

tative; a corporation would be a trading corporation when its principal or main activities were trading activities. No doubt this gave the test of the Chief Justice a look of certainty not so obvious in the narrower test, of Menzies, J., based on the purpose of formation. However, the mathematical certainty so presented is more apparent than real. It would be difficult to find an adequate criterion by which to gauge when a particular activity became predominant. In the *St. George Case* mention was made of total revenue and profit.⁴⁶ However, what percentage of total revenue or profit would be required for an activity to become predominant? Presumably, if only two activities were undertaken, one trading and one non-trading, a corporation would be a trading corporation within s. 51(xx) if more than fifty per cent of profit or revenue were made in trading activities. Such a test would be difficult to apply to well integrated companies with many activities; and in the *St. George Case* (according to the majority decision) gave a distorted view of the corporation. Moreover, the test does not appear a particularly appropriate way in which to interpret the Constitution.

The basis of the test of Stephen, J. was the same as that of Barwick, C.J. but the method of characterisation need not be. If the relevant criterion were current activities to the exclusion of intended activities the method would be identical to that of the Chief Justice and attract the same problems: when does an "ancillary" activity become a "principal"⁴⁷ activity? The proper approach to Stephen, J.'s test could be to treat the two alternatives as not mutually exclusive. Both intended functions and actual functions could be considered. To the extent that intended functions would be similar to purpose this method would approach more closely that of Gibbs, J. than that of Barwick, C.J. Even so, the basis of the test of Stephen, J. would remain distinct from that of Gibbs, J.

Given the diversity of opinion offered in the case, it must be conceded that, overall, the test of Gibbs, J., possessing the twin virtues of broadness and a degree of certainty, which are lacking in the other judgments, is to be preferred.

JOHN W. CARTER, B.A., *Second Year student.*

IMPLIED WARRANTIES IN THE SALE OF GOODS

ASHINGTON PIGGERIES LTD. v. CHRISTOPHER HILL LTD.

CHRISTOPHER HILL LTD. v. NORSILDMEL¹

The Facts

The appellants, Ashington Piggeries, were mink breeders who contracted with the respondents, Christopher Hill, to supply a mink food called "King Size". It was the respondents' business to make and supply animal feeding compounds, but they had never previously compounded food for mink. The formula for the "King Size" was supplied by the appellants. One of the ingredients included in the formula was herring meal, which was supplied to the respondents by the third party Norsildmel, a Norwegian firm. A consignment of this herring meal was later discovered to be contaminated by a substance

⁴⁶ *Id.* at 27, 29 *per* Barwick, C.J.

⁴⁷ *Id.* at 40, 41.

¹ (1972) A.C. 441.

in the meal called dimethylnitrosamine (DMNA) which caused a fatal liver disease in mink. The DMNA was produced by a preservative in the herring, sodium nitrite, reacting with the fish when it was heated to make herring meal. It was found that DMNA in such small quantities was not fatal to other animals, although it was not proved that other animals had not been harmed by the contaminated consignment. The respondents brought an action against the appellants for the price of the "King Size" sold and delivered, and the appellants counterclaimed for damages in respect of the losses caused by the food. The respondents, in turn, sought an indemnity from the third party in respect of the appellants' counterclaim.

Ashington Piggeries v. Christopher Hill

The appellants, Ashington Piggeries, alleged that the respondents, Christopher Hill, were in breach of the conditions implied by ss. 13, 14(1) and 14(2) of the U.K. Sale of Goods Act, 1893 (ss. 18, 19(1) and 19(2) of the N.S.W. Sale of Goods Act, 1923). These provide, as far as relevant:—

13. Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description. . . .

14. Subject to the provisions of this Act, and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

(1) Where the buyer expressly or by implication makes 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, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose. . . .

(2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality. . . .

Section 13 of the U.K. Sale of Goods Act, 1893

(Section 18 of the N.S.W. Sale of Goods Act, 1923).

"Herring meal does not normally contain a poison," said Milmo, J.² "Did the presence of DMNA merely affect the quality of the herring meal or did it make a difference in kind? If the former, then there was no failure to deliver in accordance with the description. If the latter, there was."³ In this way Viscount Dilhorne summed up the question which was posed to the court in order to determine whether or not there was a breach of s. 13. The appellants, Ashington Piggeries, had argued that as the herring meal, which was an ingredient of "King Size", contained DMNA in sufficient quantities to injure mink, it did not correspond with the description "herring meal". The appellants had relied in their argument on the decision of Roche, J. in *Pinnock Brothers v. Lewis and Peat Ltd.*⁴ In that case, which involved the sale of East African copra cake, the goods were so adulterated with castor seed as to be poisonous to cattle. It was held that the goods supplied could not properly be described as copra cake and consequently the sellers, in an action by the buyers, could not rely on an exclusion clause in the contract.

The majority of their Lordships distinguished this case. Lord Hodson held that, unlike the castor seed in the copra cake, DMNA was not something added to the herring meal. He went on therefore to hold that "it is working the word

² (1968) 1 Lloyd's Rep. 457 at 481.

³ (1972) A.C. 441 at 484.

⁴ (1923) 1 K.B. 690.

'description' too hard to say that 'herring meal' was a misdescription. The herring meal was contaminated but no poisonous substance was added to it to make the description 'herring meal' erroneous."⁵ Lord Guest agreed, holding: "Herring meal is still herring meal notwithstanding that it may have been contaminated". His Lordship distinguished *Pinnock's Case*⁶ on the ground that DMNA was not "a substantial addition to the commodity described". If it were, then in his Lordship's opinion the combined substance—the goods plus the addition—might well not correspond with the description. Lord Wilberforce, however, did not adopt this distinction but stated rather that the test to be applied in determining when a "substance with a quality" became an "aggregate of substances" was one of a mercantile character such as men in the market would apply. His Lordship concluded that "buyers and sellers and arbitrators in the market, asked what this was, could only have said that the relevant ingredient was herring meal".⁷ His Lordship held accordingly that the seller had not failed to supply goods corresponding with the description. Lord Diplock held that the reaction of the preservative with the herring meal affected the quality of the meal, not its identity. Viscount Dilhorne alone held that there was a breach of s. 13. His Lordship admitted that in many cases it was difficult to draw a line between a difference in quality and a difference in kind, but he held that in the present case, where the distinction was between poisonous and non-poisonous herring meal, there was not merely a difference in quality but a difference in kind.

The distinction the majority draw between the present case and *Pinnock's Case* is indeed fine. In the latter, the substance added to the ordered goods was in itself toxic, while in the present case the sodium nitrite preservative when added to the herring was in itself quite harmless, and only became toxic on reaction with the amino acids naturally present in the fish. The difficulty that Viscount Dilhorne had with the distinction is understandable, as both processes may lead to a result equally dangerous to the animal ultimately consuming the food. However, the majority of the Law Lords seemed to be content merely to say that the meal in the present case was still herring meal, though herring meal "gone bad". In doing so, and in confining breaches of s. 13 in additive situations to those where the additive is in itself toxic, their Lordships were obviously happy to leave situations such as the present to be caught by the other sections of the Act.

Section 14(1) and S. 14(2) of the U.K. Sale of Goods Act, 1893

(Section 19(1) and S. 19(2) of the N.S.W. Sale of Goods Act, 1923)

The appellants also sought to bring their claim under s. 14(1) or s. 14(2). Both these sub-sections have provisions protecting the seller from liability in certain situations. In s. 14(1), the seller will not be liable for breach of the implied condition unless the goods "are of a description which it is in the course of the seller's business to supply." In s. 14(2), when goods are bought by description the seller will only be held liable under the sub-section where he "deals in goods of that description". Both these provisions were relied upon by the respondents, Christopher Hill. The Court of Appeal held that they were entitled to do so, and therefore that the buyers' actions under both sub-sections failed. The House of Lords reversed the decision of the Court of Appeal on both points. Their Lordships were unanimous in holding that mink food could be classed as goods which it was in the course of the sellers' business to supply. Lord Hodson held that the sellers' business was to make up compounds for animal feeding, and in making the compound "King Size" they were "only using raw materials which they regularly handled".⁸ Viscount Dilhorne held

⁵ (1972) A.C. 441 at 467.

⁶ (1972) A.C. 441 at 472.

⁷ (1972) A.C. 441 at 489.

⁸ (1972) A.C. 441 at 469.

that it was in the course of the sellers' business to supply herring meal. Lords Guest, Wilberforce and Diplock also held that the sellers' business was to make up compounds for animal feeding, and therefore that mink food could be termed goods "of a kind" which it is the sellers' business to supply.

In deciding whether, in accordance with s. 14(2), the seller was a person who "deals in goods of that description", their Lordships disagreed. Lord Guest and Lord Wilberforce both held that what the Act intended in both sub-sections was the same: "to limit the implied conditions of fitness or quality to persons in the way of business, as distinct from private persons".⁹ This being so, their Lordships held that, as in sub-section (1), a fair interpretation of the words "who deals in goods of that description" would be "who deals in goods of that kind". As the sellers had dealt in goods of that kind—animal feeding stuffs—before and as they admitted that the goods were not of merchantable quality, their Lordships held that there was a breach by the sellers of the implied condition in s. 14(2) of the Sale of Goods Act, 1893. Viscount Dilhorne agreed that the question was whether the sellers had dealt in goods of that kind, and, as he thought they had, he also held that there was a breach of s. 14(2).

The Court of Appeal and the majority of the House of Lords were, therefore both consistent in their treatment of the two sub-sections; the Court of Appeal gave a narrower interpretation to the word "description" in both, and the majority of the House of Lords gave it a wider interpretation in both. It is submitted, however, that there is considerable appeal in the reasons Lord Diplock gave for not adopting a uniform approach to these two provisions. His Lordship pointed out that "the key to both sub-sections is reliance—the reasonable reliance of the buyer on the seller's ability to make or select goods which are reasonably fit for the buyer's purpose, coupled with the seller's acceptance of responsibility to do so".¹⁰ Before the seller can decide whether to accept such responsibility he must be sufficiently informed by the buyer of what he is being relied on to do. In the situation where the buyer actually makes known to the seller the purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, the seller is told what he is being relied on to do and in what manner. In the case of the buyer merely ordering the goods from the seller by description, this "does not suffice to show the buyer's reliance on the seller's knowledge of the purposes for which goods of that description are normally used or of the characteristics needed to make them fit for any of those purposes".¹¹ Merely describing the goods only makes known to the seller a range of possible purposes. As in sub-section (1), making known the purpose or purposes for which the goods are required is not enough. As in sub-section (1) the seller must know that the buyer is relying on his skill or judgment. This is so, in his Lordship's opinion, even though it is not expressly required by sub-section (2) as it is in sub-section (1) because, as Lord Diplock stated, the key to *both* sub-sections is reliance. In the situation envisaged by s. 14(2) the only information which the buyer has given the seller about the purpose for which the goods are required is the description. The less information the buyer supplies to the seller about the goods the less obvious it is that he is relying on the seller's skill or judgment. Often when a buyer makes known to a seller, whose business it is to supply goods of the same kind, the purpose for which he requires the goods, the reliance will be inferred from this. Where however only a description is given the buyer must be more obvious in showing his reliance. It is no longer enough to go to someone whose business it is to supply goods of that kind: the buyer must go to someone who deals in the very same goods.

⁹ (1972) A.C. 441 at 494 *per* Lord Wilberforce. See also Lord Guest at 473 and 474.

¹⁰ (1972) A.C. 441 at 506.

¹¹ (1972) A.C. 441 at 506.

Lord Diplock, who is supported on the point by Lord Hodson, pointed out the injustice which could arise from the decision of the majority of the House of Lords on this matter. Section 14(1) and s. 14(2) clearly envisage two quite different situations. To apply a uniform rule to both sub-sections without closely examining its effect, as the majority of their Lordships appeared to have done, overlooks this fact. In the situation envisaged by sub-section (1), the seller is fully informed by the buyer of what is required of him: little more is needed for the seller to perceive the fact that the buyer is relying on his skill or judgment. In the situation envisaged by sub-section (2), the seller is not fully informed of what is required of him. All he has been told by the buyer is the description of the goods that are ordered. In such a situation the seller, knowing less about what he is being required to do and the manner in which he is to do it, could well be unsure of whether the buyer was relying on any special expertise which he may have. The situations are clearly not the same. To say that in both situations it is enough for the buyer to show his reliance by going to a seller whose business it is to deal in the same kind of goods is, it is submitted, quite unjust on the seller in the situation envisaged by sub-section (2). A different rule should surely apply to each situation. It is submitted, therefore, that, despite the result reached by the majority of the House of Lords on this matter, the issue is not a closed one, and it is open to the High Court of Australia to follow the approach taken by Lord Hodson and Lord Diplock.

All of their Lordships held, however, that mink food could be classed as goods "of a description which it is in the course of the seller's business to supply". Further, it was not disputed that the buyers did expressly make known to the sellers the particular purpose for which the goods were required, that is as food for mink. Nor was it disputed that the goods were unfit for that purpose. The next question which their Lordships had to consider under this issue, therefore, was whether the buyers had so made the purpose known as to show that they relied on the sellers' skill or judgment, and if so, to what extent.

Can the reliance be partial? In *Cammell Laird & Co. v. Manganese, Bronze and Brass Co. Ltd.*¹² the buyers ordered propellers to be made by the sellers to specifications supplied by the buyers. When certain propellers proved unsatisfactory the buyers brought an action against the sellers for breach of contract, and the sellers counterclaimed for the price of the propellers. Lord Wright held that under s. 14(1) the reliance on the seller's skill or judgment need not be total or exclusive. Where the buyer relies in part on himself and in part on the seller there will be an implied condition of fitness under s. 14(1) in regard to the latter part, and the seller may be liable for a breach of the condition. In the *Cammell Laird Case* the condition was that the propellers be reasonably fit to be used in the ships for which they were required, apart from a fault in the buyers' design. It was held that the fault lay not in the design but in the making of the propellers, and the buyers succeeded in their claim.

The present case was clearly one to which this decision could be applied. The buyers relied on the sellers to exercise the kind of expertise which they led the buyers to believe they possessed in preparing and selecting the goods. On the application of the *Cammell Laird Case* to the present situation all of their Lordships are agreed. However, in such a case of partial reliance, once the goods have been proved to be unfit for the purpose for which they were required, a difficult question of legal policy arises. That question is whether the onus lies on the buyer to prove that the defect was due to a characteristic which lay within the field of expertise of the seller to detect and avoid, or

¹² (1934) A.C. 402.

whether it lies on the seller to prove that the defect was due to a characteristic which lay within the sphere of expertise of the buyer. The field of expertise of the seller is to deliver ingredients which are not contaminated and are fit to be fed to animals including mink. The field of expertise of the buyer is that of specific suitability for mink. It was held by Lord Hodson and by Lord Wilberforce, with whom Lord Guest concurred on this matter, that the burden lay on the buyer to prove that the defect was due to some generally toxic ingredient in the food as opposed to an ingredient toxic only to mink. General toxicity had to be shown as the seller had disclaimed all knowledge of the special characteristics of mink food, a matter left to the buyer. If the mink had died because of some particular idiosyncrasy of mink, that is to say, because DMNA was a substance to which only mink were sensitive, the sellers would not have been liable. Once this general toxicity had been proved, however, and it was held it had, Lord Wilberforce held that the onus shifted to the sellers who then had to prove that the damage caused was due to some factor within the buyers' responsibility. In order to do this the sellers had to prove that the relevant consignment of herring meal, that is the one that killed the mink, could have been fed with impunity to all other types of animals, and was therefore only unfit to be fed to mink. This, his Lordship found, they had failed to do, and consequently the buyers, Ashington Piggeries, succeeded in their claim under s. 14(1).

The only other judge to deal with this matter was Lord Diplock who, with respect, appeared to misunderstand the decision of the other judges. His Lordship purported to agree with their decision, but then laid the entire burden of proof upon the seller. The particular purpose for which both parties knew the goods were required was as a feeding stuff for mink. The buyers proved that the goods were unsuitable for that purpose and that their unsuitability was due to an ingredient, herring meal selected by the sellers. His Lordship held that in this situation the sellers must "prove affirmatively that the herring meal was of a quality suitable for use in compound feeding stuffs for domestic animals and poultry other than mink."¹³ They failed to do so, and accordingly Lord Diplock held that the buyers were entitled to succeed in their action under s. 14(1) of the Sale of Goods Act, 1893. This, it is submitted, is a vastly different proposition to that laid down by the other members of the House of Lords.

Christopher Hill v. Norsildmel

The respondents, Christopher Hill, alleged that the third party, Norsildmel, were in breach of the conditions implied by ss. 13 and 14(1) of the U.K. Sale of Goods Act, 1893 (ss. 18 and 19(1) of the N.S.W. Sale of Goods Act, 1923). *Section 13 of the U.K. Sale of Goods Act, 1893*
(*Section 18 of the N.S.W. Sale of Goods Act, 1923*)

The contract of sale between the respondents and the third party included the clause:

QUANTITY & DESCRIPTION

About 300/350 (three hundred to three hundred and fifty) tons at sellers' option of 2240lb/1016 kilos of NORWEGIAN HERRING MEAL fair average quality of the season, expected to analyse not less than 7% protein, not more than 12% fat and not more than 4% salt.

The respondents argued that the whole of the above clause was "the description" of the goods within the meaning of s. 13. The third party, however, contended that the words "fair average quality of the season" were not part of the description, but rather, constituted a warranty of quality. All of their Lordships agreed that a term is not a part of the description unless it identifies the goods sold. Their Lordships also were unanimous in holding that

¹³ (1972) A.C. 441 at 509.

the words "Norwegian herring meal" were sufficient to identify the goods and that neither the words "fair average quality of the season" nor the expected analysis provision formed part of the description of the goods. As a result, the question whether there was breach of s. 13 by the third party was the same as that raised in the first appeal. Accordingly, their Lordships held, Viscount Dilhorne dissenting as he had done in the principal appeal, that there was no breach by the third party of s. 13.

Only Lord Diplock, with whom Lord Wilberforce expressed his agreement, dealt with the question of whether there was a breach of the express warranty that the goods be "fair average quality of the season". The respondents did not allege any breach in their pleading and his Lordship held that there was no breach, as " 'fair average quality of the season' relates only to such qualities as are apparent on an ordinary trade examination or analysis of the goods".¹⁴ The presence of DMNA he considered not to be such a quality.

General Condition 3

This read: "The goods to be taken with all faults and defects, damaged or inferior, if any, at valuation to be arranged mutually or by arbitration."

All their Lordships held that this clause did not exclude the third party's liability for breach of the implied warranty under s. 14(1) of the Act. In the words of Lord Hodson:

. . . general condition 3 is to be read as purporting to exclude the buyer's right to reject goods and defects but not as purporting to exclude his right to recover from the sellers compensation for any consequential damage which he may sustain by reason of acceptance of goods which thereafter turn out to be defective and cause loss or damage by reason of that defect.¹⁵

Lord Diplock held that the third party's liability "could only by negated or varied by express words".¹⁶ He further held there were no such words in general condition 3.

In other words, as a matter of construction the clause did not apply to the breach: all it said was that if the goods were defective the buyer would take them and pay for them. The clause did not exclude a subsequent claim for damages by the buyer against the seller.

Section 14(1) of the U.K. Sale of Goods Act, 1893

(Section 19(1) of the N.S.W. Sale of Goods Act, 1923.)

Under this heading there were, apart from the question of the exclusion clause, three issues to determine: firstly, whether any particular purpose for which the goods were required was made known by the buyers, Christopher Hill, to the sellers, Norsildmel, so as to show that the buyers relied on the sellers' skill or judgment; secondly, what the particular purpose was; and thirdly, whether the particular purpose included feeding to mink.

The majority of the House of Lords (Lord Hodson, Lord Guest, Viscount Dilhorne and Lord Wilberforce) held that the purpose for which the goods were required was compounding into feeding stuffs for animals, and that this was a particular purpose within the meaning of s. 14(1). In so doing they followed the previous decision of the House of Lords in *Henry Kendall & Sons (a firm) v William Lillie & Sons Ltd.*¹⁷ In that case the plaintiffs had about two thousand breeding pheasants which were reared in much the same way as chickens or turkeys. A large number of them died as a result of a poison in their food. It was found that an ingredient of their food, Brazilian ground nut extractions, was contaminated by a poison secreted by a mould growing on the ground nuts. The purpose for which they required the goods

¹⁴ (1972) A.C. 441 at 514.

¹⁵ (1972) A.C. 441 at 471.

¹⁶ (1972) A.C. 441 at 514.

¹⁷ (1969) 2 A.C. 31.

that the buyers made known to the sellers was compounding into food for cattle and poultry, and it was held that this was a particular purpose within s. 14(1). In so holding, Lord Morris of Borth-y-Gest stated: "There is no magic in the word 'particular'. A communicated purpose, if stated with reasonably sufficient precision, will be a particular purpose. It will be the given purpose."¹⁸

Lord Pearce agreed: ". . . a particular purpose means a given purpose, known or communicated. It is not necessarily a narrow or closely particularised purpose. . . ."¹⁹

In the present case, Lord Guest and Viscount Dilhorne, following *Henry Kendall & Sons' Case*, held that to stipulate that the herring meal be fit for compounding into animal feeding stuffs distinguished this purpose from the other main purpose for which herring meal might be required—use as a fertiliser—and so constituted a particular purpose within s. 14(1). They both then held that the sellers knew by implication the purpose for which the buyers required the goods. This only left the question whether there was reliance by the buyers on the sellers' skill or judgment. Lord Guest answered this by saying: "If the proper inference from all the evidence is that the third party knew that herring meal was used as food for mink then, in my view, it is sufficient to show the reliance required by the section."²⁰

At first instance, Milmo, J. made the finding of fact that the third party, Norsildmel knew of the practice of feeding herring meal to mink. The Court of Appeal, however, came to the opposite conclusion. They held that the third party had no reason to contemplate that this consignment of herring meal would be used as food for mink. Accordingly, they refused to hold that Christopher Hill had made known to Norsildmel that particular purpose so as to show that they relied on the skill or judgment of the Norwegian firm. The House of Lords unanimously restored the finding of fact of Milmo, J. (although Lord Diplock went on to hold that, in his opinion, this finding did nothing to alter the result of this appeal). As a result, Lord Guest and Viscount Dilhorne both found a breach of s. 14(1) by the third party. Lord Hodson did not discuss the "particular purpose issue": he merely upheld Milmo, J.'s reasoning and his conclusion.

The other majority judge, Lord Wilberforce, recognised that in applying the decision in *Henry Kendall & Sons' Case* to the present situation the court was, in fact, widening the effect of that decision. He is the only one of the majority who, in his judgment, recognised and tried to answer the objections of Lord Diplock on this issue. This is discussed in more detail below. Lord Wilberforce said that the purpose here, that of compounding into animal feeding stuffs, was a particular purpose within the meaning of s. 14(1). He held that the third party knew the purpose for which the goods were required, and also that the inference of reliance ought to be drawn in this case.²¹ His Lordship upheld the argument of the respondents, Christopher Hill, that, although feeding to mink was not explicitly stated as a purpose, such feeding was known to both parties as a normal use for herring meal (upholding the finding of Milmo, J.) and that it was sold by the third party without any reservation or restriction as to the use to which it might be put. Accordingly, the particular purpose made known by the buyers to the

¹⁸ (1969) 2 A.C. 31 at 93.

¹⁹ (1969) 2 A.C. 31 at 114.

²⁰ (1972) A.C. 441 at 477.

²¹ His Lordship's reason for drawing the inference of reliance was that the third party was a committee or co-operative of manufacturers of herring meal, so "the conclusion can hardly be otherwise than of reliance . . . to produce a product reasonably fit for the purpose". (1972) A.C. 441 at 496. This, it is submitted, is a slightly different approach to that of Lord Guest and Viscount Dilhorne, *supra*, who held that it was the knowledge of the possible use of the meal for mink by the third party that showed the reliance.

sellers for which the goods were required included feeding to mink. As the goods were not fit for this purpose there was a breach of s. 14(1).

It was Lord Diplock who, in his judgment, pointed out why the result reached by the majority was unsatisfactory. If goods are merely bought by description, then, as the courts have construed s. 14(2), the only condition to be implied as to the responsibility of the seller is that the goods should be reasonably fit for one of the purposes for which they may be required. The buyer may supplement or replace the description by identifying the particular purpose for which he requires the goods: he may do this expressly or by implication. If he does so then the responsibility of the seller is to supply goods that are reasonably fit for that purpose. The difficulty arises, when this purpose is expressed in terms that are very wide, and, in fact, includes many different purposes: when does this cease to be a particular purpose and become a range of purposes? This is the same as asking: when does a sale for a purpose become, because of the width of the expression used, a sale by description? The difficulty is apparent when considered in the situation of the present case. Christopher Hill bought from the third party herring meal which they made known to the third party to be for animal feeding stuffs. Is "animal feeding stuffs" a particular purpose within the meaning of s. 14(1) or is it part of the description of the goods, and so a range of purposes? If it is the former as the majority of the House of Lords held in the present case, then it must be fit for that purpose: feeding to animals, meaning all animals. Were the term "animal feeding stuffs" classed, however, as a range of purposes, then if there were any characteristic which might make the goods fit for one type of animal were that characteristic present, and fit for another type of animal were it not, then the goods need not be fit for both types of animals.

Accordingly, Lord Diplock held that the decision of the House of Lords in *Henry Kendall & Sons v Lillico* "goes to the utmost limit of what can be held to be a 'particular purpose' within the meaning of that section without amending the Act itself".²² His Lordship distinguished that part of the decision on two grounds. The first ground was that, in the present case, the buyer had not at any time, either expressly or by implication, made known to the third party that included in the range of purposes for which the herring meal was required was use as an ingredient for mink food. In *Henry Kendall & Sons v Lillico* use as an ingredient in food for pheasants was impliedly made known as a purpose by the buyer to the seller. In the present case the majority held that the buyer had impliedly made known the purpose of using the meal in mink food, as the seller knew that mink food was a normal use for herring meal, and that no restriction as to the use to which the meal might be put was made. Lord Diplock, however, held that this was not enough. He stated that the range of purposes which the respondents had made known to the third party "was limited to what (the third party's) agent in London had learnt from the respondents in the course of the previous dealings as to the nature of the respondents' business".²³ This included use as an ingredient in feeding stuffs for many kinds of domestic animals and poultry but it did not include use as an ingredient in feeding stuffs for mink. Consequently, Lord Diplock held that, even if the third party knew that use in mink food were a normal use of herring meal, because it had never been so used before in Britain, "use for that purpose can neither be nor form any part of the particular purpose for which the goods were required which was *made known by the buyer to the seller*, so as to give rise to the implied condition under s. 14(1) that they should be reasonably fit for feeding to mink".²⁴ In other words, His Lordship asserted that when the section says "the buyer expressly or by implication

²² (1972) A.C. 441 at 512.

²³ (1972) A.C. 441 at 512.

²⁴ (1972) A.C. 441 at 512.

makes known to the seller the particular purpose for which the goods are required", then the source of the seller's knowledge must actually be the buyer himself. It is not enough that the seller merely knows that the goods *may* be required for feeding to mink. It is on this point that His Lordship differs from the majority. Which point of view is preferred depends on which side one takes in the policy decision of whether the seller's responsibility in such matters should or should not be extended.

The second distinction that Lord Diplock relied upon one may think is less convincing, for, as his Lordship himself admitted, "the second distinction is fortuitous".²⁵ In *Henry Kendall & Sons v Lillico* the sellers knew of no characteristics of Brazilian ground-nut extractions which might render them unsuitable for feeding to pheasants that would not also render them unsuitable for feeding to all other species of animals and birds. The sellers, therefore, would not have been able, had they known that the food was to be for pheasants to exercise any skill or judgment in selecting food fit for all animals and birds. In the present case however, there were certain characteristics of Norwegian herring meal, in particular the fat content, which it was known "might render it unsuitable for feeding to mink though not unsuitable for feeding to other animals and birds".²⁶ Accordingly, had the third party known that the meal was required for feeding to mink, then they would have been able to exercise skill or judgment to select goods fit for this purpose, and "it is unlikely that, because of its high fat content, it would have selected the particular consignment of herring meal for delivery under the contract".²⁷ It is relevant to note here that, while herring meal to be suitable for mink should have a fat content of 5 per cent or less, the contract of sale between the third party and the respondents read that the meal be "not more than 12% fat", and in fact the particular consignment chosen contained 9.6 per cent fat. The respondents never made it known to the third party that they required the meal for mink food. As a result, Lord Diplock considered that the presence of this characteristic which distinguished herring meal fit for feeding to mink and herring meal fit for feeding to some other animals, was sufficient to show lack of reliance by the respondents on the third party's skill or judgment to supply goods fit for that purpose.

The distinction is indeed fortuitous, for fat content bears no necessary relationship to DMNA content. However, Lord Diplock was not so much concerned about what the characteristic which distinguishes this herring meal is. Rather, he was emphasising that, in his opinion, by not informing the third party that the meal *was* required for mink food the respondents were failing to enable the third party to exercise his full skill or judgment. By so doing the respondents were failing to show any reliance on this skill or judgment. In his Lordship's opinion, the mere existence of a distinguishing characteristic was enough: its relationship to DMNA was unimportant.

It is submitted that his Lordship's reasoning is unanswerable. It is only on the question of whether this characteristic, the fat content, was actually something within the third party's responsibility, that this distinction might be doubted. Amongst the evidence, in the *Nordic Handbook on Minkuppfödning* (Mink Rearing), it is stated:

By means of a long extraction process it is . . . possible to produce herring meal with a low fat content, similar to that of, for instance, cod meal. In Norway part of the herring meal is used for the feeding of mink.

It is quite conceivable that this "long extraction process" would be undertaken by the respondents as a matter within their responsibility. They would still require that the herring meal supplied to them by the third party

²⁵ (1972) A.C. 441 at 513.

²⁶ (1972) A.C. 441 at 512.

²⁷ (1972) A.C. 441 at 513.

was free from toxin. Lord Wilberforce, who was the only other judge to discuss this point, took this approach. If it is correct, then clearly the characteristic chosen by Lord Diplock—the fat content—is not a characteristic which distinguishes herring meal which is fit for feeding to mink from herring meal which is fit for feeding to other animals. While the reasoning in Lord Diplock's dissent would still apply, its application to the present case on this point would fail.

Where the responsibility to supply the ultimate consumer with meal with a low fat content may be reasonably believed to lie is a difficult question, and one beyond the scope of this article to answer. The application of this principle to the present situation is, moreover, not really important. The importance of both his Lordship's grounds for distinguishing *Henry Kendall & Sons v Lillico* is rather as applications of the reasoning behind his judgment. For, it is submitted, it is in Lord Diplock's judgment that the greatest contribution to the law concerning s. 14 of the U.K. Sale of Goods Act, 1893 (s. 19 of the N.S.W. Sale of Goods Act, 1923) is made. It is Lord Diplock who recognises and emphasises the basis of the two sub-sections: the fundamental part of them which makes them commercially operative, rather than merely legally expedient. The key to both sub-sections is reliance: the buyer's reliance on the seller. To have any meaning this reliance must be made known to the seller. Once this has been done the seller may fairly be bound by the implied conditions in the two sub-sections. To hold him so bound before the reliance has been adequately made known is unjustly to brush over the rights of the seller. Whether his Lordship carries the point too far, or whether his reasoning fails to apply to a certain fact situation is not really the important point. The greatest value of his Lordship's speech is in drawing attention to the relevance of this fundamental aspect of both sub-sections. Lord Diplock's speech should serve as a warning to future judges not to disregard this most important element in the section, for, it is submitted, it is only by observing it that the section will continue to make good commercial sense.

MATTHEW WALTON—Third Year student.