DEFINITIONS OF "KIND" AND "COURSE OF BUSINESS" IN SALE OF GOODS

Section 14 of the Sale of Goods Act 1895-1972 (S.A.)[1] deals with implied conditions of quality. Subsection 1 concerns a promise of fitness for a particular purpose of the buyer, whilst sub-s. 2 concerns the merchantable quality of the goods. Both subsections stipulate certain requirements which must be satisfied before a seller is bound.

The subject of this article is similar, but different, qualifications to do with the seller's business practices. Section 14(1) only applies if "the goods are of a description which it is in the course of the seller's business to supply". The corresponding requirement in s.14(2) is "where goods are bought by description from a seller who deals in goods of that description."

The meaning of these phrases was considered by the House of Lords[2] in *Christopher Hill Ltd. v. Ashington Piggeries Ltd.*[3] The key word in both phrases is "description".[4] If, for example, the contract is for an electric drill and the seller has previously sold only electric hair driers, can he escape from either part of s.14 by arguing that he has not previously sold goods of the contract description? The majority of the House of Lord answered with this test: if the seller has previously sold goods of *the same kind* as the contract goods, then the requirement is met for both subsections.[5]

Although the point was not in issue in *Ashington* it appears to be accepted by all the Law Lords that s.14 is only intended to catch people who sell in the course of a business.[6] This point is well established and the distinction between business and private sellers is borne out by a comparison of s.13 and s.14. Section 13[7] requires goods at least to conform to their description. Ensuring compliance does not require expertise and s.13 applies to all sellers. However, ensuring compliance with s.14 requires an assessment of fitness for a purpose, something about which a person in the business of selling particular goods might be expected to know more than his customer.

The net effect of *Ashington,* therefore, appears to be that each of those phrases contains two requirements:

1. The seller must previously have sold goods of the *same kind* as the contract goods.

2. The seller must have made the sale *in the course of his business.*

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1. A.C.T.: Sale of Goods Ordinance, 1954, s.19; N.S.W.: Sale of Goods Act, 1923, s.19; Northern Territory: Sale of Goods Ordinance, 1972, s.18; Queensland: Sale of Goods Act, 1896, s.17; Tasmania: Sale of Goods Act 1896, s.19; Victoria: Goods Act 1958, s.18; W.A.: Sale of Goods Act 1895, s.14.
2. Lords Hodson, Guest, Wilberforce and Diplock and Viscount Dilhorne.
3. [1972] A.C. 441.
4. In s.14(2) the second use of the word is the one referred to.
5. Lords Hodson and Diplock dissented with respect to s.14(2), saying that grammar and policy required that a seller was only liable under the subsection if he had previously supplied goods of the *contract* description.
6. For example, Lord Wilberforce said at [1971] A.C. 494: "... consideration of the preceding common law shows that what the Act had in mind was something quite simple and rational: to limit the implied conditions of fitness or quality to persons in the way of business, as distinct from private persons." See also a statement by Lord Guest to a similar effect at [1972] A.C. 473 and 474.
7. A.C.T.: s.18; N.S.W.: s.18; N.T.: s.17; Qld.: s.16; Tas.: s.18, Vic.: s.17; W.A.: s.13.

But what do "kind" and "course of business" mean? Only Lord Diplock attempts to define "kind". None of the Law Lords offers a definition of course of business, but then such a definition was not necessary to the issues before them.

Kind

It was easy enough in *Ashington* to say that animal feed was the same kind of thing as "King Size" mink feed, particularly where each contained herring meal. But to return to the example of the purchase of an electric drill from a dealer in hair driers: are they the same kind of thing? The Oxford Concise Dictionary defines "kind" as "class, sort, or variety". Lord Diplock's definition of "kind" contains the idea of a verbal category to which both goods can be assigned: " 'goods of a description which it is in the course of the seller's business to supply' can only mean that the seller does deal in goods of a kind that can be verbally identified by a description that is wide enough to include goods which are intended for use for the particular purpose for which the buyer requires the goods which are the subject matter of the contract".[7a]

To satisfy that test, it is only necessary to find a term wide enough to include the contract goods and the goods previously sold. So, in my example, since "electrical goods" or "electrical appliances" would arguably include both hair driers and drills, they could be said to belong to the same class, sort or variety. But what objective does such a requirement achieve? Lord Wilberforce would have been content to make s.14(1) apply where the sale was in the course of business. Although he agreed that "description" meant "kind" he saw that element as unnecessary.[8] His policy reason has much to commend it: why should a person who holds himself out as prepared to sell electric drills as part of his business escape liability for lack of fitness simply because he has not sold them before?

However, since the majority thought the statute required two elements, kind and course of business, surely these elements must be interpreted and applied so as to further the apparent objectives of the Act. It follows that some guidelines are necessary to decide what connecting factors are relevant in deciding whether two things belong to the same class or kind. The mere fact that a verbal umbrella can be found to cover both gives no guidance. Golf balls and ball bearings may be said to belong to the class of "spheres" but is there any apparent sense in a test which makes a seller liable for unfit golf balls because he has previously sold ball bearings?

The key to discrimination is to be found in the notion of reliance. Lord Diplock said reliance underlies both subsections.[9] He applied the idea when discussing kind: "By holding himself out to the buyer as a manufacturer or dealer in goods of that kind, he leads the buyer reasonably to understand that he is capable of exercising sufficient skill or judgment to make or select goods which will be fit for the particular purpose for which he knows the buyer wants them."[10] His Lordship is here explaining the function of kind. But his definition of kind (quoted above) is deficient in this respect: the fact that a "verbal identification" can be made between the contract goods and those the seller has previously sold does not necessarily make it reasonable for a buyer to rely upon the seller's skill.

7a [1972] A.C. 505.
8. [1972] A.C. 441, 495.
9. [1972] A.C. 441, 506.
10. [1972] A.C. 441, 505.

But it would, I argue, be reasonable for a buyer to rely upon a seller in the following circumstances. By previously selling certain goods, the seller has held himself out to reasonable potential buyers as having certain expertise. If he has sold hair driers, he may be taken to have said "I know about hair dryers", and because he has made this representation, it is reasonable in the scheme of the Act that he should be liable if a buyer who might reasonably rely upon the seller's professed skill suffers for lack of fitness of the goods. But the idea of the "kind" requirement is that a seller should not be liable simply because he is in business and induces a buyer to do business with him. So the test must be this: would a reasonable buyer expect that a seller of hair driers would be skilled in supplying suitable goods of the sort the buyer has in mind? In a s.14(1) situation, what the buyer primarily has in mind is a purpose. If the purpose is, for example, drilling sandstone, the test would be applied by asking "would a reasonable buyer expect that a seller of hair driers would be skilled in supplying goods fit for drilling sandstone?" In a s.14(2) situation, the buyer has in mind a description. If the description is "electric drill", the test would be applied by asking "would a reasonable buyer expect that a seller of hair driers would be skilled in supplying electric drills fit for one of the usual purposes of electric drills?"

It may be seen that by applying this test based upon the reasonable reliance of a reasonable buyer upon a profession of skill by a seller constituted by his past sales, sense can be made of the idea of "kind" – sense which, I argue, is lacking if the test of a verbal umbrella is used. The result of the proposed approach might well be to say that golf balls and ball bearings are not the same "kind" of things, even though they both fall into the class or kind of "spheres".

The Act does speak of "a description" suggesting that whatever definition of "kind" is used, it must be possible to apply a single expression to both things under consideration. It may be that the proposed test could lead one to conclude that two things were the same kind even though no "description" covering them both sprang to mind. This result would be consistent with the discriminatory objectives of the Act. But as shown above, lack of a word or phrase covering both things is not likely to be a problem because there is no limit on the width or generality of the description. Indeed it is this very characteristic which makes Lord Diplock's definition unsatisfactory.

Course of Business

How does one tell whether a sale was in the course of business or not? No test is provided in *Ashington,* but I suggest that the same principle of reliance can be used. Surely the mere fact that a man is in business cannot make him liable as a business seller. Businessmen are responsible for quality rather than mere correspondence with description because of the appearance of expertise they present by being in business which induces people to buy from them. In other words, a higher standard of responsibility is a price businessmen pay for being in a position to attract customers. It follows that the test of whether or not a transaction is in the course of business should not depend simply upon factors such as whether it took place on the business premises, but upon whether, in the circumstances of the actual case, there is anything which would cause a reasonable buyer to be induced to deal with the seller because of an appearance of business expertise. So if the buyer does not know the seller is in business before the sale, it should not be classed as one in the course of business. For example if a farm machinery seller sells his own tractor at home, then a sale to a buyer who did not know the seller's business would not be in the course of business but a sale to a buyer who did know would be. This is because it is reasonable in the latter case to think that a reasonable buyer with

that knowledge might in part be induced to buy because of reliance upon the seller's appearance of expertise.

Kind and Course of Business

It may be that in a particular case both elements are in dispute. That is, the seller may deny not only that the contract goods were the same *kind* of thing as he had sold before, but also that the sale was in the course of his business. What should be the relation between the two elements? The proposed "kind" test takes no account of any knowledge the buyer may have of the seller's business. It considers the reasonable buyer's reasonable reliance, generated by the reasonable buyer's presumed knowledge of the seller's past sales. The proposed "course of business" test contains a subjective element lacking in the "kind" test. The actual knowledge of the particular buyer is relevant here. If the actual buyer does not know the seller is in business at all, then a reasonable buyer lacking that knowledge would not rely upon the seller having any expertise. The two tests can thus be combined in this way: if the contract goods are shown to be the same kind as goods previously sold, a presumption is raised that a reasonable buyer would rely upon the seller. But the seller may rebut this presumption by showing that the actual buyer lacked the knowledge that the seller was in business.

The "course of business" test would thus act as a qualification of the "kind" test. However, it may be that the "course of business" test is wider: it might not be open to a seller to escape liability by showing that the buyer did not know the seller had previously sold goods of the same kind. The seller would have to show that the buyer in the circumstances would not have realised the seller was in business at all, so that no appearance of general expertise was present to tempt a reasonable buyer. The qualification of "course of business" upon kind is thus only partial.

Reliance

It will be seen that in s.14(1) the concept of reliance is used in both a subjective and an objective way. The subsection requires that the buyer make known to the seller the particular purpose for which the goods are required "so as to show that the buyer relies on the seller's skill or judgment ..." Although this reliance is easily inferred from the statement of the purpose[11] and the trend in modern cases has been to downgrade the role of actual reliance,[12] it is clear that this reliance remains subjective. That is, in theory it must be shown that the buyer actually relied. In practice the subjective element will usually work the other way: the seller may be able to show that in spite of stating a purpose, the buyer did not rely on the seller.[13]

But the reliance upon which the proposed tests of "kind" and "course of business" are based is *objective.* That is, we are not concerned with whether the actual buyer relied, but with whether, in the first test, a reasonable buyer would have relied and in the second test, a reasonable buyer with the actual buyer's degree of knowledge of the seller being in business, would have relied upon the apparent expertise of the seller.

Other Applications

The proposed tests would also be useful in applying acts other than the Sale of Goods Act.

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11. Per Lord Guest in *Ashington,* [1972] A.C. 441, 477.
12. See N.C.A. Franzi, "Merchantable Quality and Particular Purpose: Questions of Overlap" (1977) 51 *ALJ* 298, 302.
13. For example, because of the way he used a trade name: *Baldry v. Marshall* [1925] 1 KB 260.

(a) *Kind*

There is a tendency in legislation based upon a reform of the Sale of Goods Act, 1893 (U.K.) to delete the requirement of "kind". Thus the Trade Practices Act, 1974 (Cth.) imposes implied conditions of merchantability and fitness for particular purpose, in s.71(1) and (2), in certain cases of the supply of goods by a corporation to a consumer. In sub-s.(1), corresponding to s.14(2) in the Sale of Goods Act, there is no requirement that the goods be bought from a seller "who deals in goods of that description". And in sub-s.(2), corresponding to s.14(1) of the Sale of Goods Act, there is no requirement that the goods be "of a description which it is in the course of the seller's business to supply." Nor is there a requirement of positive or actual reliance, but the condition of fitness for particular purpose will not apply if the circumstances show that the consumer does not rely, or that it is unreasonable for him to rely, on the seller's skill or judgment. I suggest that even in the absence of a "kind" requirement, the definition of kind would be useful in applying s.71(2). One of the circumstances which might show that it was unreasonable for the buyer to rely might be that the seller had not previously sold goods of the same kind and therefore lacked the apparent expertise to supply goods fit for such a purpose.

The N.S.W. Law Reform Commission[14] has proposed changes to the Sale of Goods Act (N.S.W) which would dispense in both conditions relating to quality, with the need to show that the seller had previously sold goods of the same kind as the contract goods. However, in L.R.C. s.20 (fitness for particular purpose) a formula similar to that of the Trade Practices Act is used by which the seller would escape liability if reliance were unreasonable in the circumstances. Again, "kind" could be applied to help define such circumstances.

The Consumer Transactions Act, 1972-1980 (S.A.) implies, by s.8(4) and (6) respectively, conditions of merchantability and fitness for particular purpose in consumer transactions. Sub-section (4), concerning merchantability, has no "kind" requirement, but sub-s.(6), curiously enough, retains the same "kind" requirement as s.14(1) of the Sale of Goods Act. The definition of "kind" would thus be relevant in applying this Act. It would also be relevant under this Act in deciding whether the contract was a consumer transaction at all. By s.5, if a buyer who is not a corporation buys goods for less than $10,000, the sale will nevertheless not be a consumer transaction if the buyer trades in goods of "that description". If the object of this limitation is to deny protection where the buyer may be expected to have expertise as to fitness for purpose himself, then presumably the phrase "that description" means "that kind".

(b) *Course of Business*

If there is a tendency in modern legislation to follow Lord Wilberforce's advice and move away from a positive requirement that the seller have sold goods of the same kind as the contract goods, there is a tendency to replace such a requirement with an express requirement that the sale must be in the course of a business. The importance of a definition of this phrase is thus increased.

In the Trade Practices Act (Cth.) both s.71(1) (merchantable quality) and s.71(2) (fitness for particular purpose) are limited in their application to supply "in the course of a business", a phrase which is not defined. My proposed definition is based upon the impression of general expertise, and the consequent inducement to do business which a buyer would be given by the knowledge that the seller is in some sort of business. The difficulty with apply-

14. 1975 *Working Paper on Sale of Goods.*

ing that idea to the Trade Practices Act is that it only applies to sellers who are corporations. It is hard to see how a buyer could buy from a corporation (except perhaps where it was an undisclosed principal) without knowing that it was in business. What then can the object of this limitation on the liability of corporate sellers be? It must be to excuse them from liability in cases where they present an insufficient appearance of expertise to induce the particular buyer to do business with them. But since the case where the buyer does not even realise the seller is in business is virtually excluded, the phrase might be given meaning by saying that the corporate seller will escape liability where what he is selling is sufficiently different from what he normally sells to mean that the reasonable buyer would not expect him to be expert in providing fit contract goods. That sounds very like the definition of "kind", a requirement which the Trade Practices Act has attempted to discard. But a mid-point can be found if it is recalled that in my opinion any "course of business" requirement is related to a general inducement to do business, rather than an expectation of an ability to provide goods fit for a purpose. It may be that goods the seller has previously sold are not, within my definition, the same kind as the contact goods, but nevertheless sufficiently similar to give the seller an appearance of general expertise in that area sufficient to operate as some kind of inducement to the buyer to do business. For example, the seller of hair driers would not be expected to be expert in providing electric drills fit for purposes, and so the two goods would not be the same kind. However, the two kinds of goods may be sufficiently closely related to give the seller a general appearance of expertise and so induce the buyer of an electric drill to do business with him. This sale would then be in the course of a business. However, if the seller of hair driers sold a bulldozer, the fact that he had previously sold hair driers would act as no inducement and so the bulldozer sale would not be in the course of a business for the purposes of the Trade Practices Act.

The New South Wales Law Reform Commission implied that terms as to quality are limited to sales where the seller has sold "as a dealer". I suggest that this phrase means the same as "in the course of a business" and that my originally proposed definition could be usefully applied here. It could also be used to see whether the consumer provisions of the Sale of Goods Act (N.S.W.) apply. By s.62 a consumer sale is one which is, inter alia, in the course of a business.

Summary

Christopher Hill Ltd. v. Ashington Piggeries Ltd.[15] shows that a seller is only bound by the condition of fitness for a particular purpose in s.14(1) or that of merchantable quality in s.14(2) if

(a) he has previously sold goods of the same "kind" as the contract goods, and

(b) the sale is in the course of his business.

Because the higher standard set for business sellers than for private ones is based upon the reasonable reliance of the buyer upon the appearance of expertise of the seller constituted by the seller's past business activity, the tests for "kind" and "course of business" should be as follows:

(a) "kind": the contract goods are the same kind as the goods the seller has previously sold if a reasonable buyer would think that a seller of the previous goods would have the expertise to advise the buyer

15. [1972] A.C. 441.

on goods fit for his purpose or to judge the fitness of goods of the description the buyer has in mind for one of the usual purposes of such goods;

(b) "course of business": the sale is in the course of the seller's business if a reasonable buyer with the actual buyer's knowledge as to whether the seller is in business or not, might be induced to deal with the seller because of reasonable reliance upon the general appearance of expertise given by such knowledge.[16]

*Peter Kincaid**

16. As noted above, this definition would have to be narrowed for application to the Trade Practices Act.

* B.A., LL.B. (Brit.Col.), LL. M. (Syd.), Senior Lecturer in Law, Macquarie University, Sydney.