</sup> The aim of that study was to ascertain first, when exemption clauses would be drafted into agreements and why, and second, the circumstances in which they are relied upon during the grievance remedy procedures. Using Manchester and Bristol as respective bases for surveys in the north west and south west areas of England, a total of 51 firms took part, 31 being light, heavy mechanical or civil engineering firms, 12 being finance companies and eight being insurance companies or Lloyds. Yates's detailed study found that limitation and procedural clauses (such as arbitration provisions) were more common than exclusion clauses in commercial agreements. In the latter case, exclusion clauses tended to be drafted so as to prevent liability arising on the part of the supplier as the result of particularly specified causes beyond his control: such as, delay caused by strikes, the non-availability of materials, or government action. In respect of limitation and procedural clauses, some firms limited liability in their contracts of supply to a particular sum. In the case of a liquidated damages clause, some firms held these figures to be a genuine attempt to pre-estimate damages while a significant group of engineering companies considered that the figures specified did not relate realistically to the likely loss sustained, as where, for instance the breaking of a steel cable might involve a huge liability in respect of consequential loss. Even so, these firms were convinced of the commercial sense of such clauses and that their inclusion in the contract could discourage litigation except where business relations between the parties had broken down for other reasons.

Time limitation clauses were commonly found in contracts for the supply of goods. These clauses either set limitations on a party's

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13. D.Yates Exclusion Clauses in Contracts Sweet & Maxwell (1982) 2nd edition, at pp.16-33.

right to arbitrate or on the time within which appropriate claims had to be made or notified. It was found to be rare that clauses to exclude liability in regard to express contractual conditions on warranties were used, except in the case of specially negotiated agreements. Where such clauses were used, they were justified on the basis that businessmen wished to be made clear to both parties what the aims and purposes of the relationship were by means of a declaration of intent, without such declarations necessarily attracting legal liability.

Some firms had apparently devoted considerable time and effort in drafting clauses to exclude the implied terms under the Sale of Goods Act. In particular, the implied conditions as to title, quiet possession and freedom from charge and encumbrance<sup>14</sup> proved an area of difficulty for legal departments in manufacturing firms because of their potential utility in litigation involving patent infringement. In none of the firms surveyed were contracts used which expressly excluded the right to reject or rescind or exclude the right to damages, although some firms did imply this in contracts where the only undertaking was to repair or replace defective goods.

Three main reasons were given by the firms surveyed by Yates for incorporating exemption clauses in contracts. First, the desire to avoid court proceedings; second, to exclude or reduce liability for consequential loss and, third, conformity with common practice. The desire to avoid court proceedings was a reason given for using limitation clauses in order to give each party a clearer indication of their respective positions. Arbitration clauses, time limit clauses and "contingency" clauses were also inserted in an endeavour

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14. Section 12, Sale of Goods Act 1979 (U.K.); s17 (New South Wales); s16 (Victoria); s12 (South Australia), (Western Australia); s15 (Queensland); s17 (Tasmania), (A.C.T.); s16 (N.T.).



to avoid litigation<sup>15</sup>. The study found amongst the firms surveyed a marked distrust of lawyers and particularly, a lack of confidence in judges' ability to understand businessmen's problems. The desire to avoid, exclude or reduce liability for consequential loss, particularly in large engineering contracts (which were specially negotiated) was shared by sub-contractors and also by manufacturers and other suppliers. In contrast to the sub-contractors the manufacturer or contractor would take out extensive insurance cover. The function of exclusion or limitation clauses in these contracts was to pass on those risks which the insurance company had either refused to cover or would only do so at a very high and commercially unacceptable premium. Apart from these large and complex engineering contracts, most businesses insured against few risks, and those were loss by fire and theft, flood and sprinkler damage, loss through explosion or similar occurrence, loss or damage in transit, and less frequent, loss due to failure to meet delivery dates. Apart from those risks most small manufacturers appeared to act as their own insurers, taking the liability for the risk themselves. The desire to conform with common practice was evinced by the use of standard forms in the majority of contracts in the engineering industry. The buyer would frequently order on his own conditions and the seller acknowledge with his printed conditions. The significance of an exact correspondence between offer and acceptance was often not apparent to the businessmen surveyed. Firms that did not make use of a lawyer in drafting their standard form conditions<sup>16</sup> either drafted their own or

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15. See R.S. Summers 'The Technique Element in Law' (1971) 59 Calif L Rev 733 *supra*. See D. Yates 'Exclusion Clauses in Contracts' *Sweet and Maxwell* (1982), at pp.26-27.

16. Twenty five per cent of the sample of engineering firms.

used standard conditions of a professional body such as the Institution of Civil Engineers.<sup>17</sup>

All finance houses and insurance companies received considerable legal assistance in drafting their terms. Insurance companies attempted to protect their clients from losing the "battle of the forms" by stipulating that insurance cover would only be provided if the contract were concluded by the client on their terms.<sup>18</sup>

(iii) Tasmania

A survey of thirty organizations between 1980 and 1982 in Tasmania was able to yield further information concerning business contractual practices. The survey involved interviewing thirty organizations and firms, of which fifteen subsequently completed a detailed questionnaire which was later analysed by a computer programme.<sup>19</sup> Of the fifteen, three consisted of the Hydro Electric Commission and two State Government departments. The remaining twelve were private firms which fell into the following categories:

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17. Other standard conditions were those of the Royal Institute of British Architects, the Institution of Mechanical Engineers, the Institute of Electrical Engineers, the Association of Consulting Engineers and the Joint Contracts Tribunal.

18. See Chapter Two; D.Yates Exclusion Clauses in Contracts, Sweet & Maxwell (1982) Chapter 2.

19. The questionnaire was a modified version of that used by Beale and Dugdale in their 1973-1974 survey. In their survey the questionnaire was not used except as a general interviewing guide. In the Tasmanian survey detailed interviewing notes were kept, even when firms subsequently declined or omitted to complete the questionnaire, or, as was not infrequent, referred the matter to their head offices in Melbourne or Sydney. In addition standard form contracts were collected from firms and organizations interviewed. The resultant sample obtained in the questionnaire therefore represents Tasmanian-based operations that had a degree of autonomy, or were in fact Tasmanian companies, or were not in the private sector.

Manufacturing and Processing	3
Mining	1
Tourism	1
Finance	4
Car Retail	2
Transport	1

A comparison of private and public sector responses to specific questions provides a basis for outlining particular contractual practices.

Q1<sup>20</sup> *Do you ever alter your standard conditions for particular sales (including services)?*

	YES	NO
PUBLIC	2	2
PRIVATE	8	8

With a few exceptions in the retail trade and one in manufacturing, all firms and organizations surveyed used standard conditions. However, there were varying attitudes to their function. Where the conditions were those of a manufacturer supplier, as in the case of the sale of a new car, the position was that the conditions could not be altered or negotiated.<sup>21</sup> One leading carrier in Tasmania indicated that the bulk of its contracts were made by telephone and were

20. The questions quoted are not in the order in which they were given on the actual questionnaire. In the case of one government department two questionnaires were completed to cover different functions. In the case of the private sector some firms completed two to cover purchasing and supply, or more if they had separate divisions of operation.

21. This did not apply in the case of the sale of used cars by a retailer.

difficult to control and supervise. Carriage was accepted on the carrier's standard terms which were set out on the back of the consignment note. Where loss or damage did occur, clients often wished to vary the terms which excluded liability. As a result of the pressure of claims the firm surveyed had now endeavoured to adhere very closely to the terms of the contract. In the case of major customers, these firms negotiated their own terms, which resulted in extra clauses being included and a separate legal document being drawn up, often by the customer, which the carrier's solicitors then checked. Finance firms used standard documents except in the case of commercial loans. In the case of leasing and hire purchase, the standard form terms were not usually altered in any way. However, one firm did negotiate on the terms for wholesale and bailment finance such as "floor plan" agreements.<sup>22</sup> In the case of commercial loans, individual documentation was prepared by local solicitors; in one instance, these lawyers acted directly on behalf of the Head Office in Sydney and, hence, could not receive any varying or contrary instructions from the local manager.

In the case of a large chemical manufacturer, the company did not use a standard form either for sales or contracts of supply. It considered that what was essentially important was the intent of each party in each case. Some contracts were complex and technical and others were very simple and flexible. The overriding concern of the company was that it maintained good relationships with those it dealt

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22. In a 'floor plan' or 'display plan' agreement a finance company enters into an agreement with the dealer company under which goods, such as cars, are purchased by the dealer company in its own name and on its own account and put on a 'floor plan' by the dealer company and accepted by the finance company which then pay a percentage of the price (usually 90 percent) of the cars to the dealer company that that latter company has paid for the cars. See Chapter Five, *supra*, in particular see Pacific Motor Auctions Pty. Ltd. v. Motor Credits Ltd. [1965] A.C 867.

with and that sales were made and goods were supplied. Contractual practices, then, became subordinate to obvious commercial strategy and intent. Another large processing firm which sold fertilizers observed that, although the terms of its sales contracts on their price lists and sales invoices had not been altered for about eight years, it did vary them from time to time to suit its own changing business practices and to meet the requirements of groups of farmers on the basis of an annual review. In the case of a large consumer produce manufacturer, although it did not alter its standard terms which were contained on its blank order form it did treat everything as negotiable between itself and the product distributors. However, despite constant pressure by distributors to alter those terms, the firm concerned was adamant that it would adhere to them.

In the public sector one government department which dealt with purchasing and supply always insisted on adherence to its own conditions, but was prepared to alter standard conditions in its contracts where there had been a change in the type and complexity of the contracts, and such a course of action had been advised by solicitors or government.<sup>23</sup> In the housing sector all government work was put out to public tender. All contracts were negotiated but the main terms of the tender contract for construction work were applicable to unless there were strong reasons for variation, addition or omission of clauses. In practice, there was a strict adherence to the tender contract. Requests to alter or vary terms after the contract had been agreed were not usually accepted, unless extra work by the contractor was involved. On the purchasing side, all tenders were based on total and unvarying concurrence to the terms of tender, those being in standard form. Road and related construction

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23. Two divisions were surveyed, one dealing with house construction, the other dealing with purchase of materials.

contracts were made on the basis of one national standard form contract<sup>24</sup> which with related documents were currently subject to alteration in the light of experience gained in contracting construction work on national highways. In the case of tenders, the Minister could intervene, informally or otherwise, on behalf of another contractor often with the effect of ironing out inequality in contracting. Although variation of contracts was not an issue as such, main contractual problems centred around specification and documentation as cost related extensions of time. The Hydro Electric Commission used standard tender forms for its four branches which covered building, plant and machinery, distribution of power and stores. Each branch could alter its tender forms as it saw fit, but, if there were any major changes, these were scrutinised by the Commission's own legal officers. Mostly standard forms were used in agreements for supply of power but none were used for installations. In the case of bulk consumers, contracts were negotiated. In relation to tenders, terms could be negotiated but, as a policy, the Commission generally kept to its conditions satisfied in the tender.

Q2. *Do you consider that your arrangements as to cancellation are satisfactory?*

	YES	NO
PUBLIC	4	0
PRIVATE	11	1

The overwhelming majority of firms and organizations surveyed regarded their contract cancellation arrangements as satisfactory.

24. National Public Works Conference, Edition 3 (1981), hereafter referred to as N.P.W.C.

The sole exception to that question was found in the answers from a tourist operator who had experienced difficulties with their own system of ordering supplies. However, these appeared to relate to problems of supervision of procedures rather than attributable to the contract terms themselves.

Q3 *In relation to your existing arrangements concerning cancellation, do you consider that if you insisted on your full legal rights, you would be:*

- (a) better off than under your existing arrangements;*
- (b) worse off than under your existing arrangements;*
- (c) in the same position as under your existing arrangements;*
- (d) no opinion?*

	<i>(a)</i>	<i>(b)</i>	<i>(c)</i>	<i>(d)</i>	<i>TOTAL</i>
<i>PUBLIC</i>	0	0	4	0	4
<i>PRIVATE</i>	1	3	4	3	11

The public sector which had been surveyed indicated a stricter adherence to contractual legal rights relating to cancellation than did the private sector. Those firms in the private sector which regarded insistence on full legal rights as placing them in a worse position than they would have been under existing arrangements usually argued on the grounds that to take the first option would only be giving a firm a short term gain. In one instance, where fertiliser sales had been cancelled by farmers as a result of bad weather or delays in delivery, the firm concerned accepted such reasons in order to maintain good relations with purchasers; a general point which has already been made. Where insistence on full legal rights in connection with

cancellation was regarded by a firm as preferable to its existing arrangements that view reflected a dissatisfaction with the way in which its contractual procedures were being conducted.

- Q4 (a) *If you allow a purchaser to cancel before you have started to fill his order, would you expect him to compensate you for the loss of sale or supply? (Private sector)*
- (b) *If you allow another party to cancel before you have started to act on the contract, would you expect him to compensate you for any loss? (public sector)*

	YES	NO
PUBLIC	0	4
PRIVATE	1	9

Both sectors, which were surveyed did not usually expect compensation from a purchaser who cancelled after an order had begun to be filled, or (in the case of the public sector) once the contract had begun to be performed. In the public sector, where compensation was provided for in the contract, this was normally payable on a scale agreed between the parties on the making of the contract. Liability for the other party to compensate also arose; in one instance, on grounds of non-performance or unsatisfactory performance. The isolated case in the private sector where compensation was expected from a cancelling purchaser, was in the car retail trade where compensation was payable on a scale agreed with the purchaser at the time of cancellation of the contract.



Q5 Do you consider that your arrangements concerning delay in delivery are satisfactory?

	YES	NO
PUBLIC	3	1
PRIVATE	12	1

Most firms and organizations considered that their arrangements concerning delay in delivery were satisfactory. In the public sector, one department that did regard its arrangements as unsatisfactory contracted for the supply of some materials on the basis of quotation forms on an informal basis. In the event of negotiation with the potential supplier over particular problems not being met, such as specification or delivery time, the department cancelled the order and went on to consider the next lowest quotation. In the private sector, one firm, while accepting cancellation by farmers of their fertilizer orders due to delay in delivery or because of weather conditions for reasons of good relations, regarded its cancellation arrangements as unsatisfactory on the basis of orders that the firm had to forgo as a result.

In the case of substantial delay caused by difficulties outside the other parties' control, most firms and organizations considered this entitled them to cancel the arrangement or allowed the other party to do so. In the case of the Hydro Electric Commission, its purchase contracts contained a force majeure clause which allowed for late delivery in the event of circumstances beyond the supplier's control. If the delay or circumstances were extreme, total cancellation might be allowed. One car retailer indicated that, in the case of substantial delay, a new delivery date could be negotiated. Where completion was delayed by some factor which was within the

other party's control most firms and organizations either made a small allowance in respect of the delay or compensated the supplier in full for any loss he might suffer. The transport firm and the purchasing division of a large processing company both allowed the supplier to cancel the contract. In this situation, the Hydro Electric Commission's contract had a liquidated damages clause which would be applicable.

- Q6 (a) *Have you ever had to refuse further dealings with another party who was unsatisfactory? (Public)*
- (b) *Have you ever had to refuse further dealings with a buyer who complained unjustifiably too often? (Private)*

	YES	NO
PUBLIC	4	0
PRIVATE	4	7

All the public sector organizations surveyed had experienced refusal of further dealings with another party who turned out to be unsatisfactory. Given the specifications that were listed in departmental and Hydro Electric Commission contracts of supply, this might reflect necessarily exacting statutory requirements, particularly in civil engineering works and the supply of components, akin to that found in Professor Yates survey noted above.<sup>25</sup> That this experience was not equally shared by the private sector indicates that either the bargaining power lay more with the other party, or, more probably, that the essence of dealing was to secure a contract, particularly in a competitive environment.

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25. D. Yates Exclusion Clauses in Contracts Sweet and Maxwell (1982), at p.24.

Q7 *Is your firm (or Department/Commission) insured against losses resulting from sales and supply contracts?*

	YES	NO
PUBLIC	0	4
PRIVATE	6	11

The public sector response requires considerable qualification. In the case of the departments dealing in such contracts and the Hydro Electric Commission's own contracts there were extensive provisions for insurance in the contracts themselves. In the case of contractors undertaking road construction or related works, the provisions of the national standard public works contract applied (NPWC Edition 3 (1981)) and these included detailed insurance requirements.<sup>26</sup> Before commencing, the contractor was required to take out an insurance policy to cover his liabilities as defined in the contract against any loss of or damage resulting from any cause whatsoever to the works (including temporary works) and all materials and other things brought to the site by or on behalf of the contractor or by his sub-contractors. The insurance cover might exclude excepted risks under the contract, one such being any negligent act or omission of the principal, superintendent of the employees, or professional consultants, or agents of the principal.<sup>27</sup> The cover might also exclude consequential loss of any kind, but not loss or damage to the works, or the cost of repairing faulty design, workmanship and materials and fair wear and tear or gradual deterioration but not, in all cases, the resultant loss or damage. Also excludable from cover

26. N.P.W.C. Edition 3 (1981) cl's 16.2-22.

27. Ibid., cl. 16.2.

might be damages for delay in completing or for the failure to complete work.<sup>28</sup> Housing construction contracts, in the case of that department, were all insured with the Tasmanian Government Insurance Office by the department.

The policy covered the works on the basis of the NPWC contract noted above,<sup>29</sup> but excluded construction machinery and plant, tools and equipment, temporary buildings and scaffolding. Also excluded from cover were the cost of rectification of faulty design, loss or damage resulting from any risk specifically excepted in the specification, a standard war and invasion clause,<sup>30</sup> and loss or damage resulting from nuclear reaction radiation or radioactive contamination. The department, under this contract, bore costs or expenses uninsured under the above heads unless, in the case of the cost of rectification of design or loss or damage due to nuclear reaction, these were caused by the contractor or his servants or agents. Also excluded from insurance cover, were consequential loss of any kind or description, including penalties, losses due to delay, lack of performance and loss of contract. In addition, the cost of replacement, repair or rectification of defective workmanship was excluded as was the cost of making good wear, tear, corrosion, oxidation due to lack of use and normal atmospheric conditions.

The Hydro Electric Commission required, in its contract for the supply of machinery, that the contractor took out insurance in the joint names of the contractor and the Commission, for plant and materials ordered for the work which were on site and to keep them insured against destruction or damage by fire until the works were

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28. N.P.W.C. Edition 3 (1981) cl.17.

29. Ibid.

30. N.P.W.C. Edition 3 (1981) cl.16.2(c).

taken over under the contract by the Commission.<sup>31</sup> In its construction contract, the Commission laid down that every insurance be effected in the Tasmanian Government Insurance Office and such proposals and policies be submitted to the Commission's solicitor for examination and be subject to the Commission's approval.<sup>32</sup> These policies were to be made in the joint names of the Commission and the contractor.<sup>33</sup> The contractor was required, at his own cost, to insure against loss or damage by fire to the full insurable value all work and materials on which the Commission's engineer had provided a progress certificate and all materials supplied by the Commission used in connection with the work as well as all working plant.<sup>34</sup> The contractor was also required to insure, at his own cost, against all liability to pay workers' compensation for the duration of the contract.<sup>35</sup> Should the contractor default in complying with the above provisions the Commission might insure and would pay all premiums which might, in turn, be deducted from any sums payable to the contractor on completion.<sup>36</sup> The Commission's contract<sup>37</sup> required the Contractor to insure the work and plant against all loss or damage in the joint names of the contractor and the Commission while the work and plant were at the contractor's risk.<sup>38</sup> The contract provided for payment by the Commission of premiums in the

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31. General Conditions of Conditions of Contract (A - Machinery) based on General Conditions of the Institution of Engineers, Australia, cl.22.

32. General Conditions of Tendering and Contract (B - Construction); cl.30.

33. Ibid., cl.31.

34. Cl.28.

35. Cl.29.

36. Cl.32.

37. General Conditions of Contract (Performance Contract - Document C).

38. Ibid., cl.13(2).

event of non-payment within a specified time by the contractor with similar provision for deduction as above.<sup>38</sup> Money payable under insurance in the case of loss or damage was to be received by the Commission which might apply it towards completion of the contract or at its option retain the money and credit it to the contractor on final completion. All insurance was to be carried out through a company approved by the Commission. The contractor was also required to take out workers' compensation and employers liability insurance in favour of both the contractor and the Commission.<sup>40</sup> The contractor was responsible for, and required to indemnify the Commission against liability, for any damage or injury to any persons or any property caused by the contractor, his sub-contractors or his or their employees. The contractor was required to insure against these risks and the Commission could recover from the contractor the amount of all claims, damages, costs and expenses paid, suffered or incurred by the Commission in respect of any such damage.<sup>41</sup>

The contractor was liable for the storage and protection, including insurance against fire, loss and damage, of all equipment from such time as it was ready for despatch ex factory until delivery in accordance with the contract.<sup>42</sup>

Within the private sector, those firms insured against losses resulting from contracts had the following arrangements. One major processor, generally covered its own insurance by having a high excess premium under a contract works insurance policy, the terms of which were included on the back of their purchasing orders and

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39. General Conditions of Tendering and Contract (B - Construction), cl.32.

40. Cl.14(1)(2); subject to the Workers' Compensation Act 1927 (Tasmania) as amended.

41. Cl.15(1).

42. Conditions of Tendering and Contract - Form No.EB1-(1966).

invoices. In the case of a major carrying company the conditions of contract on the back of its invoices stated that the carrier would effect insurance on the goods on written instructions from the consignor for the latter's benefit.<sup>43</sup>

A chemical company carried insurance for loss profits, being prepared to claim on the policy for losses of over \$10,000 and had done so in the last five years. The insurance premium in this example was calculated on the total value of goods sold and supplied annually. A mining company selling to a sole purchaser on long term contracts insured against loss of the product in transit overseas. Although prepared to claim for losses over \$10,000 no such claim had been made in the preceding five years. The premium was based on the value of each shipment made.

Q8     *What is the source of your conditions of supply or sale?  
(Private sector)*

<i>Trade or professional organization</i>	<i>1</i>
<i>Drafted on firm's instructions by an outside professional lawyer</i>	<i>7</i>
<i>Drafted on the advice of a lawyer within firm's organization</i>	<i>4</i>
<i>Drafted by non-lawyer</i>	<i>1</i>
<i>Not stated</i>	<i>4</i>

The source of standard form contracts has already been noted in connection with the public sector. In the private sector the firms

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43. The carrier stipulating in the document that it was not a common carrier and would accept no liability as such.

surveyed indicated that their conditions of contract were either drafted by an outside lawyer on the firm's instructions or drafted by a lawyer within the firm's organization. The use and variation of standard forms and the individual drafting of contracts by local legal firms for commercial clients has already been noted under Question 1.

Q9 *If your standard terms of offer differ from the standard terms of your acceptor, do you:*

- (a) *insist your terms be followed, or,*
- (b) *negotiate the differences,*
- (c) *accept your acceptor's terms in preference to your own?*

	PRIVATE	PUBLIC
(a) <i>Insist on your terms</i>	5	4
(b) <i>Negotiate</i>	6	1
(c) <i>Accept acceptor's terms</i>	0	1
<i>Not stated</i>	6	0

The organizations surveyed in the public sector generally indicated a strict adherence to contractual terms. In the case of a general purchasing department, it regarded circumstances as indicating the appropriate course of action and would even opt for (c) but only when no other course was possible, for example, a supplier having a monopoly over a commodity. The private sector firms overall showed a greater willingness to negotiate differing terms in the "battle of the forms" situation. This approach may simply have indicated a recognition of commercial realities.



Q10 *Has a purchaser/customer ever*

*(a) threatened you with legal action,*

*(b) taken legal action against you? (Private sector)*

	YES	NO
<i>(a)</i>	7	6
<i>(b)</i>	4	8

Litigation or its threat by purchasers was not a common experience amongst private firms, but the majority had recorded isolated instances. The general picture obtained from the survey, confirming earlier studies, was that litigation, actual or threatened, was carefully avoided, and that firms would explore all reasonable forms of negotiation and conciliation as an alternative.

Q11 *Have you ever referred a dispute to arbitration? (Private sector)*

YES	NO
1	12

Arbitration was registered with only one firm as a means of settling a dispute. In this instance, the car retail firm had acted at the request of a car manufacturer.

Q12 Would you consider the most effective threat against an uncooperative purchaser to be:

- (a) withdrawal of future supplies,
- (b) withdrawal of credit facilities,
- (c) a complaint to the purchasers trade association,
- (d) legal action

(Private sector)

(a)	4
(b)	4
(c)	-
(d)	6

The two main sanctions against uncooperative purchasers that private firms regarded as most effective were legal action and withdrawal of future supplies. This contrasts with the avoidance of litigation by private firms when the steps towards an action were initiated by a purchaser or customer. Arguably, the term legal action was regarded as including all preliminary steps to litigation and, therefore, the response should not be interpreted as unqualified approval for issuing a writ against the other party. Withdrawal of future supplies was particularly listed as a sanction by some manufacturing and processing firms and withdrawal of credit facilities by finance firms. No firm indicated that they regarded a complaint to the uncooperative purchaser's trade association as being an effective threat.

In the public sector, all the government departments surveyed and the Hydro Electric Commission regarded the most effective

sanction in the above circumstances to be a refusal to deal further with the other party.

### Conclusion

The Tasmanian survey confirms the general conclusion of the earlier investigations into inter-business contractual practices that legal enforceability appears secondary to reaching a common understanding. It does not wholly substantiate the conclusion of the Beale and Dugdale survey that businessmen avoided both contractual remedies as being too inflexible and lawyers as not being conversant with commercial problems.<sup>44</sup> Evidence in the Tasmanian survey indicates that local law firms were retained for drafting individual commercial loan agreements on a regular basis by most of the finance firms investigated, an undertaking aided by the standard forms of each company being retained for variation on the law firms word processors. Despite a natural commercial distaste for being on the receiving end of litigation, threatened or actual, business firms and public sector organizations did not appear averse to using the legal process where negotiation and compromise had failed. The main function of exemption and limitation clauses in contracts used by the public sector organizations, particularly those used in housing construction, public works and by the Hydro Electric Commission, was to pass on those risks to contractors which were not covered by insurance. The apportionment of these risks was delineated with considerable care in the drafting of the contracts themselves. This contrasted, as noted by Yates in his survey when comparing engineering firms with other businesses, with the private sector

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44. H. Beale and T. Dugdale 'Contracts between Businessmen : Planning and the Use of Contractual Remedies' [1975] 2 B.J.L. 545, at p.59.

where most firms insured against a few risks, or were their own insurers.<sup>45</sup> Exemption and limitation clauses then appear in commercial practice to perform subsidiary yet integral functions in inter-business contracts of delineating and apportioning risks and from preventing certain primary liabilities from even arising within a contract. The Securicor<sup>46</sup> decision therefore accords with the view of the business world that exemption clauses must be construed in their commercial context.

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45. D. Yates Exclusion Clauses in Contracts Sweet and Maxwell (1982), at p.25.

46. Photo Production Ltd. v. Securicor Ltd. [1980] 1 All E.R. 556, particularly Lord Diplock, at p.568.

## CHAPTER EIGHT

### EXEMPTION CLAUSES - THE NEED FOR FURTHER CONTROL

#### Introduction

The Trade Practices Act has made important changes in the control of exemption clauses and their effect upon implied terms in consumer contracts. The Act does not, however, cover such contracts which contain terms limiting or excluding liability for death, damage or injury arising from negligence. The desirability of further control of exemption clauses is considered in this chapter, particularly in the light of the Unfair Contract Terms Act 1977 (U.K.).<sup>1</sup>

The Second Report<sup>2</sup> of the English and Scottish Commissions will be considered as a starting point for the examination of the desirability of controlling contracts which contain terms limiting or excluding liability for death, damage or injury from negligence. The recommendations of the Second Report led to the enactment of the Unfair Contract Terms Act, criticism of which will be examined,

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1. The Act is divided into two parts. Part I contains the English provisions and operate as the law for England, Wales and Northern Ireland; Part II contains the Scottish provisions and solely affects the law of Scotland. The term 'U.K.' in the text is used for convenience. See P.K.J. Thompson Unfair Contract Terms Act 1977 Butterworths (1978) at Chapter 7 for a discussion of the differences between the English and Scottish provisions.

2. Second Report on Exemption Clauses; The Law Commission and the Scottish Law Commission (Law Com No.69); Scot Law Com No.39) (1975). Hereafter referred to as the Second Report.

particularly in respect of the premises on which the Act is based and specific provisions which would appear to give rise to problems. One of the specific problems is what precisely constitutes dealing on written standard terms of business for the purposes of s3(1) of the Act. Another problem is the effect of s13(1) of the Act which controls the exclusion or restriction of rights or remedies or subjects a person to any prejudice as a result of pursuing any such rights or remedies.

#### The Law Commissions' Recommendations

The Second Report of the English and Scottish Law Commissions in 1975 was concerned with provisions excluding or limiting a legal duty or obligation owed by one person to another which did not come within the Supply of Goods (Implied Terms) Act 1973. (U.K.)<sup>3</sup> The relevant area of the Second Report is Part III which deals with exclusion of liability for negligence.

The term "negligence" was used in the Second Report to refer to the breach of a duty or obligation which was imposed by common law or under a contract to take reasonable care or exercise reasonable skill, or to the breach of duty of care which was imposed on occupiers of premises by the Occupiers Liability Act 1957 (U.K.).<sup>4</sup>

Provisions which excluded or restricted liability for negligence which had occurred in the course of a business dealing ought to be subject to a general form of control in the shape of a reasonableness

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3. Ibid.

4. Second Report, at para.36.

test.<sup>5</sup> The two Commissions reached different conclusions as to the scope of the situations within which exemption clauses should be controlled.

The Law Commission recommended that the controls should apply to the provisions of contracts of all types and to contract terms and notices which applied conditions to licences or to the conferring of other benefits.<sup>6</sup> The Scottish Law Commission recommended that the control should apply only to:

- (1) contracts for the supply of goods (including contracts of sale of goods, hire purchase agreements and the redemption of trading stamps);
- (2) contracts of services and apprenticeship;
- (3) contracts for services of all types;
- (4) contracts of insurance;
- (5) licences to enter upon or use land.<sup>7</sup>

Such controls should not apply to exemption clauses in contracts which are concerned with the transfer of ownership or possession of land or interests in land, except that it should extend to exemption clauses in respect of contracts for services in so far as these relate to the use of land.<sup>8</sup>

The Commissions also took different views as to what the reasonableness test should be and how it should operate.

The Law Commission recommended that the test should be based on the notion as to whether it was fair and reasonable to rely on the contract terms or notice having regard to all the circumstances of the case. The onus of showing that it was not fair and reasonable to rely on the clause should rest with the party challenging the exemption clause. In contracts for the supply of goods, legislation

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5. Second Report, at para. 69.

6. Ibid., at para 240.

7. Second Report, at para. 257.

8. Ibid.

implementing the Report's recommendations should list matters to which, in particular, regard should be had but would not be the case with legislation implementing Parts III (negligence) and IV (contractual obligations) of the Report.<sup>9</sup>

The Scottish Law Commission recommended that the test should be whether it was fair and reasonable to incorporate the term in the contract or notice having regard only to matters which were or ought reasonably to have been known to or in the contemplation of the parties at the time of the contract or of the giving of the notice. The onus of showing that it was not fair or reasonable should rest on the party challenging the exemption clause. Legislation implementing the Report's recommendations should not set out particulars to which regard was to be had.<sup>10</sup>

Provisions excluding or restricting liability, incurred in the course of business, or for death or personal injury, the Commissions recommended should be void in the following circumstances:

- "(a) Where a person is killed or injured in an accident arising out of and in the course of his employment and the liability is that of his employer.
- (b) Where a person is killed or injured while being carried as a passenger by land or water or in the air and the liability is that of the carrier.
- (c) Where a person is killed or injured in consequence of a defect or malfunction or the mismanagement of a device for the movement of persons (including lifts, escalators and fairground contrivances).
- (d) Where a person is killed or injured while making use of a car park (ie. any facilities for parking motor vehicles) and the liability is that of the occupier or manager of the car park".<sup>11</sup>

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9. Second Report, at paras. 169 and 178-182.

10. Second Report, at paras. 169-176. See also Appendices A and B respectively; these contain the Draft Exemption Clauses (England and Wales) Bill (at p.117) and the Draft Exemption Clauses (Scotland) Bill (at p.168). The Scottish Law Commission recommended reconsideration and amendment of s55(5) of the Sale of Goods Act 1893 and s12(4) of the Supply of Goods (Implied Terms) Act 1973, see para.196.

11. Second Report, at para.94.



It was also recommended that a power should be given to the Secretary of State (acting on recommendations of the Director General of Fair Trading) to direct that provisions excluding or restricting liability incurred in the course of business should be void in cases of death or personal injury resulting from negligence. The Director General's recommendations should only be made where persons need protection because in his view:

- "(i) they specially depend for their personal safety on the skill and care of others;
- (ii) either they are not in a position to negotiate or, if they are, their bargaining position in relation to exemption clauses is weak; and
- (iii) they are exposed to the unfair or unreasonable use against them of exemption clauses".<sup>12</sup>

The Law Commissions' recommended special control over exemption clauses in manufacturers' "guarantees". Provisions excluding or restricting liability for loss or damage arising while goods were in consumer use, as a result of the negligence of a person concerned in the manufacture or distribution of goods, should be avoided if they were contained in a guarantee. If the guarantor was also the supplier of the goods, damages for injury or loss suffered by the person supplied owing to a defect in the goods might be recoverable, for example, in an action for breach of the term of fitness for purpose of merchantability. The Commissions did not consider, therefore, that such an exemption clause of the sort in question should be avoided where the guarantee related to goods supplied by the person giving the guarantee to the person accepting it under a contract between them.<sup>13</sup>

The control of provisions excluding a defendant's liability for negligence incurred in the course of a business should apply even where it might be assumed from the plaintiffs' conduct that he was

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12. Ibid., at para.97.

13. Second Report, at paras 99-105.

voluntarily accepting the risk. Where the Law Commissions' proposed that provisions were void or ineffective, the fact that a person agreed to or was aware of the provisions was not, of itself, to be regarded as sufficient evidence that he knowingly and voluntarily assumed the risk.<sup>14</sup>

The Commissions objected to proposals that control over exclusion or limitation of liability should, first, take the form of a complete ban, whether in all transactions or in consumer transactions, or, second, be limited to specific activities. A complete ban, in the Commissions' view, would not go far enough.

In the Commissions' view:

"The comments we have received leave us in no doubt that clauses or notices exempting from liability for negligence are in many cases a serious social evil and our review of the powers at the disposal of the court for dealing with such clauses show that they are far from adequate. The case for some stricter form of control seems to us to be unanswerable".<sup>15</sup>

The Commissions came down in favour of a general control of exemption clauses in contracts by the use of a reasonableness test that would apply to exemptions from liability in both consumer and commercial contracts. However, in special cases, there would be a complete ban on such exemptions.<sup>16</sup> The arguments for and against the reasonableness test and alternative systems of control have already been canvassed.<sup>17</sup>

In reviewing the inadequacy of the existing legislation, the Commissions saw no justification for gaps in control over contracts of employment, carriage in motor vehicles and by rail, sea and air and those relating to car parks and to movement by mechanical devices (such as lifts). These lacunae were essentially as follows: the

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14. Ibid., at para.105, 131, 135.

15. Second Report, at para.44.

16. Ibid., at para.46.

17. See Chapter Four, supra.

employer remained free to contract out of his liability in respect of the death or personal injury to an employee where this was due to the latter's own negligence. A carrier by motor vehicle (unless a public service vehicle) was free to exclude his liability to a passenger where the use of the vehicle was not required to be insured against third party risks. The carrier by public service vehicle, if not required to be insured against third party risks, was free to exclude his liability to a passenger who was not travelling under a contract. Rail carriers were free to exclude liability to passengers travelling on a free pass. Carriers on land by means of a vehicle other than a motor vehicle, carriers on an inland waterway and carriers by sea were free to exclude liability for death and injury to a passenger. Accordingly, the Commission recommended that a total ban should apply to both contracts of employment and to all carriage of passengers. The freedom the sea carrier had particularly could not be defended. Sea passengers usually entered into contracts of carriage without benefit of legal advice, were unable to vary the terms of carriage, and hence, were sometimes inadequately insured.<sup>18</sup>

The Commissions also took note that certain activities, although they did not involve carriage as such, had a resemblance to it. A member of the public who used a lift or escalator in a department store or used a fairground ride like the "Big Dipper" relied on the care and skill of the person or persons operating the mechanical device in question. There should therefore be a total ban on excluding or limiting liability for death or personal injury resulting from negligence suffered by any person as the result of the defect, malfunction or mismanagement of any device for the movement of

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18. Second Report, at paras.85 and 86; the Commission noted the effect of the acceding by the United Kingdom to the Athens Convention on the Carriage of Passengers and the Luggage by Sea; see Unfair Contract Terms Act 1977 s28.

persons.<sup>19</sup>

The Commission paid particular attention to exemption clauses and notices exempting liability for negligence in car parks.<sup>20</sup> Many operators of car parks, it was noted, relied on such clauses and attempted, in some cases, to introduce such clauses by notices or tickets or a combination of both. These clauses had been criticised widely as being unreasonable and unfair both within and outside parliament.<sup>21</sup> Negligence by the proprietor was not presumed; it was for a claimant to prove. The impossibility and unlikelihood of a car park user negotiating the terms of admission were well illustrated by Megaw L.J.:

"It does not take much imagination to picture the indignation of the defendants if their potential customers, having taken their tickets and observed the reference therein to contractual conditions which, they said, could be seen in notices on the premises, were one after the other to get out of their cars, leaving the cars blocking the entrances to the garage, in order to search for, find and peruse the notices!"<sup>22</sup>

The Commission stated that their recommendations should apply to all car parks, which included lorry parks and all parking facilities for motor vehicles, operated in the course of a business. These would include car parks operated by a firm whose business was not that of providing car parking facilities. The Commission recommended that the operator of a car park should not be allowed to exclude or restrict liability for death or personal injury as the result of his

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19. Ibid., at para.87; the Commissions viewed the recommendation as covering lifts, escalators, 'travelators' and 'coaster trains'.

20. Second Report, at paras 88-93.

21. Ibid., at para.88, the Law Commissions did not refer specifically to any Parliamentary debate on the matter nor mention criticism by the courts. However, in Thornton v. Shoe Lane Parking [1971] 2 Q.B. 163 Lord Denning said of the exemption clause at issue '...it is so wide and destructive of rights that the court should not hold any man bound by it unless it is drawn to his attention in the most explicit way .. In order to give sufficient notice, it would need to be printed in red ink with a red hand pointing to it, or something equally startling (at p.170). For a review of car parking cases see N.E. Palmer Bailment Law Book Co. (1979), at pp.195-213.

22. Thornton v. Shoe Lane Parking [1971] 2 QB 163, 173.

negligence or that of his employees, and such purported exemptions should be void.<sup>23</sup>

Exemption Clauses and Negligence: Provisions of the Unfair Contract Terms Act<sup>24</sup>

The Unfair Contract Terms Act 1977 affects exemption clauses in contracts generally. The Act deals specifically with negligence in s2. This is divided into (a) breach of the duty to take reasonable care or exercise reasonable skill and (b) breach of the common duty of care under the Occupiers Liability Act 1957. These constitute the main heads of tortious liability which are most likely to be subject to restriction or exclusion by exemption clause or notice. Liability under the Misrepresentation Act 1967 and Consumer Protection Act 1961 is a more limited area dealt with by the Unfair Contract Terms Act; there are, lastly, heads of tortious liability to which the Act does not apply.

Section 2 of the Act provides as follows:

- "(1) A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence.
- (2) In the case of loss or damage, a person cannot so exclude or restrict his liability for negligence except so far as the term or notice satisfies the requirement of reasonableness.
- (3) Where a contract term or notice purports to exclude or restrict liability for negligence a person's agreement to or awareness of it is not of itself to be taken as indicating his voluntary acceptance of any risk".

Section 2(1) bans the use of any exemptive methods to exclude or limit a claim in respect of personal injury or death, whether by notice

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23. Second Report, at paras.88-93.

24. See P.K.J.Thompson, Unfair Contract Terms Act 1977 Butterworth (1978) Chapter Nine; R.Lawson, Exclusion Clauses after the Unfair Contract Terms Act 1977, Oyez (1978) at pp.83-84; D.Yates, Exclusion Clauses in Contracts 2nd edition (1982) at pp.81-110; J.Livermore, Legal Aspects of Marketing Heinemann, 4th edition (1984), at pp.16-21.

or contract term. The only exception to the ban is in regard to terms exonerating employees from claims by their employers. Terms in manufacturers' guarantees that limit liability for negligence are banned and made void by virtue of s5. The section only applies to goods of a type ordinarily supplied for private use or consumption and only where loss or damage arises from the goods proving defective while in consumer use.

Apart from the terms and notices restricting or excluding liability in negligence which are prohibited by the Act, other such terms and notices are subjected to the reasonableness test, which is contained in s11. The effect of this section is that the term or notice must be fair and reasonable having regard to the circumstances which were, or ought reasonably to have been, in the contemplation of the parties when the contract was made (or, in the case of a notice, having regard to all the circumstances at the time of the accident). In both cases, if the term or notice limits the liability to a specified sum the court must have regard, in particular, to the resources available to the defendant and the availability of insurance.

In certain contracts, business liabilities in negligence may be excluded or limited. This is the case with contracts of employment which limit the liability of the employee. In a number of contracts liability (which includes liability for negligence) may be excluded or restricted except in relation to a consumer. Schedule 1 to the Act lists contracts of marine salvage or towage, charter-parties of ships or hovercraft and contracts for carriage of goods by such craft (whether the contract requires this or merely permits it). These exceptions are restricted to contracts between businessmen and do not apply to claims in respect of personal injury or death.

For the purposes of the Act liability in negligence can be

excluded or restricted in two ways:<sup>25</sup> (a) by a term in a contract made between the plaintiff and defendant and (b) by a notice brought reasonably to the plaintiff's attention. In (a) a contract is presumed to exist between the plaintiff and defendant. Where, in such a case, a plaintiff has a claim in negligence, he may often have an additional claim in contract for breach of the contractual duty of care. In the majority of reported cases, the courts have tended to construe exemption clauses as effective to include liability in contract, but not for negligence in tort, (as for instance, in White v. John Warwick Cycle Co Ltd<sup>26</sup>). A widely drawn clause that purported to exclude liability in tort and contract is within the ambit of the Act and would only be enforced if it was congruent with the reasonableness test.<sup>27</sup>

Notices may also be used to exclude or limit liability in negligence in the case of manufacturers' guarantees and where advice is given other than under a contract where a legal duty of care arises as in a Hedley Byrne situation.<sup>28</sup> In the Hedley Byrne case it was held that a notice that investment advice given in a publication was "without responsibility" protected the defendants in proceedings against them in negligence<sup>29</sup>. Notices excluding or limiting liability are controlled by the Act in cases of business liability when the reasonableness test must be applied.<sup>30</sup> Notices

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25. Unfair Contract Terms Act, (1977) ss 2(1), 5(1).

26. [1953] 1 W.L.R.1285, see Chapter One. See also Alderslade v. Hendon Laundry [1945] 1 All E.R., 244, at p.245 per Lord Greene M.R.; Rutter v. Palmer [1922] 2 K.B. 87, at p.92 per Scrutton L.J.; Halls v. Brooklands Auto Racing Club [1933] 1 KB 205, at p.213 per Scrutton L.J.

27. See Coats Patons (Retail) Ltd v. Birmingham Corporation [1971] 69 Local Government Reports 356; Hollier v. Rambler Motors (AMC) Ltd [1972] 1 All E.R. 399.

28. Hedley Byrne & Co Ltd v. Heller & Partners Ltd [1964] A.C. 465; see also Mutual Life and Citizen's Assurance Co Ltd v. Evatt [1971] AC 793; see now Paramatta City Council v. Shaddock (1981) 36 A.L.R. 385.

29. See note 33. Stevenson v. Nationwide Building Society (1984) 272. For example 663; non-contractual notice.

30. Section 1(1).

excluding or limiting liability in manufacturers' guarantees are banned in the case of consumer goods in consumer use. This ban does not apply to non-consumer goods or goods put to commercial use. The terms and notices of all manufacturers' guarantees are subject to a reasonableness test which depends on whether the goods are consumer goods and if they are applied consumer goods. The Act applies to terms or notices which purport to exclude or restrict liability for breach of the common law duty of care under the Occupiers' Liability Act 1957. Terms or notices which exclude or restrict liability for personal injury are banned, whilst those affecting other loss or damage are only effective if they comply with the reasonableness test. The Act only applies to liability owed to a lawful visitor in respect of breach of obligations or duties arising from the occupation of premises used for business purposes of the occupier.<sup>31</sup>

The Misrepresentation Act 1967 is amended by s8 of the Unfair Contract Terms Act.<sup>32</sup> Terms excluding or restricting liability, and remedies, for misrepresentation, unless they clear the reasonableness test, are, in consequence, invalid. The section is not limited to cases of business liability or where a party deals as a consumer.

Contract terms excluding or restricting liability for a tort other than negligence will not normally be of practical importance, with one possible exception.<sup>33</sup> This will apply where goods are left with another person, as in the case of luggage deposited in hotels, on trains, or left behind in former lodgings. The person who retains such goods and then disposes of them, when not allowed to do so by contract with the person who left them, will be liable in conversion. The above situations are not covered by the Unfair Contract Terms

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31. Section 2(1),(2).

32. Inserting a new s3 in the Misrepresentation Act 1967 (U.K.).

33. For example, where such terms or notices limit liability in trespass, nuisance, deceit, defamation, intimidation, wrongful interference with goods, or Rylands v. Fletcher torts.



Criticism of the Unfair Contract Terms Act

The Unfair Contract Terms Act has been criticised, both on the premises on which it is based and also in respect of specific provisions, notably by Palmer and Yates.<sup>35</sup>

The Act itself would appear to be drafted on the firm premise that exemption clauses do not effect the accrual of obligation; that is, they do not form part of the primary obligations in a contract, but operate as defences to accrued rights of action.<sup>36</sup> The judgement of Lord Wilberforce in the Securicor case takes a defensive view of exemption clauses while Lord Diplock was prepared to acknowledge that primary obligations (as well as secondary obligations) could be modified<sup>37</sup> or recast by the terms of the contract. Lord Diplock took the view that the primary obligation of Securicor to provide a night patrol to the factory carried out by a person who would exercise reasonable care and skill towards the premises' safety was modified by the exclusion clause. It has been argued that, if Lord Diplock's view of the role of exemption clause is preferred in future cases, and there is a strong support both from academic writers<sup>38</sup> and the tacit practices of the business community for that view, then the Unfair Contract Terms Act may prove to be ill-adapted to deal with the demands made upon it.<sup>39</sup> Two provisions in the Act dealing with a

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34. See P.K.J. Thompson, Unfair Contract Terms Act 1977, Butterworths (1978) at pp.56-58; see also N.E.Palmer, Bailment Law Book Co. (1979), Chapter Nine; Chapter Eighteen, at pp.688-692.

35. N.E.Palmer and D.Yates 'The Future of the Unfair Contract Terms Act' [1981] C.L.J. 108; N.E.Palmer 'Exclusions of Liability under Non-Contractual Bailments and Unfair Contract Terms Act 1977' (1978) N.L.J. 915; D.Yates Exclusion Clauses in Contracts (1982), Chapter Three; N.E.Palmer Bailment, at pp.952-954; see also B.Coote note in (1978) 41 M.L.R. 312.

36. B.Coote *ibid*; see Chapter One *supra*.

37. [1980] 1 All E.R. 556, at pp.564, 568.

38. B. Coote 'The Second Rise and Fall of Fundamental Breach' (1981) 55 A.L.J. 788; D. Yates Exclusion Clauses in Contracts (1982), at pp.92, 132.

39. N.E. Palmer and D. Yates 'The Future of the Unfair Contract Terms Act 1977' [1981] C.L.J. 108, at p.123.

term which goes to primary obligations can be used to illustrate this problem.

Unfair Contract Terms Act : Section 3(2)(b)

Under s3(2)(b) a party contracting with another who deals either as a consumer or on the first party's written standard terms of business cannot, by reference to any contract term, claim to be entitled:

- "(i) to render a contractual performance substantially different from that which was reasonably expected of him, or
- (ii) in respect of the whole or any part of his contractual obligation, to render no performance at all,

except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness".

This section is aimed at clauses which have the effect of depriving the person against whom they are invoked of contractual rights expressed in such terms that the promisee may be led to believe that the promisor is undertaking an obligation more valuable to the promisee than it in fact is. The Law Commission in their Second Report on Exemption Clauses (1975) had in mind the facts of Anglo-Continental Holidays Ltd v. Typaldos Lines (London) Ltd<sup>40</sup> when they made their proposals for control of provisions in contracts that cut down duties owed.<sup>41</sup> In the Typaldos case the defendants, travel agents, agreed to book for the plaintiffs, also travel agents, cruises on a named ship travelling on a fixed route. The agreement was made subject to a clause which provided that vessels, sailing dates and itineraries, were "... subject to change without prior notice". In reliance on this clause, the defendants offered the plaintiffs cruises on a different ship following a different itinerary.

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40. [1967] 2 Lloyd's Rep. 61.

41. Second Report on Exemption Clauses (1975) Law Com No 69 at pp.55-57; See Chapter Two.

The vessel substituted was inferior to the first named ship and the plaintiffs regarded the itinerary substituted as also inferior. In the Court of Appeal, Lord Denning, assuming the clause to be part of the contract, appeared to regard it as an exemption clause and held that the defendants could not "... rely on a clause of this kind so as to alter the substance of the transaction".<sup>42</sup> Lord Russell, however, did not regard it as an exemption clause in the sense that the courts had traditionally regarded them. "It is a clause under which the actual contractual liability may be defined, and not one which will excuse from the actual contractual liability".<sup>43</sup> The type of clause in the Typaldos case now falls under s3(2)(b) of the Unfair Contract Terms Act.

In a case where s3(2)(b) has prima facie application "reasonableness" has to be considered at a number of points. Where a consumer enters into a contract containing exemption clauses (which are procedural or definitive, others ambiguous or obscure) which is not signed, but may be binding on him on the basis of reasonable notice<sup>44</sup> it is suggested that there may be at least six occasions on which the court has to consider the reasonableness of the terms:

- (1) Incorporation: If the clauses are not reasonable, or are of a kind that the consumer would not reasonably have expected to be included in the contract, he may<sup>44</sup> not be regarded as having consented to them.
- (2) Construction: If the meaning argued for the clauses is not reasonable, and they are ambiguously drafted, another more reasonable construction may be preferred.
- (3) Section 3(2)(a): If the procedural clauses are not reasonable they are to that extent invalid under the Act.

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42. [1967] 2 Lloyd's Rep. 61, at p.66.

43. [1967] 2 Lloyd's Rep. 61, at p.67; see also reference to the Typaldos case by the Law Commissions in Second Report on Exemption Clauses (1975), at para. 144.

44. See Thornton v. Shoe Lane Parking Ltd [1971] 1 All E.R. 686; Parker v. S E Railway Co [1877] 2 C.P.D. 416; see Chapter One.

- (4) Section 3(2)(b): If the definitional clauses are contrary to what the consumer reasonably expected (thus their essential reasonableness is relevant) they fall under this subsection and
- (5) Section 3(2)(b)(i) renders them ineffective except so far as they are reasonable.
- (6) A common law test of reasonableness may be applicable<sup>45</sup> at the time of reliance on the clause.

Arguably the result of applying the test in most cases will be the same. Thus, in applying (a) and (b) together with (d) and (e) to a pre-emptive clause, if the clause is sufficiently reasonable to have been incorporated on the basis of reasonable expectation, without specific notification and assent, it could be regarded as a clause that the consumer might reasonably expected to have been there. It might, therefore, be a reasonable clause, particularly if the court has already held that only the more reasonable meaning applies. Therefore, in most cases the statutory test may add very little and, on the arguments already used<sup>46</sup> that have favoured unconscionability over reasonableness as a statutory hurdle for contractual terms, any Australian legislation in this area should not in this respect follow the Unfair Contract Terms Act.

Another way in which s3(2)(b) may be avoided is for the trader to argue that the other party did not deal "on the other's written standard terms of business".<sup>47</sup> In a recent Scottish case, McCrone v. Boots Farm Sales Ltd.<sup>48</sup> Lord Dunpark expressly avoided

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45. On the basis of Lord Denning's views expressed in Gillespie v. Roy Bowles Transport Ltd [1973] Q.B. 400, at p.416; Photo Production Ltd v. Securicor Transport Ltd (C.A.) [1978] 3 All E.R. 146, at pp. 151-152, 153, Levison v. Patent Steam Carpet Cleaning Co Ltd [1978] Q.B. 69.

46. See Chapter Four, *supra*.

47. Section 3(1) Unfair Contract Terms Act 1977.

48. 1981 S.L.T. 103. No facts are reported, for discussion of the case see R.Lawson 'The Unfair Contract Terms Act : A Progress Report.' (1981) 131 N.L.J. 933 and for the specific problems on the use of the phrase 'standard form contract' in s17(1) of Part II of the Unfair Contract Terms Act which applies to Scotland; see E.J.Jacobs 'Written Standard Terms of Business' [1983] J.B.L. 226.

formulating a comprehensive definition of the equivalent term in the Scottish part of the Act. The phrase "written standard terms of business" is not defined in the Act chiefly because the Law Commission and the Scottish Law Commission considered that the courts were well able to recognise standard terms used by persons in the course of their business and to lay down a precise definition of "standard form contract" (as the Scottish part of the Act is worded) would leave open the possibility that terms clearly contained in a standard form might fall outside the definition.<sup>49</sup> Both Commissions gave examples of what would be included within "standard form contracts" as the following: "printed documents setting out conditions of various kinds, terms found in catalogues and price lists, and terms set out or referred to in quotations, notices and tickets".<sup>50</sup> This wide interpretation was also given to the term "standard form contract" in McCrone's case by Lord Dunpark:

"If the section is to achieve its purpose the phrase 'standard form contract' cannot be confined to written contracts in which both parties use standard forms. It is, in my opinion, wide enough to include any contract, whether wholly written or partly oral".<sup>51</sup>

In discussing standard forms, the Commissions classified them broadly into two types.<sup>52</sup> First, there is the form adopted for commercial dealings of a particular type, such as the Royal Institute of British Architects. Second, there is the form produced by, or on behalf of, one of the parties to an intended transaction for incorporation into a number of contracts of that type without negotiation. The Commission made it clear that they regarded standard terms as including those inserted in a blank part of printed contract or incorporated by

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49. Second Report on Exemption Clauses (1975), at paras 151-157.

50. Ibid., at para 152.

51. 1981 S.L.T. 103, at p.105.

52. Second Report on Exemption Clauses (1975), at para 152.

reference to a handwritten document. A standard form contract, in the Commission's view, need not be wholly in writing, since contracts were often partly written and partly oral.<sup>53</sup> The lack of opportunity to vary or negotiate terms the Commission did not regard as a distinguishing feature of standard form contracts.<sup>54</sup>

Therefore, it appears that although the English part of the Act uses the words "written standard terms of business" and the Scottish part employs the phrase "standard form contract"<sup>55</sup> the Commissions regarded them as meaning the same thing. It may be that common sense would suggest that both parts of the Act should be given the same effect, nor is there any good reason why English and Scottish law should differ on this point. However, the fact remains that different wording is used. The Scottish part of the Act defines "consumer" as "a party to a standard form contract who deals on the basis of written standard terms of business of the other party to a contract who himself deals in the course of business".<sup>56</sup> The English part of the Act simply refers to dealing on "the other's written standard terms of business". The crucial issue would appear to what extent may terms be varied and still be standard. In the McCrone case, Lord Dunpark obiter regarded the phrase "standard form contract" as wide enough to include any contract, whether wholly written or partly oral, which includes a set of fixed terms or conditions which the offeror applies, without material variation, to the contract.<sup>57</sup> Although his Lordship was not attempting a comprehensive definition it is to be regretted that the Commissions' failure to distinguish between the two phrases referred to, and to provide a definition of them, has created an uncertain area

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53. Ibid., at para 154.

54. Second Report para 156. See Chapter Four.

55. Unfair Contract Terms Act 1977 Part 1, s3 and Part II, s17(2) respectively.

56. Unfair Contract Terms Act 1977 Part II s17(2).

57. 1981 S.L.T. 103, at p.150.

within the law. In the course of the passage of the Unfair Contract Terms Act through the House of Lords an amendment was proposed, subsequently withdrawn, which read:

"... standard terms of business means terms which have been fixed in advance by the party putting them forward with the object of constituting conditions of contract for use in standard form whether generally or with any specific party".<sup>58</sup>

Arguably, both parts of the Act should have been worded on the basis of s17 with reference to standard form contracts. Standard form contracts might be defined as a written collection of proposed contract terms fixed in advance for use in similar transactions and presented to the other dealing party as a condition of doing business.<sup>59</sup> The House of Lord's proposal on written standard terms of business mentioned above would constitute a workable parallel definition.

Borderline cases can be anticipated, even with the definitional changes above, where written standard terms of business are the basis of the contract but are varied for the contract at issue, or where additional oral or written terms are purportedly incorporated by reference. From earlier discussion, such written terms might be regarded as standard, even with variation or reference to external terms.

The supposition that a written agreement, either supplemented by orally agreed terms, or by terms implied at law or varied by an external terms, oral or written, would fall within the Act, is made on the basis that, were it otherwise, the provisions of the Act could easily be evaded. This line of approach must also mean that only a part of contract which was entirely in writing need be on standard

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58. Proposed by Lord Lyell; House of Lords Committee Stage, H.L. Debates Vol. 384 cols. 445 et seq.

59. See West German Law on Standard Contract Terms 1976 para 1; the definition above is a modification of the West German definition. See Chapter Four.

terms to come within the Act.<sup>60</sup>

There is also the question of when a party has dealt on the others' written standard terms of business. In British Crane Hire Corporation v. Ipswich Plant Hire Ltd<sup>61</sup> plant was ordered over the telephone and the contract documentation was later sent on to the plaintiffs. In assessing whether there had been a previous course of dealings to incorporate exemption clauses into the contract, the Court of Appeal noted that both firms were in the plant hire business and were familiar with the terms of the hire contract.<sup>62</sup> However, it seems unlikely that many cases will arise where a party will be able to deny successfully that it has been dealing on the basis of the other's written standard terms of business.

However, it is still open as to whether dealing for the purposes of s3(1) of the Act would require more than one transaction between the parties for the section to operate.

#### Unfair Contract Terms Act : Section 13(1)

Section 13(1) provides:

"To the extent that this Part of this Act prevents the exclusion or restriction of any liability it also prevents

- (a) making the liability or its enforcement subject to restrictive or onerous conditions;
- (b) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy;
- (c) excluding or restricting rules of evidence or procedure;

and (to that extent) section 2 and 5 to 7 also prevent excluding or restricting liability by reference to terms and notices which exclude or restrict the relevant obligation or duty".

60. See R. Lawson Exclusion Clauses after the Unfair Contract Terms Act Oyez (1978), at p86.

61. [1974] 1 All E.R. 1059; see note by N.E. Palmer (1974) 25 N.I.L.Q. 338; see Chapter One.

62. [1974] 1 All E.R. 1059, at p.1062.



Section 13(1) does not cover exclusions or restrictions of duty which fall under s3(2)(b), (ie. reference to any contract term excluding or restricting any liability for breach of contract). Section 2 and ss 5 to 7 are drafted solely in terms of restriction or exclusions of liability. The effect of s13(1) then appears to be that the same conditions which the Act applies to an exclusion or restriction of liability must similarly be applied in connection with the duty which (had it existed and been broken) would have produced that liability. Both the liability and the duty can be modified under section 2, 5, 6 and 7 only in terms of the Act. So in the case of death or personal injury arising from conduct performed in the course of business, the duty of care cannot be excluded or restricted by a term or notice at all.<sup>63</sup>

A literal interpretation of 13(1) would deprive the parties of practically all capacity to agree and define the content of all the obligations undertaken. To assume that every term or notice which displaces a particular obligation must, as a matter of policy, be subject to the same controls as a term or notice that modifies liability for breach is arguably fallacious. Parties may exclude a primary duty from their contractual relationship with full knowledge and consent. If, by a literal interpretation of s13(1), such an excluded duty is compelled to be readmitted this might be regarded as re-writing the contract for the parties.

One example may suffice to illustrate this.<sup>64</sup> A seller, entitled to displace the operation of the implied condition of reasonable

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63. In the case of a consumer contract of sale no term or notice which purports to exclude or restrict the implied conditions as to description sample, quality or fitness will stand; in the case of a non-consumer contract such term or notice will only be valid to the extent that it is shown to be reasonable.

64. See N.E.Palmer and D.Yates 'The Future of the Unfair Contract Terms Act 1977' [1981] C.L.J. 108, at pp.127-128 for this and other examples.

fitness<sup>65</sup> by showing that it was unreasonable for the buyer to have relied on his skill and judgment, would (on the basis of a literal interpretation of s13(1)) be prohibited from showing evidence of a term or notice containing a warning to that effect in the case of a consumer sale.

In criticising the drafting of s13(1), it can be argued that the draftsman had overlooked the distinction between a purely verbal deletion of a primary duty (ie. an evasion purporting to take effect by specific agreement alone) and a circumstantial displacement of a primary duty (ie. a negation which is a corollary to the promissory content of a transaction, but cannot be included as this would run counter to the transaction as a whole). Although the first may be legitimately controlled under s13(1), the second cannot be so without recasting and standardising agreements in an unacceptable manner. A realistic interpretation of s13(1), it is suggested, is to limit that part discussed to those situations in which the express modification of a primary duty is completely at odds with the general circumstances of the disputed contract.

The deletion of duty should only be controlled where the court is convinced that, but for that deletion, that duty would inevitably have arisen in a legal relationship incorporating all the other incidents of the disputed relationship.

The conclusion may be made that both the content of s13(1) and the reasonableness test of s3(2)(b) pose no great threat to carefully drawn definitional exemption clauses covered by the Unfair Contract Terms Act. This position can be regarded as further strengthened by the approach to exemption clauses in the Securicor

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65. Section 14(3) Sale of Goods Act 1979 (U.K.)

case by Lord Diplock.<sup>66</sup>

#### Exemption Clauses and Negligence: Reform of Australian law

The Trade Practices Act is notably deficient by comparison with the Unfair Contract Terms Act in that the former does not deal with contracts and notices which exclude liability for death, damage or injury arising from negligence.

There is little doubt that the observations of the Second Report concerning clauses or notices exempting from liability for negligence that these, in many cases, were a serious social evil could be equally applied in the Australian context.<sup>67</sup> The Unfair Contract Terms Act could be used as a model for an amendment to the Trade Practices Act or for a separate enactment subject to certain qualifications. The view has been put that there should be no control in the form of a reasonableness test over exemption clauses in commercial contracts.<sup>68</sup> As an alternative, it has been proposed that the tests contained in the New South Wales Contracts Review Act (1980) be applied to all contracts.<sup>69</sup> In the light of the English cases in which the reasonableness test in the Unfair Contract Terms Act has been considered it may be that the test will prove viable as a guide to the courts. In the Australian context a preference for statutory tests to establish unconscionability has been argued.<sup>70</sup>

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66. See Chapter One. The restrictions of both ss13(1) and 13(2)(b), it is contended, can be avoided by the use of definitional exclusion clauses and the deletion of the normal contractual relationship between trader and customer through the use of sub-contractors or non-contractual sub-bailees. See D.Yates and N.E.Palmer 'The Future of the Unfair Contract Terms Act 1977' [1981] C.L.J. 108, at pp. 131-134; N.E.Palmer 'Exclusions of Liability under Non-Contractual Bailments and Unfair Contract Terms Act 1977' (1978) 128 N.L.J. 915.

67. Second Report on Exemption Clauses (1975), at para. 44.

68. See Chapter Four.

69. Ibid.

70. See Chapter Four.

However, the Unfair Contract Terms Act, in respect of its provisions concerning negligence, would still serve as a useful basis for drafting legislation to achieve necessary reform of the law in Australia.

## CHAPTER NINE

### CONCLUSION

The current state of the law relating to exemption clauses has been described, fittingly, as "unmanageably complex".<sup>1</sup> These complexities, in part, have stemmed from the past failure of the courts to recognise that exemption clauses are an integral part of a contract and should not be ignored in assessing the rights and duties of the parties to the agreement. The Securicor decision marks a turning point in English law where the commercial realities were allowed to predominate over the vicissitudes of fundamental breach. Where parties are of equal bargaining power and employing a contract that clearly delineates and appropriates the risks, rights and liabilities of both sides fundamental breach<sup>2</sup> should not have to intrude as a means of determining those rights and liabilities. Arguably in Australia the law had in Sydney City Council v. West<sup>3</sup> reached the position laid down in the Securicor case by the House of Lords. Construing an exemption clause to relieve a party from liability for what would otherwise have been a fundamental breach of contract in H and E van der Sterren v. Cibernetics (Holding) Pty. Ltd.<sup>4</sup> the High Court of Australia clearly indicated that in a commercial bargain that was of clear financial benefit to the plaintiff

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1. D.Yates Exclusion Clauses in Contracts Sweet & Maxwell 2nd edition (1982), at p.264.

2. Or, by implication, breach of a fundamental term.

3. (1965) 114 C.L.R. 481; see Chapter One.

4. (1970) 44 A.L.J.R. 157; see Chapter One.

such an arrangement was reasonable.<sup>5</sup>

It might seem therefore that inter-business contracts should remain clear of further interference, other than that required by the existence of the vitiating factors of mistake, misrepresentation, duress and fraud, and that the legislature should not attempt to impose statutory tests outside the realm of consumer contracts. It has been argued that in the majority of commercial contracts which contain exemption clauses insurance arrangements can be made to apportion loss and risk without due cost to those insuring. However, there may exist circumstances where the terms of a commercial contract can bear unfairly upon another party, for example in a government standard form contract with a contractor.<sup>6</sup> The solution suggested is for the criteria contained within the New South Wales Contracts Review Act 1980 to be embodied in legislation applying to all contracts. Given the relatively small proportion of inter-business contracts that have been struck down by s2-302 of the UCC in the United States there appears no reason to believe that applying unconscionability tests to such contracts in Australia would produce a different result. The advantage, already noted, that the Contracts Review Act has over s2-302 is a more precise formulation of the criteria of unconscionability.<sup>7</sup> Applying these provisions equally to

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5. See N.E.Palmer Bailment Law Book Co. (1979), at pp.942-944; citing Metrotex Pty Ltd v. Freight Investments Pty Ltd [1969] V.R. 9 (Supreme Court, Full Court) as "a vivid example of the willingness of Australian Courts to adopt a laissez-faire philosophy in the analysis of bailees exclusions and to extend such exclusions where appropriate to quite severe or aggravated forms of breach. In such an environment fundamental breach has little part to play as an effective rule of law"; ibid., at pp.943-944.

6. See South Australian Railways Commissioner v. Egan (1973) 47 A.L.J.R. 140; Chapter Four.

7. Contracts Review Act 1980 s9(2). Contrast D.Yates Exclusion Clauses in Contracts Sweet & Maxwell 2nd edition (1982), who would leave commercial contracts to be adjudicated by the common law principles enunciated in the Securicor case and apply tests of unconscionability to consumer contracts only; at p.283; see Chapter Four supra.

commercial contracts would, with precision, isolate and remedy those abuses existing in inter-business contracts.

The other side of the coin, reform of the implied terms in contracts of supply, requires, it has been suggested, a recasting of the Sale of Goods Acts and amendment of the Trade Practices Act. The comparison can be made between the approach of the Irish Sale of Goods and Supply of Services Act 1980 and the United Kingdom Sale of Goods Act 1979. While the latter remains essentially a restatement of the original 1893 Act, as a commercial code, the Irish Act reformulates, amongst other matters, implied terms in contracts of supply, borrowing, in part, from the Australian Trade Practices Act. The proposed Tasmanian legislation, the Supply of Goods and Services Bill,<sup>8</sup> goes further by repealing the Sale of Goods Act 1896 and applying implied terms to all contracts of supply. This Bill appears to be more in line with the Trade Practices Act than does the Victorian Goods (Sales and Leases) Act 1981. The Victorian legislation, by covering sales and leases only, creates piecemeal reform, and fails to mirror, as is desirable for State legislation, the wider coverage of the Trade Practices Act. Unless uniformity is created, the Tasmanian model being offered as an example, Australian legislation in this field will increasingly develop into a maze of statutory requirements governing the supply of goods and services in which both consumers and traders will be lost.

Changes to the implied terms of title and merchantable quality, including recent proposals in the United Kingdom by the Law Commissions in their Working Paper Sale and Supply of Goods<sup>9</sup> have

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8. See Appendix B.

9. Working Paper No. 85 (The Law Commission), Consultative Memorandum No. 58 (The Scottish Law Commission); see Chapter Three.

earlier been considered.<sup>10</sup> In respect of the implied term of title the reforms brought in by the Victorian Chattels Securities Act 1981 exemplify a rational solution to some of the problems posed by the nemo dat rule. The provision in this Act for registration of security interests in motor vehicles giving a purchaser constructive notice of the contents of that register<sup>11</sup> could well be copied by other jurisdictions including the United Kingdom where the recommendations of its own Law Commission concerning the nemo dat rule have yet to be acted upon.<sup>12</sup>

The proposals of the Law Commissions of England and Scotland concerning merchantable quality, subject to criticisms already made, serve to more precisely delineate key elements that should be included within a new definition. The four elements proposed; those of fitness of purpose, appearance, finish and freedom from minor defects, suitability for immediate use, durability and safety, would appear to be both relevant and desirable in respect of consumer contracts. What does appear inappropriate is to apply liability for minor defects as an element in merchantable quality to both commercial and consumer contracts.

The Law Commission's reluctance to accept different standards for commercial and consumer contracts in relation to this particular factor is hard to understand. In certain cases, where minor defects had been specifically provided for in a commercial contract, the result would be that the express intention of the parties would be defeated by statute. The experience of businessmen at the hands of the

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10. Chapters Five and Three.

11. Chattels Securities Act 1981 (Victoria) Part III; s15.

12. Twelfth Report (Transfer of Title to Chattels) (1966) Cmnd.2958.



convoluted judicial treatment of fundamental breach in its English setting, might well have alerted any charged with a review of the implied terms not to confuse solutions to problems in consumer contracts with those arising from bargains struck between parties dealing commercially.

What is clear from the previous examination of the issues is that transactions of the latter half of the twentieth century can no longer be successfully regulated by enactments of the late nineteenth century. Reform, long overdue, should aim at producing a more rational environment in which commerce can conduct itself and the consumer obtain suitable protection and redress. It is not suggested that both requirements are easy to balance against each other, but in the preceding pages an attempt has been made to assist the debate, with a view to reform.

## POSTSCRIPT

In December, 1985, the Trade Practices Amendment Bill 1985 was read a third time in the House of Representatives. This Bill seeks to make significant changes in the existing Trade Practices Act 1974. The Bill has since been published together with an explanatory memorandum and the following comments relate to the Bill as it may affect some of the content in the foregoing chapters.

### 1. Consumer Definition

Clause 5 of the Trade Practices Amendment Bill 1985 (subsequently referred to as the Bill) proposes the raising of the monetary limit in s4B from \$15,000 to \$40,000 in order to provide for inflation over the last eight years and to provide some additional protection for small business purchases. An amendment to s4<sup>1</sup> of the Trade Practices Act provides that all purchases of commercial road vehicles<sup>2</sup> are deemed to be consumer purchases. Under this provision, truck owner-operators who purchase a truck for use in their business are given the protection offered by the warranties and conditions implied by Division 2 of Part V of the Trade Practices Act.

### 2. Definition of Services

Clause 37 proposes the repeal of s74(3), which defines services, and leaves s4(1) of the Trade Practices Act to define this term. This will mean that the warranties under s74 will apply to all contracts for the supply of services.<sup>3</sup> A new ss74(3) provides, however that the section does not apply to contracts for the storage or transportation of goods for commercial purposes. Contracts of

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1. Sub-section 4B(1)(a)(ii).
  2. As defined by ss 4B(4).
  3. As defined by s4(1).

insurance are covered by the Insurance Contracts Act 1984 (Cwlth.) and arguably this area needs no additional regulation at the federal level. In the area of transportation and storage of goods for the purpose of a business, business parties have well-established insurance arrangements which sometimes involve limitation of liability in a way contrary to s74. It was judged that no useful purpose would be served in upsetting these arrangements, and for this reason contracts for the storage and transport of goods for a commercial purpose have been exempted from the application of s74.

3. Unconscionable Conduct

Clause 21 proposes to insert a new s52A(1) prohibiting a corporation, in trade or commerce, in connection with supply or possible supply of goods and services, from engaging in conduct that is unconscionable. The term "unconscionable" is not defined in the section although s52A(2) provides guidance as to matters to which the Court should have regard. The Explanatory Memorandum cites the general principles for use in determining whether conduct is unconscionable stated in Commercial Bank of Australia Ltd. v. Amadio and Another<sup>4</sup>:

"Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so. The adverse circumstances which may constitute a special disability for the purposes of the principles relating to relief against unconscionable dealing may take a wide variety of forms and are not susceptible to being catalogued ... the common characteristic of such adverse circumstances seems to be that they have the effect of placing one party at a disadvantage vis-a-vis the other."<sup>5</sup>

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4. (1983) 46 A.L.R. 402; see Chapter Four supra.

5. Ibid. per Deane J., at p.423.

Sub-section 52A(2) is intended to give some guidance to the Court as to matters to which it should have regard in considering whether the conduct in a particular case is unconscionable within the meaning of the section. The Court may have regard to:

- "(a) the relative strengths of the bargaining positions of the corporation and the consumer;
- (b) whether, as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation;
- (c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;
- (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer by the corporation or a person acting on behalf of the corporation in relation to the supply or possible supply of the goods or services; and
- (e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the corporation."

Section 52A(2) makes it clear that these criteria do not limit the matters to which a Court may have regard for the purposes of determining whether a corporation has breached s52A(1). It should be noted that the section only applies to supply to a consumer by a corporation and does not follow the earlier draft which included inter-business transactions.<sup>6</sup>

#### 4. Exclusion under Separate Contracts

Section 68 provides that the implied conditions and warranties

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6. See The Trade Practices Act : Proposals for Change Canberra (1984) , cl.20, at p.17. For discussion of the original proposal see Chapter Four supra.

under Division 2 of Part V of the Trade Practices Act cannot be excluded or modified. It does not, however, presently cover the situation where these implied conditions and warranties are excluded by a term in a contract separate from the contract under which the goods or services are supplied, for example, a blanket indemnity clause in a separate contract. Clause 35 of the Bill seeks to amend s68 so that any term in any contract which seeks to exclude or modify the application of Division 2 to a contract to which it would otherwise apply, is deemed void.

5. Liability for Loss or Damage from Breach of Certain Contracts

The existing s.73 absolves a finance company from all liability under the Act for the defective condition of goods it has provided in certain circumstances. The section ensures that the dealer who actually handles the goods, rather than a company that finances the transaction, is responsible under the conditions and warranties implied by Division 2 for the quality of goods supplied by way of hire-purchase or lease.

However, in some cases the credit provider must carry some fault. If he has an arrangement with the supplier to provide credit in respect of purchases from the supplier, he is aiding the supplier's business. He is then in a better position to know of the solvency of the supplier and depending on the connection he may be able to exercise some control over the supplier's business conduct.

Under the credit legislation recently introduced in New South Wales, Victoria, Western Australia and the Australian Capital Territory, where a credit provider who is linked to the supplier provides credit to a consumer in respect of a purchase from the supplier, the credit provider and the supplier are liable jointly and severally for any breach of the contract of sale, misrepresentation or failure of consideration.

The existing s.73 is being repealed and replaced with a section modelled on and consistent with the linked credit provider provisions in the State Credit legislation.<sup>7</sup> Section 74(1) provides that a "linked credit provider"<sup>8</sup> is liable jointly and severally with the supplier for any misrepresentation, failure of consideration or breach of the contract of sale. However, where judgment is given against a supplier and a linked credit provider, the consumer must first demand payment from the supplier and may exercise his rights against the credit provider only to the extent that the judgment was not satisfied by the supplier. It is a defence if the credit provider establishes that the credit provided was not as a result of an approach from the consumer induced by the supplier, or that he was satisfied by due enquiry before becoming a linked credit provider of the supplier's financial standing and good business conduct and subsequently he had no reason to suspect that a consumer might be entitled to recover loss against the supplier (sub-s.(3)).

Where the credit provider is not linked to the supplier, the credit provider is not liable for breaches of the conditions and warranties implied by Division 2.<sup>9</sup> In these circumstances the consumer can seek redress from the supplier.

6. Title to Goods under Division 2A

The substantive provisions of Division 2A are amended under cl.39 to provide that a person who derives title to the goods under a consumer (for example, by way of gift) or who acquires the goods from a consumer, has the same rights against the manufacturer as

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7. Credit Act 1984 (Victoria) s24; Consumer Credit Act 1984 (New South Wales) s24.

8. Defined in ss74(14). The terms 'continuing credit contract' and 'loan contract' used in s73A and s73B respectively are defined in terms of s48 and s5(1) Consumer Credit Act 1984 (New South Wales) and Credit Act 1984 (Victoria).

9. Sub-section 74(2).

does the original consumer. However, this would mean that a used car dealer who buys a car from a consumer for the purpose of re-selling it in the course of his business would also be given these rights. As it is intended that Division 2A confers rights only on consumers, it is provided that Division 2A rights are not conferred on persons who acquire goods for the purpose of re-supply.<sup>10</sup>

Currently, the rights conferred by Division 2A, except for those conferred by s.74D, only apply to the original consumer purchaser.<sup>11</sup> Under s.74D, the manufacturer's liability with respect to merchantable quality arises

not only in favour of the original consumer but follows title in the goods. It has been considered anomalous that this section alone should afford rights against the manufacturer to persons who derive title to the goods under, or acquire the goods from, the consumer - such persons should also be able to claim under ss.74B, 74C, 74E, 74F and 74G. Section 74B is therefore amended to provide that persons who acquire goods from a consumer or derive title to the goods under a consumer (e.g by way of gift) may seek redress through Division 2A."<sup>12</sup>

#### 7. Actions in Respect of Non-Compliance with Express Warranty

Division 2A of Part V does not apply to goods supplied directly from manufacturer to consumer. Although the manufacturer would normally be bound by the conditions and warranties implied by Division 2 in the case of direct supply, Division 2 does not confer rights equivalent to those conferred by ss.74F and 74G. It is proposed therefore that these sections are amended by cl.43 to

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10. Cl.38(6) inserting para. (aa) after 74A(2)(a).

11. See Chapter Five, supra.

12. Subject to the exception noted, see footnote 9 supra. Equivalent amendments to s74B are proposed to ss74C - G inclusive and s74J (see cl's 40-45).

provide that where a manufacturer supplies goods directly to a consumer, the manufacturer has the same responsibility as manufacturers who sell indirectly to consumers.

8. Repair Facilities and Spare Parts

As with s.74F above, s.74G is being amended by cl.44 to provide that where a manufacturer supplies goods directly to consumer, he has the same responsibility in respect to complying with an express warranty as he would if he sold indirectly to a consumer. The word "statement" in ss74G(2) is replaced, under the proposed amendment, with "representation" to standardise language throughout the Act.

Sub-section (2)(a) is being amended to cover undertakings as to the provision of services and supply of parts that are or may be required in the future. This amendment is consistent with the amendment to the s.74A definition of "express warranty". The existing s.74A definition of "express warranty" only refers to claims by the manufacturer in relation to the quality, performance or characteristics of the goods. This definition does not cover promises about services to be provided or spare parts to be supplied in the future in excess of the statutory requirements (for example, repairs under warranties) or promises about the availability in the future of replacement components (for example, replacement plates in a crockery set). The s.74A definition of "express warranty" is therefore being amended to cover such promises.

9. Product Safety and Information Standards

Clause 34 of the Bill sets out to repeal ss62, 63 and 63AA of the Trade Practices Act and replacing them with a Division 1A of Part V dealing with product safety and information standards and product recall powers.



(i) Warning Notice to the Public

The new s65B gives the Minister the power to publish in the Gazette a warning notice, stating that certain goods are under investigation as to their safety or to determine whether a product safety standard should be prescribed in relation to the goods under s.65C (see below). The notice may also warn the public of possible risks associated with using the goods.

Under s65B(2) where such a notice has been published advising of an investigation, as soon as practicable after the completion of the investigation the Minister is required to insert a notice in the Gazette advising of the outcome. This notice may contain an announcement of what future action is to be taken in relation to the goods. However, this second notice is not required if a notice in relation to the goods has been issued under s65J or s65L, as a s65J or 65L notice would supercede a warning notice issued under s65B(1).

(ii) Product Safety Standards and Unsafe Goods

The new s65C reproduces in Division 1A the existing s62, which is repealed under the proposed cl34. Section 65C contains certain innovations. For example s65C(2) allows for the prescription of safety standards consisting of requirements as to methods of manufacture or processing, and as to testing of the goods during or after manufacture, as are reasonably necessary to protect persons using the goods.

Sub-section 65C(3), consistent with the U.N. Guidelines on Consumer Policy to which Australia is a signatory, prohibits the export of goods which do not comply with consumer product safety standards or have been declared unsafe or made the subject of a permanent banning order under the section, unless the Minister has

consented in writing to the export of the goods. This allows the Minister to consent to the export of such goods in appropriate circumstances, for example, where a foreign government requests supply of a certain product.

Sub-section 65C(7) provides that if the Minister's declaration under ss65C expires and a prescribed consumer product safety standard in respect of the goods does not exist the Minister may impose a permanent ban on the goods.

Sub-sections 65C(8) and 65C(9) are amended to cover a good which is unsafe not because of a defect but because of its very nature (for example, a toy catapult).

Further, where the Minister proposes to issue a notice under s65C(5) or 65C(7) or s65J applies and provides an opportunity for a hearing in relation to the publication of the notice.

(iii) Product Information Standards

The new s65D reproduces in the new Division 1A the existing s63 which is being repealed. Consistent with the new s65C, s65D(2) permits the prescription of product information standards consisting of requirements as to methods of manufacture or processing as well as the other matters contained in the existing s63(2).

(iv) Power of Minister to Declare Product Safety or Information Standards

The new s65E<sup>13</sup> provides for the Minister to declare product safety or information standards. Section 65E(1) allows for the prescription of one standard as both a product safety standard and a product information standard if necessary.

(v) Compulsory Product Recall

The new s65F provides the Minister with power to order a mandatory product recall in certain circumstances. The provision is proposed for use where voluntary recall measures do not exist or

recall action taken by suppliers is unsatisfactory. Suppliers will be actively encouraged by the Commonwealth, State and Territory Governments to develop and (when needed) implement effective recall procedures.

Sub-section 65F(1) provides that, where a corporation supplies, on or after 1 July 1986, goods that:

- (a) are of a kind likely to be used or intended to be used by a consumer;
- (b) do not comply with a prescribed product safety standard or have been declared unsafe or permanently banned under s65C; or
- (c) are of a kind, in the opinion of the Minister, which will or may cause injury to a person;

and the Minister considers that the corporation has not taken satisfactory action to recall the goods, the Minister may require the supplier to take action to recall the goods or disclose to the public the nature of the defect and procedures for disposing of the goods. The Minister may also require the supplier to advertise that he undertakes to repair or replace the goods or refund the price. Where the supplier chooses to refund the price of goods, and a period of twelve months or more has elapsed since the acquisition of the goods from the supplier, s65F(2) provides that the Minister may specify in the notice that the amount of the refund may be reduced for past use, in accordance with a specified formula.

It should be noted that, under s65F(1)(c), this mandatory recall power may only be exercised where the supplier has not taken satisfactory remedial action. This power of recall is exercisable

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13. Reproducing the existing s63AA which is to be repealed. See cl.30 of the Bill.

subject to s65J, which provides the supplier with certain rights to a hearing.<sup>14</sup>

Under s65F(3), the Minister may give directions in the recall notice or in another notice published in the Gazette as to the manner in which the supplier is to carry out the recall. Sub-section 65F(4) provides that where a supplier undertakes to repair the goods, they shall be repaired so as to remedy the defects or to comply with the relevant product safety standard where such a standard has been prescribed. Sub-section 65F(5) makes similar provision where the supplier has undertaken to replace the goods. Where the supplier undertakes to repair or replace goods, ss65F(6) makes it clear that the supplier bears the cost of the repairs or replacement, including transport costs.

Sub-section 65F(7) provides that, where goods which are being voluntarily recalled or are subject to a mandatory recall notice issued under s65F(1) have been exported, the exporter must notify the person overseas to whom he/she supplied the goods that they are subject to recall and the reason for their recall, and under s65F(8) provide the Minister with evidence of the notification. This prevents goods which are subject to recall action in Australia being dumped without notice of the recall on overseas markets.

(vi) Compliance with Product Recall Order

The new s65G requires suppliers to comply with the requirements of a recall notice issued under s65F, and prohibits the supply by a corporation of goods to which the notice relates and, where the notice identifies a defect or dangerous characteristic, which carry the defect or dangerous characteristic identified in the notice.

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14. See infra.

(vii) Loss or Damage caused by Contravention of Product Recall Order

The new s65H is a deeming provision similar to ss65C(8) and 65D(7). It provides that where a corporation contravenes s65G, and a person suffers loss or damage by reason of a defect in the goods or of not having information about the unsafe characteristics of the goods, the person is deemed to have suffered the loss or damage because of the failure of the corporation to comply with s65G. The person could then recover the amount of loss or damage under s82 of the Trade Practices Act.<sup>15</sup>

(viii) Opportunity for Conference for Suppliers

The new s65J provides an opportunity (subject to ss65L and 65M - see below) for suppliers who would be affected by a notice issued by the Minister under ss65C (product safety standards) and 65F (compulsory product recall) to seek a hearing before the notice is issued. Sub-section (1) requires the Minister, when proposing to publish a notice under ss65C(5), (7) or 65F(1), to publish a notice in the Gazette setting out a copy of the draft notice and a summary of the reasons for the proposed publication of the notice. Persons who supply or propose to supply goods of the kind affected by the notice are then invited to inform the Trade Practices Commission within ten days of a date specified in the Gazette if they wish the Commission to hold a conference in relation to the proposed publication.

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15. Section 82 provides that any person who suffers loss or damage by the conduct of another person done in breach of a provision Part IV or V may recover the amount of the loss or damage by action against that other person or any person involved in the breach.

10. Offences against Part V

Section 79 is being amended to double the maximum level of times for a contravention of Part V<sup>16</sup> to \$100,000 for a corporation and \$20,000 for a natural person.

A new s79(4) is being inserted in the Act to allow the Federal Court to grant an injunction or make a corrective advertising order in addition to imposing a fine on the person in prosecution proceedings.<sup>17</sup>

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16. Other than ss52 and 52.

17. The present position is governed by the Crimes Act (Cwlth) 1914 ss5 and 5A. In effect s79 of the Trade Practices Act is being amended to cover the offences created by the Crimes Act.

## APPENDIX A

### EXEMPTION CLAUSES : EXAMPLES

# JOHN McSHANE MOTORS

## *Used Car Warranty*

THIS WARRANTY IS ISSUED TO .....

of .....

In respect of the use vehicle described as follows:—

Make ..... Year .....

Reg. No ..... Engine No. .... Speedo Reading .....

1. Should any mechanical defect, subject to exclusions below, which affect the normal operation of the vehicle develop during a period of ..... days,

commencing on ..... or up to the time the vehicle has

been driven ..... kilometers, whichever termination shall be reached first, John McShane Motors will supply PARTS ONLY necessary to rectify the defect.

2. BATTERIES, GENERATORS and OTHER ELECTRICAL EQUIPMENT are included only for the first 14 days of this Warranty.

3. TYRES and TUBES are not included in this Warranty.

4. THIS WARRANTY is expressly in lieu of all other Warranties expressed or implied and all other obligations or liabilities on our part, and John McShane Motors neither assume or authorise any other person to assume for them any liability in connection with this vehicle except the obligation created by this Warranty.

5. THIS WARRANTY shall not apply if the vehicle is repaired or altered without the permission of JOHN McSHANE MOTORS, or if the vehicle has been subjected to abuse, negligence or accident or has been driven in any reliability or speed trial or test.

6. THIS WARRANTY is not transferable or assignable.

7. ....

.....

.....

OWNERS please note that this Warranty expires at ..... kilometers

or on ....., whichever is the sooner.

**JOHN McSHANE MOTORS**

By .....

Signed .....

Purchaser



## **TERMS AND CONDITIONS OF THE WITHIN ORDER**

1. Any order taken by any representative or employee must be accepted in writing by the Company before the same shall be binding on the Company and such acceptance shall be deemed to have been communicated to the Customer when notice in writing of such acceptance shall have been posted or telegraphed to him in the ordinary way by prepaid letter or telegram or handed to him. For the purposes of this clause the words "notice in writing" shall be deemed to include a copy of the duly accepted original hereof. Notwithstanding such acceptance by the Company the Company may refuse to deliver in accordance with such order and may cancel any contract arising out of such order if the Company receive information that any particulars supplied are inaccurate or that the Customer is not a fit and solvent person to the satisfaction of the Company.
2. Delivery shall be taken by the Customer (unless otherwise stated hereon in writing) and all things done and payments made at the Head Office of the Company in Derwent Park. That if the Goods are handed over to me at any place other than your above address delivery shall for the purpose of this instrument be deemed to be made as and from the time when it left such address. And the Goods from such time shall be at my risk and expense.
3. The Customer agrees to accept the vehicle with present specifications or with any alteration or modification adopted by the Company and/or manufacturer in respect of the vehicle mentioned herein.
4. Every endeavour will be made to give delivery on the date within mentioned but delivery on such date cannot be guaranteed and failure to deliver on such date shall not void or give a right to void the contract arising from the acceptance of the within order or render the Company liable for damages. The Company shall not be liable for any delays arising from strikes lockouts accidents wars or any causes beyond its control.
5. In the event of the customer falling or refusing to take delivery of the goods herein described on the delivery date all moneys paid as deposit on this order and any goods which the Company has taken over as part or whole payment for the goods shall be forfeited to the Company.
6. The property in any car or goods agreed to be sold shall be and remain in the Company until payment in full of the total purchase price. The property in any car or goods agreed to be hired shall be and remain in the said Company or Nominee until payment in full of the total rental and all other moneys which shall be payable by the Customer under the hiring agreement to be signed by the Customer before he obtains delivery of such car or goods.
7. This order if and when accepted by the Company shall be in substitution for any previous order contract or agreement if any made by or entered into by the Customer relating to the car or goods referred to in the within order.
8. Prices and Conditions of Sale may be altered at any time without notice, and all products and parts therefor are sold subject to the prices and Conditions of Sale ruling at the time of delivery. In the event of increase of price, however, the Customer may in writing cancel this order within seven days of receiving notice of the increase.
9. That in entering into this instrument I have depended entirely on my own judgment and that this instrument embodies the entire terms, inducements and representations whatsoever made or given to me by you or any other person, and I declare that all implied conditions or warranties, statutory or otherwise, are hereby negatived. My taking delivery of the Goods shall be conclusive evidence that the same are in satisfactory order and condition and fit for the purposes for which I require them, and despite any error or misdescription no claim or objection in respect of the Goods shall be admissible after such delivery.
10. If any term or provision or part thereof of this contract is or shall be for any reason invalid or unenforceable the validity and enforceability of the remainder hereof shall be in no way affected thereby.

## CONDITIONS OF PARKING

### WREST POINT HOTEL CASINO



## **WREST POINT**

### **HOTEL - CASINO**

#### **CONDITIONS OF PARKING**

Cars driven to and from car park and parked there entirely at the customer's risk. Australian National Hotels Ltd., the Hotel Licensee, and their servants and agents, shall not be responsible or liable for any loss or mis-delivery of or damage or injury of whatever kind to the customer's motor vehicle, or of or to any articles carried thereon or therein, or of or to any accessories belonging thereto howsoever that loss, mis-delivery, damage, or injury shall be caused. No variation of these conditions shall bind Australian National Hotels Ltd. or the said Licensee unless made in writing signed by them or their duly authorized agent.

\$1-00 received with thanks.

THE HYDRO-ELECTRIC COMMISSION  
GORDON RIVER ROAD  
NOTICE AND WARNING

ENTRY PERMIT No.

40382

The Gordon River Road provides the only vehicular access to South-West Tasmania. The Hydro-Electric Commission has been charged with the responsibility of protecting the fauna and flora of the area from users of the Gordon River Road, which is vested in the Commission. Your co-operation to this end is invited.

Boating maps and other informative material can be provided at the gatehouse. Maps cost \$1-00 each. The following conditions apply in respect of this road:

PRIVATE ROAD

The Gordon Road is a private road controlled by the Commission.

You are entering, as a licensee, upon a construction area where there are dangerous conditions if construction work is in progress and heavy machinery, trucks and other vehicles operating. There is danger of possible rock falls and slippery conditions. You enter entirely at your own risk and take the area as you find it with its attendant dangers. You shall not have or make any claim for injury or damage howsoever occasioned against the Commission, its contractors or its or their employees whether due to negligence, breach of duty or other default.

ENTRY TIMES AND CLOSURES

The Road is normally open 24 hours daily.

Visitors are warned that the Road may be closed wholly or in part at any time if dangerous conditions exist as the result of snow or damage by rain or floods or if construction work is proceeding in the vicinity.

The gatekeeper has authority to refuse entry.

ROAD SAFETY

The Road has been designed for a 40 m.p.h. speed except on sections indicated by signs where the designed speed is 30 m.p.h. Drivers must observe all signs, beware of loose surfaces and soft edges and at all times drive carefully.

VEHICLE SAFETY FACILITIES

There is a service station at Strathgordon with facilities for haulage and repair of vehicles and fuel is available there only.

Drivers of motor vehicles are particularly warned against proceeding on the Road without sufficient fuel as supplies are not available on the route of the Road. The return journey from Maydena to the end of the Road is 106 miles. The Commission does not accept any responsibility for any person or vehicle which may become stranded.

SERVICES

The following services and facilities are available to visitors in the village area: 1. General Store (not open at weekends); 2. Cafe; 3. Service Station - Road House; 4. Self Service Laundry; 5. Gents Hairdresser (part time only); 6. Post Office; 7. Commonwealth Bank.

FIRES

Visitors are warned that they are prohibited from lighting fires except in fireplaces. No fires to be lit in the open during acute fire danger periods.

Cigarettes and matches must not be thrown out of cars and at all times visitors must prevent bush fires.

WILD LIFE AND VEGETATION

No person having a gun in his possession or a dog under his control will be permitted to enter on the Gordon Road or the surrounding areas controlled by the Commission. Guns may be left with the gatekeeper.

Removal of or damage to vegetation is prohibited.

PARKING OF CARS

Visitors wishing to park cars for any length of time must ensure that cars are parked safely off the main surface of the road so as not to create a hazard for other motorists.

LITTER

Please use litter bins and keep the environment clean.

For and on behalf of the Commission.

(R. R. Raward)  
Secretary

11th November 1976.

Valid for entry on.

(date)

GENERAL CONDITIONS OF CONTRACT: EXTRACT

**16. CARE OF THE WORKS**

**16.1 Liability of the Contractor to Date of Practical Completion of the Works**

From the commencement of the Contract to the Date of Practical Completion of the Works (as defined in sub-clause 42.2) the Contractor shall be solely liable for the care of the Works, the Temporary Works and all materials, Constructional Plant and other things that are brought on to the site by or on behalf of the Contractor or any of his sub-contractors for the purpose of carrying out the work under the Contract or that are entrusted to him by the Principal for that purpose.

The Contractor shall at his own cost make good to the satisfaction of the Superintendent any loss of or damage to the Works, the Temporary Works or the aforesaid materials, Constructional Plant and other things resulting from any cause whatsoever (save and except the Excepted Risks as defined in sub-clause 16.2) when such making good is necessary for the satisfactory completion of the Works. When so ordered by the Superintendent any such loss or damage caused by any of the Excepted Risks as defined in sub-clause 16.2 shall be made good by the Contractor as a variation to the Contract and dealt with pursuant to clause 40.

If a Certificate of Practical Completion is issued for a separable part of the Works pursuant to sub-clause 42.2, then the Contractor's liability for the care of that separable part of the Works as defined above shall cease on the Date of Practical Completion of that separable part of the Works, except for his liability during the Defects Liability Period for that separable part of the Works, or for any Operational Maintenance Period specified in the Contract for that separable part of the Works, as stated in sub-clause 16.3.

Nothing contained in this sub-clause shall relieve the Contractor of his responsibilities or liabilities under clause 18.

**16.2 Excepted Risks**

The Excepted Risks are —

- (a) Any negligent act or omission of the Principal, the Superintendent or the employees, professional consultants or agents of the Principal.
- (b) Any risk specifically excepted in the Specification.
- (c) War, invasion, act of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection or military or usurped power, martial law or confiscation by order of any Government or public authority.
- (d) Ionising radiations or contamination by radio-activity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel not caused by the Contractor or his employees or agents or sub-contractors.

**16.3 Liability of the Contractor after Date of Practical Completion**

- (a) After the Date of Practical Completion of the Works or a separable part of the Works the Contractor shall, subject to the provisions of paragraphs (b), (c) and (d) respectively in this sub-clause, indemnify and keep indemnified the Principal against all loss or damage to the Works or the separable part of the Works or to the relevant Temporary Works arising out of or resulting directly or indirectly from any negligent act or omission of the Contractor or any sub-contractor or any employee or agent of the Contractor or of any sub-contractor or out of any default of the Contractor under the Contract; and for the purposes of this sub-clause the word "default" shall be construed, but without restricting its generality of meaning, as including faulty design, workmanship or materials.
- (b) If a Certificate of Practical Completion is issued for the Works and no Certificate of Practical Completion has been issued for any separable part of the Works the indemnity shall extend to the Works and the Temporary Works during the period commencing on the Date of Practical Completion of the Works and ending on the day on which the Defects Liability Period for the Works, or the Operational Maintenance Period specified in the Contract for the Works, as the case may be, expires.
- (c) If a Certificate of Practical Completion is issued for a separable part of the Works the indemnity shall extend to that separable part of the Works during the period commencing on the Date of Practical Completion of that separable part of the Works and ending on the day on which the Defects Liability Period for that separable part of the Works, or the Operational Maintenance Period specified in the Contract for that separable part of the Works, as the case may be, expires.
- (d) If a Certificate of Practical Completion is issued for the Works and a Certificate of Practical Completion has been issued for a separable part of the Works the indemnity shall, without limiting or affecting the indemnity applicable in relation to the separable part of the Works, extend to the Works and the Temporary Works other than the separable part of the Works

APPENDIX B

DRAFT SUPPLY OF GOODS AND SERVICES BILL

**3.13 DRAFT PROVISIONS FOR A SUPPLY OF GOODS AND SERVICES BILL****A BILL FOR**

*An Act to amend and repeal the Sale of Goods Act 1896 and with respect to the terms to be implied in contracts of supply of goods and services and in leases of goods and with respect to certain other matters.*

**Definitions — Consumer**

*Cf. Trade Practices Act 1974 section 4B*

**1. (1) For the purposes of this Act unless the contrary intention appears —**

(a) a person shall be taken to have acquired particular goods as a consumer if, and only if —

- (i) the price of the goods did not exceed the prescribed amount; or
- (ii) where that price exceeded the prescribed amount — the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption, and the person did not acquire the goods, or hold himself out as acquiring the goods, for the purpose of re-supply or for the purpose of using them up or transforming them, in trade or commerce, in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land; and

(b) a person shall be taken to have acquired particular services as a consumer if, and only if —

- (i) the price of the services did not exceed the prescribed amount; or
- (ii) where that price exceeded the prescribed amount — the services were of a kind ordinarily acquired for personal, domestic or household use or consumption.

**(2) For the purposes of subsection (1) —**

(a) the prescribed amount is \$15 000 or, if a greater amount is prescribed for the purposes of this paragraph, that greater amount;

(b) subject to paragraph (c), the price of goods or services purchased by a person shall be taken to have been the amount paid or payable by the person for the goods or services;

(c) where a person purchased goods or services together with other property or services, or with both other property and services, and a specified price was not allocated to the goods or services in the contract under which they were purchased, the price of the goods or services shall be taken to have been —

(i) the price at which, at the time of the acquisition, the person could have purchased from the supplier the goods or services without the other property or services;

(ii) if, at the time of the acquisition, the goods or services were not available for purchase from the supplier except together with the other property or services but, at that time, goods or services of the kind acquired were available for purchase from another supplier without other property or services — the lowest price at which the person could, at that time, reasonably have purchased goods or services of that kind from another supplier; or

(iii) if, at the time of the acquisition, goods or services of the kind acquired were not available for purchase from any supplier except together with other property or services — the value of the goods or services at that time;

(d) where a person acquired goods or services otherwise than by way of purchase, the price of the goods or services shall be taken to have been —

(i) the price at which, at the time of the acquisition, the person could have purchased the goods or services from the supplier;

(ii) if, at the time of the acquisition, the goods or services were not available for purchase from the supplier or were so available only together with other property or services but, at that time, goods or services of the kind acquired were available for purchase from another supplier — the lowest price at which the person could, at that time, reasonably have purchased goods or services of that kind from another supplier; or

(iii) if, at the time of the acquisition, goods or services of the kind acquired were not available, at the time of acquisition, for purchase from any supplier except together with other property or services — the value of the goods or services at that time; and

(e) without limiting by implication the meaning of the expression 'services', the obtaining of credit by a person in connection with the acquisition of goods or services by him shall be deemed to be the acquisition by him of a service and any amount by which the amount paid or payable by him for the goods or services is increased by reason of his so obtaining credit shall be deemed to be paid or payable by him for that service.

(3) 'Services' includes any right (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce, and without limiting the generality of the foregoing, includes the rights, benefits, privileges or facilities that are, or are to be, provided, granted or conferred under —

(a) a contract for or in relation to —

- (i) the performance of work (including work of a professional nature), whether with or without the supply of goods;
- (ii) the provision of, or of the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction; or
- (iii) the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction;

(b) a contract of insurance;

(c) a contract between a banker and a customer of the banker entered into in the course of the carrying on by the banker of the business of banking; or

(d) any contract for or in relation to the lending of moneys,

but does not include rights or benefits being the supply of goods or the performance of work under a contract of service.

(4) Any materials supplied in connection with services shall be deemed to be a supply of goods within the meaning of this Act.

## Supply

*Cf. Trade Practices Act 1974 section 4B*

(5) 'Supplier' includes in relation to goods and services a person who supplies or agrees to supply the goods or services. 'Supply' when used as a verb, includes —

(a) in relation to goods — supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase;

(b) in relation to services — provide, grant or confer;

and, when used as a noun, has a corresponding meaning, and 'supplied' and 'supplier' have corresponding meanings.

(6) Where it is alleged in any proceeding under this Act that a person was a consumer in relation to the supply of particular goods or services, it shall be presumed, unless the contrary is established, that the person was a consumer in relation to the supply of those goods or services.

## Conditions and Warranties

2. (1) Except where otherwise provided whether a term in a contract of supply is a condition or a warranty depends in each case on the construction of the contract.

(2) A term in a contract of supply may be a condition even though it is called a warranty in the contract and a statement in a contract of supply to the effect that a term is not a condition does not of itself establish that the term should not be treated as a condition.

**Implied Undertakings as to title, encumbrances and quiet possession**

*Cf. Trade Practices Act section 69*

3. (1) In every contract for the supply of goods there is —

- (a) an implied condition that the supplier has a right to supply the goods;
- (b) an implied condition that the goods are free from any charge or encumbrance of which the person supplied is not aware when the contract is made; and
- (c) an implied warranty that the person supplied will have and enjoy quiet possession of the goods except so far as it may be lawfully disturbed by the supplier or by another person who is entitled to the benefit of any charge or encumbrance disclosed or known to the consumer before the contract is made.

(2) Where the seller is in breach of a condition under subsection (1) of this section in a contract for the supply of goods or an express term having a similar effect, the person supplied may not discharge the contract on the ground of the breach unless —

- (a) he has given notice to the supplier to the effect that he will discharge the contract unless the supplier, within a reasonable time, provides good title to the goods or removes the charge or encumbrance, as the case may be; and
- (b) the supplier has not, within a reasonable period after the notice was given, provided good title to the goods or removed the charge or encumbrance, as the case may be.

(3) In a contract for the supply of goods in the case of which there appears from the contract or is to be inferred from the circumstances of the contract an intention that the supplier should transfer only such title as he or a third person may have, there is —

- (a) an implied warranty that all charges or encumbrances known to the supplier and not known to the person supplied have been disclosed to the person supplied before the contract is made; and
- (b) an implied warranty that —
  - (i) the supplier;
  - (ii) in a case where the parties to the contract intend that the supplier should transfer only such title as a third person may have — that person; and
  - (iii) anyone claiming through or under the supplier or that third person otherwise than under a charge or encumbrance disclosed or known to the consumer before the contract is made, will not disturb the quiet possession of the goods of the person supplied.

**Supply by Description**

*Cf. Trade Practices Act 1974 section 70*

4. (1) Where there is a contract for the supply by a supplier by description, there is an implied condition that the goods will correspond with the description, and, if the supply is by reference to a sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

(2) A supply of goods is not prevented from being a supply by description for the purposes of subsection (1) by reason only that, being exposed for supply they are selected by the person supplied.

**Implied Undertakings as to Quality or Fitness**

*Cf. Trade Practices Act section 71*

5. (1) Where a supplier supplies goods in the course of a business, there is an implied condition that the goods supplied under the contract for the supply of the goods are of merchantable quality, except that there is no such condition —

- (a) as regards defects specifically drawn to the attention of the person supplied before the contract is made; or
- (b) if the person supplied examines the goods before the contract is made, as regards defects which that examination ought to reveal.



(2) Where a supplier supplies goods to a person in the course of a business and the person supplied, expressly or by implication, makes known to the supplier or to the person by whom any antecedent negotiations are conducted any particular purpose for which the goods are being acquired, there is an implied condition that the goods supplied under the contract for the supply of the goods are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the person supplied does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the supplier or of that person.

(3) Subsections (1) and (2) of this section apply to a contract for the supply of goods made by a person who in the course of a business is acting as agent for a supplier as they apply to a contract for the supply of goods made by a supplier in the course of a business, except where the supplier is not supplying in the course of a business and either the person supplied knows that fact or reasonable steps are taken to bring it to the notice of the person supplied before the contract is made.

#### Supply by Sample

*Cf. Trade Practices Act section 72*

6. Where in a contract for the supply of goods there is a term in the contract, express or implied, to the effect that the goods are supplied by reference to a sample —

- (a) there is an implied condition that the bulk will correspond with the sample in quality;
- (b) there is an implied condition that the consumer will have a reasonable opportunity of comparing the bulk with the sample; and
- (c) there is an implied condition that the goods will be free from any defect, rendering them unmerchantable, that would not be apparent on reasonable examination of the sample.

#### Meaning of Merchantable Quality

7. (1) In every contract for the supply of goods there is an implied condition that the goods are of merchantable quality.

(2) Goods of any kind are of merchantable quality if the goods tendered in performance of the contract are of such type and quality and in such condition that having regard to all the circumstances, including the price and description under which the goods are sold, a buyer with full knowledge of any defects, would, acting reasonably, accept the goods in performance of the contract.

(3) Without limiting the generality of subsection (2) goods of merchantable quality will remain fit or perform satisfactorily, as the case may be, for a reasonable length of time having regard to all the circumstances.

#### Supply of Services

*Cf. Trade Practices Act section 74*

8. In every contract for the supply by a supplier of service or services and materials there is an implied condition that the services will be rendered with due care and skill and that any materials supplied in connection with those services will be reasonably fit for the purpose for which they are supplied.

#### Implied Conditions in Supply of Services

9. (1) In every contract for the supply by a supplier of services where the person supplied expressly or by implication makes known to the supplier any particular purpose for which the services are required or the result that he desires the services to achieve, there is an implied condition that the services supplied under the contract for the supply of services and any materials supplied in connection with those services —

- (a) will be reasonably fit for that purpose; or
- (b) are of such a nature and quality that they might be reasonably expected to achieve that result, except where the circumstances show that the person supplied does not rely or it is reasonable for him to rely on the supplier's skill or judgment.

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**Supply of Services by Sample****10. In a supply of services —**

- (a) where the supplier shows to the buyer a demonstration of, or a result achieved by, services and the person supplied is induced by the demonstration or by the showing of the result to buy services of that kind; or
- (b) in which there is a term express or implied to the effect that the supply is a supply of services of the kind that are shown to the person supplied in demonstration, or that achieved a particular result shown to the person supplied there is —
  - (i) an implied condition that the services will correspond in nature and quality with the services shown in the demonstration or will correspond in quality with the services that achieved that result; and
  - (ii) an implied condition that the services will be free from any defect rendering them unfit for the purposes for which services of that kind are commonly bought that would not be apparent on reasonable examination of the services shown in the demonstration or the result achieved by services of that kind and of which the person supplied is not aware when the sale is made.

**Rescission of Contracts**

*Cf. Trade Practices Act section 74A*

**11. (1) Where —**

- (a) a supplier supplies goods in the course of a business; and
- (b) there is a breach of a condition that is, by virtue of a provision of this Act, implied in the contract for the supply of the goods, the person supplied is, subject to this section, entitled to rescind the contract by —
- (c) causing to be served on the supplier a notice in writing signed by him giving particulars of the breach; or
- (d) causing the goods to be returned to the supplier and giving to the supplier, either orally or in writing, particulars of the breach.

(2) Where a person supplied purports to rescind under this section a contract for the supply of goods by a supplier, the purported rescission does not have any effect if —

- (a) the notice is not served or the goods are not returned within a reasonable time after the person supplied has had a reasonable opportunity of inspecting the goods;
- (b) in the case of a rescission effected by service of a notice, after the delivery of the goods to the person supplied but before the notice is served —
  - (i) the goods were disposed of by the person supplied, were lost, or were destroyed otherwise than by reason of a defect in the goods;
  - (ii) the person supplied caused the goods to become unmerchantable or failed to take reasonable steps to prevent the goods from becoming unmerchantable; or
  - (iii) the goods were damaged by abnormal use; or
- (c) in the case of a rescission effected by return of the goods, while the goods were in the possession of the person supplied —
  - (i) the person supplied caused the goods to become unmerchantable or failed to take reasonable steps to prevent the goods from becoming unmerchantable; or
  - (ii) the goods were damaged by abnormal use.

(3) Where a contract for the supply of goods by a supplier has been rescinded in accordance with this section —

- (a) if the property in the goods had passed to the person supplied before the notice of rescission was served on, or the goods were returned to, the supplier — the property in the goods reverts in the supplier upon the service of the notice or the return of the goods; and
- (b) the person supplied may recover from the supplier, as a debt, the amount or value of any consideration paid or provided by him for the goods.

(4) The right of rescission conferred by this section is in addition to, and not in derogation of, any other right or remedy under this Act or any other Act, or any rule of law.

**Implied terms and conditions not to be excluded or modified**

*Cf. Trade Practices Act section 68*

12. (1) Any term of a contract for the supply by a supplier of goods or services to a consumer (including a term that is not set out in the contract but is incorporated in the contract by another term of the contract) that purports to exclude, restrict or modify or has the effect of excluding, restricting or modifying —

- (a) the application in relation to that contract of all or any of the provisions of this Act;
- (b) the exercise of a right conferred by such a provision; or
- (c) any liability of the supplier for breach of a condition or warranty implied by such a provision,

is void.

*Cf. Unfair Contract Terms Act 1977 (U.K.) section 13*

(2) Without limiting the generality of subsection (1) any term of a contract referred to in subsection (1) of this section that purports to, or has the effect of —

- (a) making the liability or its enforcement subject to restrictive or onerous conditions;
- (b) excluding, restricting or modifying any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy;
- (c) excluding, restricting or modifying rules of evidence or procedure;
- (d) excluding, restricting or modifying liability by reference to terms and notices which exclude, restrict or modify the relevant obligation or duty,

is void.

(3) But an agreement in writing to submit present or future differences to arbitration is not to be treated for the purposes of this section as excluding or restricting any liability.

(4) A person who contravenes a provision of this section is guilty of an offence punishable on conviction by a fine not exceeding \$10 000.