The Law Commission and The Scottish Law Commission

(LAW COM. No. 24)

(SCOT. LAW COM. No. 12)

EXEMPTION CLAUSES IN CONTRACTS

FIRST REPORT:

AMENDMENTS TO THE SALE OF GOODS ACT 1893

Laid before Parliament by the Lord High Chancellor, the Secretary of State for Scotland and the Lord Advocate pursuant to section 3(2) *of the Law Commissions Act* 1965

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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law other than the law of Scotland or of any law of Northern Ireland which the Parliament of Northern Ireland has power to amend. The Commissioners are:

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the Right Honourable William Ross, M.B.E., M.P., Her Majesty's Secretary of State for Scotland, and

the Right Honourable the Lord Wilson of Langside, Q.C., Her Majesty's Advocate.

PART I INTRODUCTION

1. This Report contains the results of the consideration by the Law Commission and the Scottish Law Commission of certain problems created by the practice of contracting out of the conditions and warranties implied by sections 12–15 of the Sale of Goods Act 1893; it also deals with certain matters related to the operation of those sections. The Report is accompanied by draft clauses designed to give effect to our recommendations.[1] It is part of a wider study of exemption clauses in contracts and a subsequent report will be concerned partly with exemption clauses in contracts for the supply of services and partly with certain problems common to contracts for the sale of goods and contracts for the supply of services.

2. While the Scottish Law Commission have participated fully in the deliberations and decisions on the subject matter of this Report, the Report is in some respects cast in the language of the law of England. For instance, "condition" and "warranty" are used throughout in their English sense. We are all agreed that in cases of this kind it is unnecessary to trouble the reader by using both the English and Scottish terminology.

3. Under Item II of the Law Commission's First Programme it was recommended that an examination be made of the following matters:

(*a*) the desirability of prohibiting, invalidating, or restricting the effects of clauses exempting from, or limiting liability for, negligence;

(*b*) the extent to which the manner of incorporating such clauses, if permissible, should be regulated;

(*c*) the desirability of any extension or alteration of the doctrine of fundamental breach.

Paragraph 12 of the Scottish Law Commission's First Programme proposed the examination, within the larger framework of the law of obligations, of standard form contracts and clauses purporting to exclude liability.

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[1] See Appendix A which includes, for convenience of reference, sections 12—15 and 55 of the Sale of Goods Act 1893.

4. Although initially it had been recommended by the Law Commission that the examining agency for the matters falling under (*a*) and (*b*) above should be an interdepartmental committee, it was eventually decided that the examination of the whole range of problems arising from exemption clauses (and not only from clauses excluding liability for negligence) should be carried out by the two Law Commissions with the assistance of a Joint Working Party.

5. The Working Party[2] was established in June 1966 with the following terms of reference:

> "To consider what restraints, if any, should be imposed on the freedom to rely upon contractual provisions exempting from or restricting liability for negligence or any other liability that would otherwise be incurred, having regard in particular to the protection of consumers of goods and users of services."

These terms of reference combine the expanded subject matter of Item II (*a*) of the Law Commission's First Programme with the relevant part of the Scottish Law Commission's proposed study of the law of obligations.

6. In August 1966 the President of the Board of Trade asked us for advice (under section 3(1) (*e*) of the Law Commissions Act 1965) with regard to the recommendations made in the Final Report of the Committee on Consumer Protection (the Molony Committee)[3] for amending some of those provisions of the Sale of Goods Act which import certain implied conditions and warranties into contracts for the sale of goods. It has been agreed with the President of the Board of Trade that we should consider those recommendations in conjunction with our study of the seller's right to contract out of the implied conditions and warranties imposed by sections 12–15 of the Act, and that the results of this combined task should be embodied in our Report to you. The Working Party have given us the benefit of their assistance and advice in dealing with these additional matters.

7. The Working Party started their task by issuing a general invitation to submit memoranda which was published in the national and legal press. In addition, a number of representative and other bodies were particularly invited to submit evidence. As a result the Working Party received much valuable information and comment from government departments, representative organisations of many kinds, nationalised and private enterprises and individuals and were greatly helped in their task of advising the two Law Commissions.

8. After giving careful consideration to the advice of the Working Party we published a joint document[4] containing a series of provisional proposals and a number of questions. We requested advice from members of our Advisory Panel on the Codification of the Law of Contract,[5] and in accordance with our usual practice we invited comment from a large number of organisations representing the practising and academic branches of the legal profession, industry

[2] The membership of the Working Party is shown in Appendix B.

[3] 1962; Cmnd. 1781.

[4] Law Commission Published Working Paper No. 18, Scottish Law Commission Memorandum No. 7. We refer to this document subsequently in this Report as our "Working Paper".

[5] See the Second Annual Report of the Law Commssion (Law Com. No. 12) paragraph 31 and Appendix II and the Second Annual Report of the Scottish Law Commission (Scot. Law Com. No. 7) paragraph 11 and Appendix I.

and commerce, the insurance and consumer interests, as well as from government departments and various bodies representing local authorities.[6]

9. We do not in this Report deal with contracting out of liability for negligence. Our Working Party concurred in the conclusion of the Molony Committee[7] that it was impracticable to make recommendations concerning the exclusion of negligence liability in contracts for the sale of goods (and in "guarantees" given, notably by manufacturers, in connection with the sale of goods) before carrying out a full examination of the problem in its impact on contracts for the supply of services We endorsed this decision of our Working Party which is still engaged on a comprehensive study of the problem.

10. We wish to record our great indebtedness to all members of our Working Party. Their expert advice and assistance have been and continue to be invaluable.

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[6] See Appendix C.

[7] Final Report, paragraphs 474-478.

PART II AMENDMENTS TO SECTION 12 OF THE SALE OF GOODS ACT 1893

Present effect of the section

11. This section contains an implied condition and two implied warranties, the effect of which can be briefly stated as follows:

(*a*) There is an implied condition that the seller has a right to sell or will have the right to sell when ownership is to pass.

(*b*) There is an implied warranty that the buyer will have quiet possession of the goods.

(*c*) There is an implied warranty that the goods will be free from any undeclared encumbrance in favour of a third party.

The condition and the warranties apply in all contracts of sale "unless the circumstances of the contract are such as to show a different intention". This qualification is in addition to the generally applicable provisions of section 55 whereby all the statutory conditions and warranties can be excluded by express agreement, or the course of dealing between the parties, or usage.

Views of the Molony Committee and of the Law Reform Committee

12. The Molony Committee did not consider that any amendment to the section was necessary.[8]

13. However, since the publication of the Final Report of the Molony Committee, the Law Reform Committee have published their Report on the Transfer of Title to Chattels, which included a proposal to amend the law of England relating to the buyer's rights under section 12.[9] The Committee found it unjust that where a seller's right to sell proves to be defective, the buyer should be able to recover the purchase price in full without any allowance being made for his use and enjoyment of the goods.[10] They recommended[11] that the buyer should be able to recover no more than his actual loss, giving credit for any benefit that he may have had from the goods while they were in his possession.

Consultations on Law Reform Committee's proposal

14. We were in agreement with the principle of the Law Reform Committee's recommendation and in our Working Paper canvassed a provisional proposal that section 12 should be amended accordingly.

15. This proposal met with a mixed reception. It received considerable support both from lawyers and from representatives of commerce, but a number of

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[8] Final Report, paragraph 451.

[9] Twelfth Report of the Law Reform Committee (Transfer of Title to Chattels) (1966; Cmnd. 2958) paragraph 36.

[10] See *Rowland* v. *Divall* [1923] 2 K.B. 500, referred to by the Committee. There the buyer of a car used it for several months before it was found to have been stolen; he nevertheless recovered the full price on the grounds of total failure of consideration without having to give credit for his use of the car before it had to be returned to the true owner.

[11] See n. 9 above.

telling points were made about its application in practice. To mention a few of these points:

(*a*) Is a dishonest seller (e.g., one who knew that he had no proper title but concealed that fact) to be treated on an equal footing with a seller in good faith?

(*b*) Should a seller, or at least a seller in good faith, be given an opportunity to perfect his defective title before the buyer can proceed to rescind the contract?[12]

(*c*) How is the financial value of the "benefit" derived by the buyer from the possession of goods to be calculated? In particular, should account be taken of the appreciation or depreciation of the value of the goods while in the buyer's possession?

(*d*) How is the benefit to be apportioned where the goods have passed through the hands of a chain of buyers?

Conclusions and recommendations for the amendment of section 12

16. Our conclusion is that, although we remain in agreement with the principle of the Law Reform Committee's proposal, the practical problems involved in its application are such that they cannot be satisfactorily dealt with by amendment of section 12 of the Sale of Goods Act until a study has been carried out of the rules relating to the law of restitution.

17. We have mentioned in paragraph 11 above that as the law stands at present the contractual provisions implied by section 12 can be ousted or varied either by reliance upon the special circumstances of the transaction (permitted by the opening words of the section itself) or under the general provisions of section 55. We take the view that both these gateways are too wide. We see no justification for excluding or varying the implied condition and warranties imposed by section 12, save where it is clear that the seller is purporting to sell only a limited title. Even in transactions dealing with limited titles the seller should not, we suggest, be allowed to exclude in their entirety the warranties of quiet possession and of freedom from charges or encumbrances in favour of third parties.

18. We accordingly recommend[13] that:

(*a*) Where the seller purports to sell only such right or title as he or a third person may have, there should be no implied condition that he has a right to sell the goods or that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass.

(*b*) Where the seller purports to sell only such right or title as he himself may have, he should be bound by an implied warranty that the buyer's quiet possession of the goods will not be disturbed either by the seller or by anyone claiming through or under the seller, otherwise than under a charge or encumbrance which was disclosed or known to the buyer before the making of the contract.

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[12] See *Butterworth* v. *Kingsway Motors Ltd.* [1954] 1 W.L.R. 1286 (sale of car, the subject of a hire-purchase agreement) where a week after the buyer had rescinded the contract, the defect in the original title was cured, but it was held that as soon as the buyer had given notice of rescission he had a vested right to the return of his money and nothing done by the seller afterwards could deprive the buyer of this right.

[13] See Appendix A, clause 1, p. 52.

(*c*) Where the seller purports to sell only such right or title as a third person may have, he should be bound by an implied warranty that the buyer's quiet possession of the goods will not be disturbed by either the seller or the third party, or by anyone claiming through or under them or either of them otherwise than under a charge or encumbrance which was disclosed or known to the buyer before the making of the contract.

(*d*) Whether or not express words or the circumstances show that the seller is purporting to sell only such right or title as he or a third party may have, the seller should be bound by an implied warranty that all charges or encumbrances actually known to him and not known to the buyer have been disclosed to the buyer before the making of the contract.

(*e*) No purported exclusion of the limited warranties suggested in propositions (*b*)-(*d*) above should be of any effect.

(*f*) In transactions other than those in which the seller is purporting to sell only such right or title as he or a third party may have, the condition and warranties set out in section 12 in its present form should be implied notwithstanding any provision to the contrary in the contract of sale.

19. In paragraphs 11–18 above we have, in dealing with proposals relating to section 12, also dealt with the question how far contracting out of the implied condition and warranties under that section should be permissible. The nature of our proposals is such that it would have been impracticable and confusing to the reader to have dealt separately with the problems of contracting out. This is not, however, the case with sections 13–15. In considering those sections we have thought it more convenient to deal separately in paragraphs 20–59 with amendments to the sections themselves and to leave for later consideration the questions which arise in relation to contracting out of the conditions and warranties implied by the sections.

PART III AMENDMENTS TO SECTIONS 13–15 OF THE SALE OF GOODS ACT

Section 13

Present effect of the section

20. Under this section, 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. Where the sale is by sample as well as by description, it is not sufficient that the bulk of the goods correspond with the sample; the goods must also correspond with the description.

Criticism of the section

21. The wording of this section can be criticised on more than one ground. First, it seems to add very little to the law since if goods are described in the contract it is clearly an *express* term of the contract that the goods should fit the description. However, the section serves a useful purpose by providing that correspondence with description is a condition and not a mere warranty. Since the courts in England have given the section a very strict interpretation, this means that even a minor departure from the contractual description will, subject to the *de minimis* rule, entitle the buyer to reject the goods, despite the fact that they are of merchantable quality and fit for the purpose for which they are bought within the meaning of section 14 of the Act.[14] Secondly, it has been argued that the term implied by section 13 is something more than a condition of the contract in that it represents a fundamental obligation of the seller, breach of which goes to the root of the contract and may deprive the seller of the protection of a clause which seeks to exclude his liability under section 13. As a result of the decision of the House of Lords in the *Suisse Atlantique* case[15] the position appears to be that while as a matter of law the parties are not precluded from excluding liability even for fundamental breach (or breach of a fundamental term), the court will be reluctant to give so wide an interpretation to an exemption clause, unless it clearly and unambiguously extends to a breach which is in effect fundamental. It has yet to be decided whether the requirement of correspondence with description must be regarded, in all cases, as a "fundamental term" of the contract[16] or whether the courts will adopt the alternative approach of looking at the gravity of the breach itself.

Conclusions and recommendations on amending section 13

22. Although, as a matter of theory, we readily recognise the existence of the problems outlined in the preceding paragraph, we find that in practice section 13 has caused little difficulty; indeed, it has proved to be a valuable instrument for the protection of the buyer. Accordingly, in line with the Molony Committee's approach,[17] we have no major amendment of the section to propose.

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[14] *Arcos, Ltd.* v. *E.A. Ronaasen and Son* [1933] A.C. 470.

[15] *Suisse Atlantique Société d'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361.

[16] See *Chalmers' Sale of Goods Act* 1893, 15th ed. (1967) p. 58.

[17] Final Report, paragraphs 453–455.

23. However, we see a case for removing one particular doubt concerning the ambit of section 13. There is high authority for the proposition that a sale may be a sale by description even though the buyer has seen the goods;[18] but there is as yet no authority on the point whether a sale in a self-service store effected without any words being spoken, is also classifiable as a sale by description. The uncertainty of the legal position was considered by the Molony Committee with some anxiety and prompted the following statement in its Final Report:

> "The shop counter across which the customer asks for what he wants has ceased to be the prominent feature of retail establishments it once was. The customer is now encouraged to make his choice unaided by a sales assistant. A very considerable proportion of consumer goods are selected from shelves in self-service stores or from open counters or racks in shops that still maintain some sales staff. It is questionable whether these sales are 'by description' and if not, the customer has no shred of right in law to complain of a defective purchase. This form of trading is on the increase and may well extend to a much wider range of article with the growth of discount houses."[19]

24. From these considerations the Molony Committee drew the conclusion that the present formulation of section 14(2) of the Sale of Goods Act, under which the condition of merchantable quality only arises on a sale "by description" is unsatisfactory, and that this requirement should be abandoned, at any rate in consumer sales. As will be seen presently in the context of our consideration of section 14,[20] we propose to go one step beyond the Molony Committee's proposal by recommending that the requirement of the sale being "by description" should disappear from section 14(2) altogether, and not only in relation to consumer sales.[21] It appears to us, however, that in view of the growing importance of self-service stores a useful purpose would be served if it were made quite clear by a suitable amendment[22] to section 13 that sales in such stores can rank as sales "by description".

25. Once this clarification has been carried out, the coverage of section 13 will be to all intents and purposes comprehensive. It will embrace all agreements to sell non-specific goods; all agreements for the sale of specific goods where the buyer has not seen them and is relying on their description; all sales of specific goods which the buyer has seen, if the goods are sold not merely as specific goods but also as goods answering a description; and the sale of goods displayed for self-selection by buyers. The expression "specific goods" is used above in the sense in which it is defined in section 62 of the Sale of Goods Act 1893, i.e., "goods identified and agreed upon at the time a contract of sale is

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[18] See, for example, Lord Wright in *Grant* v. *Australian Knitting Mills, Ltd.* [1936] A.C. 85 at p. 100:

> "It may also be pointed out that there is a sale by description even though the buyer is buying something displayed before him on the counter: a thing is sold by description, though it is specific, so long as it is sold not merely as the specific thing but as a thing corresponding to a description, e.g., woollen under-garments, a hot-water bottle, a second hand reaping machine, to select a few obvious illustrations."

[19] Final Report, paragraph 441.

[20] See paragraph 45 below.

[21] For a general comment on the reasons why the Molony Committee's recommendations were restricted to consumer sales, see paragraph 27 below.

[22] See Appendix A, clause 2, p. 52.

made". This comprehensiveness of the section is further enhanced by the wide construction which the decided cases have given to the word "description". It has been held to cover matters as diverse as ingredients, measurements, method of packing, quantity, quality, and the date of shipment; in fact, everything which constitutes a substantial element in the identity of the thing sold.

Effect of the repeal of section 17 of the Merchandise Marks Act 1887

26. For the sake of completeness, some mention should be made of the effect upon the function of section 13 of the Sale of Goods Act of the recent repeal of section 17 of the Merchandise Marks Act 1887. This section provided (among other things) that if a trade description (within the meaning of the 1887 Act as amended, notably by an Act of 1953) was applied to goods sold, the vendor was "deemed to warrant" that it was not a false description. Breach of this warranty entailed civil liability; but the statute allowed the vendor to contract out by delivering a written disclaimer to the purchaser at the time of sale or contract. The Molony Committee took the view[23] that although there was a large area in which section 13 of the Sale of Goods Act and section 17 of the Merchandise Marks Act overlapped, there was merit in allowing the two sections to co-exist in future; the main reason given was that the coverage of section 17 was wider, and that in practice one could readily conceive of cases in which a false trade description (for example, a labelled statement that a woman's dress was "washable") might mislead and cause financial loss to a consumer even though it was not part of the contractual description and not such as to render the article unmerchantable. Indeed, the Molony Committee, consistently with its recommendation that in consumer sales (other than sales by auction and sales of second-hand goods) no contracting out of section 13 of the Sale of Goods Act should be permitted,[24] proposed that the vendor's freedom to contract out of section 17 of the Merchandise Marks Act should be similarly restricted. However, the Molony Committee's proposals concerning section 17 of the 1887 Act have not been adopted; in fact, the Trade Descriptions Act 1968 has repealed the whole of the 1887 Act, and the erstwhile function of section 17 now falls to be performed in England by section 2(1) of the Misrepresentation Act 1967. Under this last provision the vendor in England is liable in damages whenever a false trade description amounts to a misrepresentation and the only defence open to the vendor is to prove that he had reasonable ground to believe, and did believe up to the time the contract was made, that the facts represented were true. Plainly, the coverage of section 2(1) of the 1967 Act is less wide than that of section 17 of the 1887 Act had been; false descriptions, not amounting to misrepresentation, or excusable on the above grounds, do not give rise to civil liability under the new statute. To this extent, section 13 of the Sale of Goods Act will have to do even heavier duty in future than it had to perform in the past, during the 75 years of its co-existence with section 17 of the Merchandise Marks Act.

Section 14

General comments

27. In practice this section has proved to be one of the most important provisions of the Sale of Goods Act. Most disputes arising from contracts for the

23 Final Report, paragraph 459.
24 Final Report, paragraph 453.

sale of goods concern defects or alleged defects in the quality of the goods supplied. In the general scheme of the Sale of Goods Act it is the function of section 14 to provide a basis for resolving such disputes in those cases where the parties have omitted to employ express words precisely describing the quality of the goods. The section is designed to fill gaps of this kind by providing that in certain circumstances there should be read into the contract either or both of two implied conditions, designed to deal with two different aspects of the general concept of "quality". These two aspects are, in the language of commerce, generally referred to as "fitness" and "merchantability". Taken together, the two implied conditions provided by section 14 represent a vitally important limitation of the time-honoured principle of *caveat emptor*. The question whether after seven decades, the present formulation of section 14 still caters adequately for the contemporary requirements of trade and commerce was closely examined by the Molony Committee and led to a certain number of proposals for amendment. It will be seen from the next following paragraphs of this Report that in our own examination of the present text of section 14 we are using the Molony Committee's proposals throughout as the starting-points of our review. The only general comment that we wish to make at this stage concerns the limitation of those proposals to consumer sales. As we understand the position, the Molony Committee's reason for so limiting their proposals lay in the interpretation they placed upon their own terms of reference. They thought it necessary to concentrate "on the truly significant areas of consumer need" and to refrain from scrutinising "the whole range of commercial life wherever it touches the consuming public. . .".[25] Our own terms of reference are wider, and as a result we are able to do what the Molony Committee felt themselves precluded from doing, i.e., consider amendments applicable to both consumer sales and business sales.

28. We recommend below certain changes in the effect of particular provisions of section 14. In considering what amendments are necessary to implement these recommendations of substance we have also considered the general structure of the section. Apart from proposing to move subsection (4) to section 55,[26] we recommend that in restructuring the section the provisions corresponding to the present subsection (2) should precede those corresponding to the present subsection (1). It seems more appropriate that provisions of more general application should precede those of less general application.

The opening words of section 14

29. The opening words of the section make it clear that except as provided in subsections (1)–(4) of the section and subject to the provisions of the Sale of Goods 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. . ."

These words, which embody the old English doctrine of *caveat emptor*, are cut down considerably by the exceptions which follow in subsections (1)–(3), and it may be thought at first sight that modernisation of the law might justify their deletion. But on closer scrutiny the balance of advantage seems to lie with the retention of the opening words, and in taking this view we are fortified by the views expressed by The Law Society in consultation. For one thing, the opening words are still of obvious importance in cases where the seller is not acting in the

[25] Final Report, paragraph 1.
[26] See paragraph 56 below.

course of business; for another, they have enabled the courts to hold (and it would be undesirable to disable the courts from doing so in the future) that the implied conditions of fitness and merchantability apply to all goods supplied "under" a contract of sale, even if such goods were not themselves the subject matter of the sale.[27] For these reasons we recommend no change in the effect of the opening words of the section.

Subsection (1) of section 14

Present effect of the subsection

30. As at present formulated, this subsection imposes an implied condition that the goods are reasonably fit for the buyer's particular purpose if—

(i) the buyer expressly or by implication makes known to the seller the particular purpose for which he requires the goods; and
(ii) he relies on the seller's skill or judgment; and
(iii) the goods are of a description which it is in the ordinary course of the seller's business to supply (whether he is the manufacturer or not).

There is, however, a proviso that where a specified article is sold under its patent or trade name, there is no implied condition as to its fitness for any particular purpose.

Recommendations for amending the subsection

31. The Molony Committee recommended two amendments to subsection (1). The first of these concerned the requirement that, in order to give rise to the implied condition of fitness, the goods must be "of a description which it is in the course of the seller's business to supply". The Molony Committee took the view that if a retailer sells an article in the course of business, he should be answerable for both its merchantability and its fitness for purpose, whether or not he has traded in the same line previously. "The test should be whether he sells by way of trade to the particular purchaser and not whether he makes a habit of trading in similar goods, which is a circumstance not necessarily known to the purchaser."[28] We associate ourselves with these arguments and recommend that the condition of fitness for purpose should be implied into all sales other than those in which the seller sells in a private capacity. In other words, the condition should be implied whenever the seller is acting in the course of a business[29] even though he may not be a dealer in goods of the relevant description.[30]

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[27] In *Geddling* v. *Marsh* [1920] 1 K.B. 688 it was held that the condition of fitness applied even to a returnable bottle in which mineral water was supplied; and in the case of *Wilson* v. *Rickett Cockerell & Co. Ltd.* [1954] 1 Q.B. 598 where a supply of "coalite" included a detonator which caused an explosion, the Court of Appeal, in rejecting the seller's argument that the detonator did not form part of the goods contracted for, held that for the purposes of section 14(2) the Court had to look at the entirety of the goods supplied under the contract.

[28] Final Report, paragraph 443; the arguments there advanced with reference to merchantable quality were adopted in paragraph 447 with reference to fitness for purpose.

[29] The Molony Committee, in the text quoted from paragraph 443 of their Final Report, suggested that the test should be whether the seller sells "by way of trade". We prefer the formula "in the course of a business" which, unlike the phrase "by way of trade", does not lend itself to a restrictive interpretation tending in the direction of making the seller's particular trade the applicable test. Such a restrictive interpretation would defeat our main purpose which is to ensure that the conditions implied by section 14 are imposed on every trade seller, no matter whether he is or is not habitually dealing in goods of the type sold.

[30] Thus, for example, where a coal merchant whose business it is to supply coal sells one of his delivery vehicles the condition of fitness should be implied; for the sale is part of the seller's business activities, even though he is not a dealer in vehicles.

32. The second amendment proposed by the Molony Committee concerned the proviso mentioned in paragraph 30 above, whereby the condition of fitness is negatived in the case of a sale of "a specified article under its patent or other trade name". Their position was stated as follows:

> "The readiness with which the Courts have implied 'reliance on the seller's skill and judgment' and rejected arguments that particular cases fell within the 'patent or other trade name' provision suggests that these limitations are somewhat unrealistic. We have no hesitation in saying that the 'patent or other trade name' provision ought to be deleted."[31]

33. In our Working Paper we adopted the Molony Committee's proposal, and our consultations on this point resulted in a wide acceptance of the proposed amendment, notably by the representative organisations of commerce and industry. The Law Society, however, favoured the retention of the proviso, mainly on the ground that it still had a useful function to perform in identifying (with greater certainty than the alternative test of reliance on the seller's skill or judgment) particular cases where the condition of fitness ought not to be implied. We have given careful consideration to this argument, but find ourselves unable to accept it. It is irreconcilable with the well-known decision of the Court of Appeal in *Baldry* v. *Marshall, Ltd.*[32] which is clear authority for the proposition that even where goods are sold under their trade name, if the buyer has relied on the seller's skill or judgment the implied condition that they should be reasonably fit for the purpose will apply. As one learned writer has put it, *Baldry* v. *Marshall, Ltd.*

> "has virtually interpreted the proviso out of existence since it is now plain that the only circumstances in which the proviso applies are circumstances in which the buyer has not relied on the skill or judgment of the seller".[33]

Taking the same view, we feel justified in continuing to associate ourselves with the Molony Committee's proposal for the deletion of the proviso.

34. On one important point we propose to go beyond the Molony Committee's recommendations. They proposed no change in the present requirement whereby the condition of fitness for purpose is implied only 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 and judgment".

They took the view that the words "the buyer relies on the seller's skill and judgment" sanctioned oral contracting out in the law of sale, and they suggested that this right of the seller should not be cut down. *A fortiori* the Molony Committee thought that it would not be fair to deny the seller the further facility of contracting out by written agreement; but they recommended that this facility should only be exercisable in a manner comparable to that provided by hire-purchase law, namely "in a written form delivered at the time of sale and accompanied by an explanation of its effect."[34]

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31 Final Report, paragraph 447.

32 [1925] 1 K.B. 260. See also *Bristol Tramways, &c., Carriage Co., Ltd.* v. *Fiat Motors, Ltd.* [1910] 2 K.B. 831.

33 Atiyah, *The Sale of Goods*, 3rd ed. (1966) p.70.

34 Final Report, paragraphs 448-449.

35. As we are taking the view that, at any rate in sales to private consumers, the seller should not be permitted to exempt himself in writing or orally from the conditions implied by section 14,[35] we have given careful consideration to the question whether the requirement quoted in paragraph 34 above ought not to be reformulated in a manner which would be more consistent than the present text with our own approach to the question of contracting out. For the reasons explained in the next following paragraphs we have come to the conclusion that there is indeed a case for an amended formulation. In our Working Paper we pointed out that in the light of the recent decision of the House of Lords in the *Hardwick Game Farm* case[36] it appeared to be the present legal position that where goods are purchased for their normal and obvious purpose, then, in the absence of anything to the contrary, the condition of fitness for that purpose is implied. It is implied even though the buyer has done nothing specifically to indicate that he requires the goods for that purpose, and has done nothing more to show that he relies on the seller's skill and judgment than to buy them from a seller trading in that type of goods. Only if the buyer requires the goods for some unusual or special purpose must he make this purpose known to the seller; and if he does so, then, in the absence of anything to the contrary, this may be sufficient to show that he relies on the seller's skill and judgment. Moreover, it suffices if the buyer has placed *any* reliance on the seller's skill and judgment even though he may have relied still more on his own or on that of a third party.

36. We originally thought that the legal position set forth in the preceding paragraph might be more accurately and clearly expressed if subsection (1) were re-worded in a manner which accomplished two purposes: first, to draw a distinction between the legal effect of a purchase for the usual purposes of the goods and the legal effect of a purchase for a special purpose; and secondly, to impose on the seller the burden of disproving the buyer's reliance on his skill and judgment.[37]

37. Our consultations tended to show that in reformulating the subsection we could dispense with applying a different principle to usual as opposed to special purposes. Moreover, we had perhaps gone too far in requiring the seller to prove *total* absence of reliance on his skill and judgment. We think that the seller's burden of proof could, without undue prejudice to the buyer, be lightened by providing an alternative to proving strictly that the buyer *had not* relied upon the seller's skill and judgment. We suggest that it should be sufficient for the seller to prove that in all the circumstances it was not reasonable for the buyer to rely upon the seller's skill and judgment. The effect of this alternative would be twofold: first, it would allow the seller to escape liability without proving that there was no actual reliance; secondly, it would enable the seller to protect himself by intimating to the buyer that he must not rely on the seller's skill and judgment.

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35 See paragraphs 77–95 below.

36 [1968] 3 W.L.R. 110 *sub nom. Kendall (Henry) & Sons (a firm)* v. *Lillico (William) & Sons, Ltd.*

37 The formula propounded in paragraph 17 of our Working Paper read as follows: "Where goods are bought from a seller acting in the course of trade or business, then, unless the circumstances are such as to show that the buyer places no reliance upon the seller's skill and judgment, there is an implied condition (in Scotland: warranty) that the goods shall be reasonably fit for the usual purpose for which such goods are bought or, if the buyer makes known to the seller that he requires the goods for some special purpose, that they are reasonably fit for that purpose."

38. The present text of section 14(1) refers to the fitness of the goods for the "particular" purpose for which they are required by the buyer. The English courts have tended to give a broad interpretation to the phrase "particular purpose" so that it covers not only goods purchased for a special or unusual purpose but also goods purchased for a normal or usual purpose.[38] We recommend that in its proposed reformulation the subsection should express this interpretation[39] and remove any doubt which may exist on the point in Scots law.

39. In interpreting section 14 as it stands at present, the English courts have related merchantable quality to the usual purposes for which goods are sold, and they have interpreted the phrase "particular purpose" (which occurs in subsection (1)) as including in appropriate circumstances a usual purpose.[40] To this extent the case law has created an overlap between subsections (1) and (2). We found on consultation that some lawyers took the view that this overlap should be eliminated. In particular, it has been suggested to us that subsection (1) should be restricted to fitness of the goods for a special purpose (in the sense of an unusual purpose) while subsection (2) would link merchantability to the usual purposes for which goods are sold. Although we readily concede the attraction of this approach as a matter of elegance, we think that the attraction is outweighed by the proven utility of the overlap in practice. As will be seen later in this Report,[41] we propose to maintain the present proviso to subsection (2) whereby, if a buyer has examined the goods, the implied condition of merchantability does not arise as regards defects which such examination ought to have revealed. It follows that if a consumer examines the goods but fails to detect defects which an examination properly to be expected of him would have detected, he will have no remedy under subsection (2); in the final result, he may be worse off than he would have been if he had not examined the goods at all. As the law stands, this danger to the buyer is mitigated by the present formulation of subsection (1): if, because of a careless or unskilful examination, the buyer's claim falls down on merchantability, he still has a remedy under subsection (1) if the goods prove to be unfit for the particular purpose which had been indicated by him. But in the vast majority of cases the buyer would lose this chance if the condition to be implied under subsection (1) were to be restricted to fitness for a special, i.e., unusual, purpose. This, from the point of view of consumer protection, would be a retrograde step, and accordingly in our proposals for the reformulation of subsection (1) we have avoided the use of any form of words which would so restrict the implied condition of fitness.

Subsection (2) of section 14

Present effect of the subsection

40. As at present formulated, this subsection imposes an implied condition that the goods are of merchantable quality if

(i) the goods are bought by description; and

(ii) they are bought from a seller who deals in goods of that description (whether he be the manufacturer or not).

[38] As to Scotland, see the comments of Lord Reid in the *Hardwick Game Farm* case (see n. 36 above) at [1968] 3 W.L.R. pp. 130–131.

[39] See Appendix A, clause 3, p. 54, where, as a result of the restructuring of section 14 as a whole, the provisions corresponding to the present subsection (1) appear in subsection (3).

[40] See *Preist* v. *Last* [1902] 2 K.B. 148.

[41] See paragraphs 47–48 below.

There is, however, a proviso that if the buyer has examined the goods, the implied condition does not arise as regards defects which the examination ought to have revealed.

41. The Sale of Goods Act contains no definition of merchantable quality, and this expression has been interpreted in different ways by the courts. In the case of *Cammell Laird & Co., Ltd.* v. *Manganese Bronze & Brass Co., Ltd.* Lord Wright said:

> "What subsection (2) 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 such goods would normally be used and hence were not saleable under that description."[42]

In the earlier case, however, of *Bristol Tramways, &c., Carriage Co., Ltd.* v. *Fiat Motors, Ltd.* Farwell L. J. said:

> "The phrase in s.14 subsection (2)" [i.e., merchantable quality] "is, in my opinion, used as meaning that the article is of such quality and in such condition that a reasonable man acting reasonably would after a full examination accept it under the circumstances of the case in performance of his offer to buy that article whether he buys for his own use or to sell again."[43]

In the recent *Hardwick Game Farm* case[44] the House of Lords had occasion to consider the meaning of the phrase though their Lordships' observations were *obiter*. Lords Guest, Pearce and Wilberforce expressed a preference for Farwell L. J.'s definition as amplified by Dixon J. in *Australian Knitting Mills* v. *Grant*[45] namely, the goods

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

though each of their Lordships placed a slightly different interpretation on this definition. On the other hand, Lord Morris of Borth-y-Gest preferred Lord Wright's approach, while Lord Reid was critical of all three definitions but suggested that with certain qualifications both Lord Wright's and Dixon J.'s were helpful.

Consultation on proposed definition of "merchantable quality"

42. The Molony Committee made no recommendation for the inclusion of a statutory definition of merchantable quality in an amended Sale of Goods Act; in fact, their Final Report was silent on this point. In this situation we have felt free to treat this issue as an open one and to canvass the question of a definition first within the framework of the Working Party and eventually in our Working Paper. It was the majority view of the Working Party that it is not satisfactory for an Act which purports to codify a whole branch of the law to use a technical

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[42] [1934] A.C. 402 at p. 430.

[43] [1910] 2 K.B. 831 at p. 841.

[44] See n. 36 above.

[45] (1933) 50 C.L.R. 387 at p. 418.

term the meaning of which is far from self-evident and becomes meaningful only when the case law is looked at. We found ourselves in agreement with the Working Party's advice that merchantable quality should be defined, and in our Working Paper we put forward a tentative definition[46] which was based on the test propounded by Farwell L. J. but also incorporated specific references to the price at which and the description under which the goods are sold. The resulting text was in effect an amplified version of Dixon J.'s definition which received the approval of the majority of the House of Lords in the *Hardwick Game Farm* case.

Recommended definition of "merchantable quality"

43. As a result of our consultations in which our tentative definition was widely criticised as being unduly complicated, we now feel justified in putting forward a somewhat shorter definition, based on the relatively simple concept of the fitness of goods for the usual purposes for which they are bought.[47] It appears to us that the new formula has the advantage of being more in line with the text of Article 33(1)(*d*) of the Uniform Law on the International Sale of Goods[48] and with one of the minimum standards of merchantability laid down in section 2–314(2)(*c*) of the U.S. Uniform Commercial Code.[49]

44. It is intended that the definition of merchantable quality should apply not only to section 14(2) but also to section 15.[50]

Extended coverage of the condition of "merchantable quality"

45. The Molony Committee expressed particular concern over the requirement stated in the present text of subsection (2) that the condition of merchantability only arises on a sale "by description", i.e., when the goods are identified by a written or oral description of their nature given by either party.[51] This requirement, they argued, did not fit the contemporary ways of retail establishments and notably of self-service stores; and accordingly the Molony Committee strongly urged that a condition of merchantability should arise on all consumer sales, no matter whether they were "by description" or otherwise. We find

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[46] The text of the proposed definition was as follows:
" 'Merchantable quality' means that the goods tendered in performance of the contract shall be 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."

[47] The proposed new definition reads as follows:
"Goods of any kind are of merchantable quality within the meaning of this Act if they are 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 their price, any description applied to them and all the other circumstances; and any reference in this Act to unmerchantable goods shall be construed accordingly." (See Appendix A, clause 7(2), pp. 60-62).

[48] Article 33(1):
"The seller shall not have fulfilled his obligation to deliver the goods, where he has handed over: . . .
(*d*) goods which do not possess the qualities necessary for their ordinary or commercial use; . . ."

[49] S.2–314(2):
"Goods to be merchantable must be at least such as . . .
(*c*) are fit for the ordinary purposes for which such goods are used; . . ."

[50] See paragraph 59(*c*) below. Accordingly it is suggested that the definition should be included in the interpretation section of the Act, namely section 62.

[51] Final Report, paragraph 441. The Molony Committee's main argument against the requirement of "description" is quoted in paragraph 23 above.

ourselves in full agreement with this proposal; indeed, as we have already indicated,[52] we would favour a more radical change, i.e., that the condition of merchantability should in all sales, and not only in consumer sales, cease to be dependent upon the sale being "by description".

46. The Molony Committee was no less dissatisfied with the requirement which, in the present text of subsection (2), makes the condition of merchantability dependent upon the seller being a dealer in goods of the type sold. In the context of subsection (1) we have already referred to the reasons given by the Molony Committee for their opposition to this requirement and stated our full acceptance of their arguments, which we adopt also in relation to subsection (2). In common with the Molony Committee we recognise that there are exceptional cases where somebody may order a particular article through a retailer knowing that the retailer does not normally stock that type of goods. The Molony Committee thought that even in such cases the consumer was entitled to get a merchantable article.[53] Once again, we propose to go one step further and make sure that every buyer from a business seller should have a right under the implied condition to receive goods of merchantable quality.

Effect of examination by the buyer

47. The Molony Committee did not wish to disturb the proviso to subsection (2) whereby the condition of merchantability does not apply as regards defects which ought to have been revealed on examination of the goods if the purchaser had in fact examined the goods. We agree with this view.

48. However, the present proviso to subsection (2) has been criticised on the ground that a purchaser who did not trouble to examine the goods at all was in a better position than a purchaser who was diligent enough to examine the goods but did not carry out his examination with sufficient care or skill. We have given serious thought to the question whether the proviso should be so amended as to exclude the condition of merchantability in regard to defects which should have come to light if only the purchaser had availed himself of whatever reasonable opportunity to examine the goods he may have been afforded. Such an amendment would restore the position to what it used to be at common law in both England and Scotland prior to the Sale of Goods Act; but it must be borne in mind that in those days consumer goods were relatively simple and unsophisticated, and the size of the retail trade was incomparably smaller than it is today. There are three additional arguments militating against the revival of the old common law rule: first, it would be difficult to define "reasonable opportunity", and anything short of a watertight definition would lead to uncertainty and litigation; secondly, the private consumer would be less well protected than he is today; and thirdly, commercial buyers in accordance with the usages of their particular trade are often not expected to examine the goods, even though they may have a reasonable opportunity to do so. It seems to us that on balance these arguments outweigh the criticism that can be legitimately levelled at the present formulation of the proviso, and accordingly we do not recommend an extension of the proviso on the lines which have just been indicated.

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[52] See paragraph 24 above.

[53] Final Report, paragraph 443.

Defects notified to the buyer

49. On the other hand, we see a case for extending the present proviso in another direction. We have recommended above[54] that merchantable quality should be so defined as to enable the court to take into account all the circumstances of the case, among other things the description applied to the goods. If, therefore, the seller gives to the buyer specific notice of a defect this would no doubt be taken into account in determining whether the goods were of merchantable quality. We think, nevertheless, that it would be desirable in the interests of both buyer and seller to provide that where the seller specifically draws the buyer's attention to defects in the goods, the implied condition of merchantable quality should not apply to such defects. This provision would give the seller a clear cut defence in law, even in those cases where under the proposals in Part V of this Report he is unable to protect himself by an exemption clause. On the other hand the provision would, when read together with the definition of merchantable quality, give a clear indication of the seller's obligation to the buyer where under the definition itself there might be room for doubt whether or not the description of the goods does in fact cover particular defects. We have in mind, for example, that on the sale of a used car, while its description as being of a specified make and year and as having done a particular mileage would in itself cover certain defects which a buyer could reasonably expect to find, there might be doubt whether a description of the kind indicated covered defects which, though serious, were not directly referable to the age and mileage of the car.

50. It has been suggested to us that on the model of section 18(2) of the Hire-Purchase Act 1965 and of the Hire-Purchase (Scotland) Act 1965, written notice of the defects should be required. This, we think, would be going too far. In the great majority of sales to private consumers there is no written contract, and in any event we see no cogent reason why, outside the area of hire-purchase and credit sales (where there are compelling reasons to insist on writing), the law of sale should invalidate notices given orally. On the other hand, we attach great importance for present purposes to the requirement that the notice of defects should be specific; a mere contractual provision purporting in general terms to put the buyer on notice of defects should not be sufficient.[55] Accordingly, we recommend that notice of specific defects should be required to preclude the implied condition of merchantable quality from applying to such defects.

Second-hand or substandard goods

51. The Molony Committee thought that the distinction between new and second-hand goods merited close attention in connection with merchantability, and we have taken the same view. As matters stand, the law of sale, unlike the law of hire-purchase, draws no distinction. The Molony Committee thought that it should, and that in the case of second-hand goods sold as such, as well as in the case of goods sold as shop-soiled or imperfect, the retailer should be able to relieve himself of liability for their merchantable quality. They argued that this concession was necessary because otherwise it might be im-

[54] See paragraph 43 above.

[55] Where, however, the description indicates that the goods are substandard, this would be a factor to be taken into consideration in deciding whether they are merchantable in the circumstances; see paragraphs 51–52 below.

possible to dispose of inferior or used goods; and they took this view notwithstanding the evidence that the used-car market was "a fertile source of consumer trouble".[56]

52. Although we agree that the law should not make it impossible, or indeed unduly difficult, to dispose of used or imperfect goods, our approach to achieving this result (and also the approach of our Working Party) has been different from that of the Molony Committee. They were thinking in terms of an exception to any rule which might disallow contracting out of the implied condition of merchantability; our own thinking has been in terms of so defining merchantable quality that it should not operate unfairly in the case of used or imperfect goods. We have tried to reach this result by incorporating in the definition of merchantable quality a specific reference to the description under which goods are sold; and we have linked this reference to another specific one pointing to the price of the goods. In our expectation this formula will put the honest seller of used or imperfect goods out of any danger of unfairness. If he has described the goods as used, second-hand, substandard or otherwise inferior or if this can reasonably be inferred from the fact that the price itself is patently lower than that at which new goods of that type are obtainable in the market, then the standard of fitness involved in the condition of merchantable quality will not be higher than is appropriate to the kind of used or inferior goods with which the particular transaction is concerned. A solution of this kind seems to us to be preferable to one which, even in transactions with private consumers, would allow the sale with impunity of goods which are so inferior in quality as to be unfit for any reasonable purpose. In our view even goods described as "second-hand", "shop-soiled" or "seconds" should measure up to some standard of fitness, and a seller who describes goods in such or similar terms should not be permitted to sell what is in effect useless rubbish.

Sales through auctioneers and other agents

53. Difficult problems arise where an auctioneer or other agent acting in the course of his trade or profession is selling goods on behalf of a private owner. The majority of the Working Party considered that sales of this kind should be treated as though the owner himself were engaged in trade. We canvassed this view in our Working Paper and found that it was highly controversial. Auctioneers stressed the point that most auctions were carried out on the instructions of private sellers; and it was also suggested that it would be unfair to treat such sellers on a par with traders since, in the majority of cases, private sellers had no expertise and no means of knowing about latent defects. Other critics thought it unfair that a private individual selling through an auctioneer or agent should be worse off than he would be by selling direct to a purchaser. Again, some of those whom we consulted were prepared to treat private sellers as traders if the sale was through an agent acting in the course of his trade, but were not convinced that the same considerations ought to apply to sales through auctioneers.

54. We see no case for treating auctioneers differently from other agents for the purpose of extending the range of sales upon which, as subsections (1) and (2) stand at present, the conditions of fitness and merchantable quality are imposed. Under the present section 14, no sale of goods by private individuals

[56] Final Report, paragraph 445.

(i.e., persons who do not deal in goods of that description) is subject to any implied condition of fitness or merchantability, even in cases where such individuals sell through an auctioneer or other agent.[57] This is an unsatisfactory situation, for a buyer purchasing goods otherwise than direct from the owner will frequently be ignorant of the status of the owner on whose behalf the goods are offered for sale and consequently be left in a state of uncertainty as to whether the conditions of section 14 do or do not apply. In many cases this ignorance may cause hardship since private individuals, purchasing from an agent who is patently engaged in trade, in practice rely on the agent's reputation, and should be entitled to assume that the goods they buy are merchantable and fit for whatever particular purpose the purchaser may have indicated. But this difficulty would not arise if the buyer was made aware that the sale was being effected on behalf of a private seller.

55. Accordingly, we propose that where a sale is effected through an agent who is acting in the course of business, the conditions of section 14 should be implied regardless of whether the seller is a "private" or a "business" seller; and that the seller should not be relieved of any liability arising under the implied conditions unless he is in fact a "private" seller and reasonable steps have been taken to bring this fact to the buyer's notice.

Subsections (3) and (4) of section 14

56. Subsection (3) makes it clear that an implied warranty or condition as to the quality or fitness for a particular purpose may be annexed to the sale by the usage of trade; in other words, meeting the specific requirements of sub sections (1) and (2) is not the only way in which certain standards of quality may become terms of the contract of sale even in the absence of express words. In its turn, subsection (4) clarifies the impact of express words upon any warranty or condition implied by the Sale of Goods Act (and not only upon the conditions implied by subsections (1) and (2) of section 14). What subsection (4) says in effect is that an express warranty or express condition may co-exist with an implied warranty or implied condition; and that express words operate to negative an implied warranty or condition only in case, and to the extent, of any inconsistency. In their present form neither subsection (3) nor subsection (4) has given rise to difficulties in practice, and no amendment was proposed by the Molony Committee. Our own position is the same; but, since subsection (4) is of general application, in the draft clauses attached it has been moved to section 55 where it logically belongs.

Section 15

Present effect of the section

57. This section deals with sales by sample, and begins by laying down the rule that a contract of sale becomes a contract of sale by sample only where there is a term in the contract, express or implied, to that effect. The mere exhibition of a sample by the seller to the buyer is not enough. In the light of some cases[58] which were decided as far back as 1814–1815 and have never been overruled, it would seem to be an additional requirement in England that if the contract is reduced to writing, the term by which the transaction is turned into a sale by sample must be included in the writing.

[57] Unless, presumably, the auctioneer or agent becomes a party to the contract—as well he may.

[58] *Meyer* v. *Everth* (1814) 4 Camp.22 (sugar described in bought note); *Gardiner* v. *Gray* (1815) 4 Camp. 144 (waste silk sold under written contract).

Consultation and conclusion

58. In our Working Paper we canvassed a possible amendment of section 15 to dispense with the requirement of a term in the contract, and more particularly with the additional requirement of making such a term part of any written contract. The advice we have received on consultation has not been favourable to such an amendment. It was thought that to make the seller liable under the conditions implied by subsection (2) merely because a sample had been exhibited might lead to unjust results; as for the requirement of writing, it has been urged upon us that while there was an obvious case for its reconsideration, this could better be done within the framework of a comprehensive study directed to the respective merits of written and parol evidence and not, incidentally as it were, in relation to one particular section of one particular statute. We readily concede the force of these objections, and accordingly we make no recommendation for amending section 15 on the lines tentatively suggested in our Working Paper.

59. Subsection (2) of section 15 imposes, in the case of contracts for sale by sample, three implied conditions, the effect of which, briefly, is as follows:

(*a*) The bulk of the goods must correspond with the sample.

(*b*) The buyer must have a reasonable opportunity of comparing the bulk with the sample.

(*c*) The goods must be free from any defect, rendering them unmerchantable,[59] which would not be apparent on reasonable examination of the sample.

None of this has caused any particular difficulty in practice and, in line with the Molony Committee's thinking, we have no amendments to propose.

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[59] Under our proposals this will be construed by reference to the definition of "merchantable quality" (see Appendix A, clause 7(2), pp. 60-62).

PART IV POSITION OF THIRD PARTIES

The present law

60. As our law stands, the donee or user of goods bought by someone else has in general no right of action[60] against the seller for any breach of condition or warranty, as there is no privity of contract between him and the seller. If such a person is injured or his property is damaged because the goods are defective, he may obtain redress only on proof of negligence on the part of the seller or the manufacturer. In certain circumstances this burden of proof is lightened by the doctrine of *res ipsa loquitur;* but even so there is no room for doubt that the law's strict observance of the boundaries between the fields of contractual and delictual liability can and does lead to anomalies and hardship in individual cases.

Proposed change for the benefit of "end users"

61. Our Working Party referred to us a concrete proposal for changing the present legal position. The gist of it can be simply stated: any user of goods sold, regardless of whether he is the actual buyer or a donee or a person otherwise entitled to use the goods, should have a direct remedy against the seller for any breach of the statutory conditions or warranties. Given such a remedy, users would no longer be dependent upon their ability to establish a claim in negligence.

62. We found ourselves in some sympathy with the proposal, and in our Working Paper explained its implications in some detail. We also stressed the point that a reform of this kind would not be a revolutionary innovation in the common law world. There are important lines of decisions in a number of states in the United States of America giving extended rights to users of goods. The decisions in this area of "products liability" give no clear guidance as to whether the liability is based on contract or tort or is *sui generis*. The point is dealt with in the Uniform Commercial Code of the United States of America as an extended contractual right.[61] We warned that a reform embracing the whole of our law relating to products liability would involve studies in depth, in the fields both of contract and tort, which could not be fitted into the framework of the present inquiry. However, we saw a possibility of an immediate though limited breakthrough, by extending the benefit of the seller's obligation to certain "third party beneficiaries"; but we thought that for the time being the extension should be limited to sales to private consumers. We therefore tentatively proposed that in such sales the benefit of the seller's obligations under sections 12-15 of the Sale of Goods Act should be extended to any person who may reasonably be expected to use, consume or be affected by the goods.[62] At the same time we canvassed a number of questions, concerning the *extent* of the relief, which would

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[60] But see section 3(1) of the Consumer Protection Act 1961.

[61] By section 2–318 of the Uniform Commercial Code the seller's warranty, express or implied, extends to any person who is in the family or household of the buyer or is a guest in his home, if it is reasonable to expect that such a person may use, consume or be affected by the goods. In seven states of the U.S., on the occasion of their adoption of the Code, the class of third party beneficiaries was so widened that the seller's obligation extends to "any person who may reasonably be expected to use, consume or be affected by the goods".

[62] Working Paper, paragraph 37.

require to be answered once the *principle* of granting relief to third parties was accepted. Should the operation of the principle be limited to cases where the third party suffered personal injury or should it be extended to cover damage to property, and possibly any other kind of financial loss? Again, should the third party, in the absence of personal injury or damage to property, be given the same right as the buyer has to reject the goods for breach of the statutory conditions and warranties, or to claim damages for their defects? We raised all these questions, as well as the related question of the likely impact of a change in the law on the cost of insurance, but did not purport to answer them; our main purpose was to solicit views.

Consultation and conclusion

63. The process of consultation disclosed widespread interest both in the principle of giving relief to non-purchasing consumers, and in the limits of the relief. Commentators specifically concerned with the consumer interest expressed wholehearted support for the proposed extension of the seller's obligations. Those expressing the viewpoint of insurers had doubts about the wisdom of adding to the insurance burden on the retailing section of commerce. Although some distinguished lawyers were strongly in favour of the proposed reform, the majority advised against introducing a fundamental change in the law by a side wind and urged upon us the need for further intensive studies of the whole range of contractual and delictual problems involved in reforming the law relating to products liability. We accept this argument to which, as indicated in the preceding paragraph, we referred in our Working Paper. In the final result, therefore, we are not pressing the tentative proposal we had put forward in our Working Paper. As however the results of the consultation have confirmed our view that the extension of the seller's liabilities to certain third parties is a live issue, we hope that as soon as practicable products liability in all its legal implications will be made a subject of a separate study.

PART V CONTRACTING OUT OF THE CONDITIONS AND WARRANTIES IMPLIED BY SECTIONS 13–15 OF THE SALE OF GOODS ACT

Introductory

64. The implied conditions and warranties imposed by sections 12–15 of the Sale of Goods Act were intended to import into contracts for the sale of goods certain rules of fair dealing, to be applicable in so far as the contract does not provide to the contrary. These rules regulate matters of essential importance to the parties—the buyer's right to a good title and to the quiet enjoyment of the goods free from encumbrances (section 12);[63] the correspondence of the goods with the description under which they are sold (section 13); the standard of quality that the buyer can justifiably expect the goods to reach (section 14); the conditions to be implied on a sale by sample (section 15). In many cases the contract is silent on one or more or all of these matters; and while the Act sets out to fill such gaps by providing implied terms, these are subordinated to the autonomy of the parties. This subordination is forcefully expressed by section 55 of the Act; it provides that any right, duty or liability arising under a contract of sale by implication of law may be negatived or varied by express agreement. It can also be negatived or varied by the course of dealing between the parties or by usage (if the usage be such as to bind both parties to the contract).

65. During the past few decades the habit of ousting the implied terms by express contractual provisions has become a widely practised technique of the law of sale at all levels of commerce; it has received a steadily growing impetus from the ubiquitous appearance of standard contracts on the economic scene. By the time the Molony Committee published their Final Report, they were firmly of opinion that the main criticism that could be levelled at the law of sale of goods concerned

> "the ease and frequency with which vendors and manufacturers of goods exclude the operation of the statutory conditions and warranties by provisions in guarantee cards or other contractual documents".

Admittedly, (so the Committee argued) contractual freedom was a principle of English law to which the law of sale of goods was no exception; and similarly, it was an established principle of the law that if a contract was put into writing and signed, the document was normally conclusive as to the terms of the bargain, whether or not it had been understood, or even read, by one of the parties. The Committee had reached the conclusion that the operation of these rules was capable of making grave trouble for the consumer; and they set themselves the problem whether this contracting out should be allowed to continue in consumer sales (in the sense of sales to those who buy for private use or consumption) or on other sales of consumer goods (in the sense of goods customarily bought for private use or consumption) these being the transactions relevant to the protection of the private consumer with which the Committee was concerned.[64]

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[63] For the reasons given in paragraph 19 above we have already dealt with contracting out of the condition and warranties implied by section 12.

[64] Final Report, paragraphs 426 and 432.

66. Our terms of reference are wider, and we cannot confine our inquiry to sales to private consumers or sales of consumer goods in the sense indicated in paragraph 65. We have to examine the problem generally and at all levels of trade, including sales by suppliers of raw materials or components to manufacturers; by manufacturers to wholesalers or other intermediate distributors; and by manufacturers or intermediate distributors to retailers. In this Part of the Report we shall deal first (in paragraphs 67–95) with three main problems which arise with respect to the concept and control of consumer sales. These are:

(*a*) whether exemption clauses purporting to exclude or restrict the implied conditions and warranties of the Sale of Goods Act should be controlled in sales to private consumers and if so to what extent;[65]

(*b*) whether such control should be extended to certain purchases effected in the course of a business, where the buyer is in no better position than a private consumer to protect himself against the imposition or the consequences of such exemption clauses;[66]

(*c*) whether legal provisions and in particular a definition of "consumer sale" can be satisfactorily formulated to give effect to any positive conclusions that may be reached with regard to (*a*) and (*b*) above.[67]

Secondly, we deal (in paragraphs 96–113) with the problem of control of business sales generally. Thirdly, we deal (in paragraphs 114–119) with auction sales as a separate topic. Finally, we deal (in paragraphs 120–123) with international sales.

Consumer sales: Molony Committee and Working Party proposals

67. The Molony Committee collected a great deal of evidence on the question whether the practice of contracting out was widespread in consumer sales. The results were stated in the following terms:

> "The answer is that it [i.e. the practice of contracting out] is universal in the motor vehicle trade, and general in respect of electrical and mechanical appliances. In all these cases it is associated with guarantees or 'warranties' as the motor car manufacturers term them; and is inspired, no doubt, by the fact that the goods are complex and mass produced. These classes of goods are comparatively expensive. The practice also appears in many other types of business conducted by means of catalogues or requiring an order form to be completed by the purchaser. In these no guarantee is given in return. Our conclusion is that it would be unwise to regard the contracting out practice as the prerogative of particular trades or to assume that it may not spread beyond its present limits."[68]

68. On the strength of the evidence which they had collected, the Molony Committee declared themselves compelled to view the practice of contracting out as a general threat to consumer interest, in the sense that "heavy and irrecoverable loss may fall upon the consumer who is unlucky enough to get a

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[65] See paragraphs 67–80 below.

[66] See paragraphs 81–84 below.

[67] See paragraphs 85–95 below.

[68] Final Report, paragraph 427.

defective article."[68] They also reported that on consulting a great number of bodies (these included trade associations at manufacturing and distributing levels, hire-purchase finance associations, university law faculties and the four bodies representing the legal professions of England and Scotland) the Committee had found "a very substantial measure of agreement" on the fundamental proposition that "the retail purchaser should not be exposed to 'contracting out' ".[69] After reviewing and rejecting a certain number of objections to a prohibition of "contracting out" (into the merits of which we need not go apart from stating our broad agreement with the Molony Committee's reasoning)[70] they found an overriding argument in favour of prohibiting "contracting out". The mischief was that this practice enabled well-organised commerce "consistently to impose unfair terms on the consumer and to deny him what the law means him to have".[71] On the whole, the consumer did not even know how he was being treated; but where he was alive to the position, he found it difficult and sometimes impossible to avoid submitting to the terms of business universally adopted, because he had no bargaining power of sufficient weight. This being the essence of the case for intervention in support of the consuming public, the Molony Committee endorsed the soundness of the case and accepted the need to ban "contracting out". They took the view that in order to be effective the prohibition must extend to the efforts of any person to relieve the retailer of liability, whether made before, at or after the moment of sale. The sanction was to be a denial of legal effect to any provisions relieving the retailer of his statutory liabilities. To this general ban there were to be two exceptions. First, in the case of second-hand goods, shop-soiled goods or otherwise imperfect goods sold as such, the retailer was to remain free to relieve himself of liability for their merchantable quality; and the same liberty was to apply to all goods sold by auction.[72] Secondly, the Committee thought that, within the ambit of section 14(1) of the Sale of Goods Act, in a case where the seller entertains and perhaps expresses doubts or admits incapacity to advise about the fitness of an article for the buyer's purpose, he should be entitled to convey his misgivings orally and thus relieve himself of the implied condition that the goods must be fit for the particular purpose indicated by the buyer.

69. The evidence collected by the Working Party showed that contracting out of the statutory conditions and warranties has continued to be a source of dissatisfaction to consumers. Representatives of the consumer interest have suggested that for the most part the situation has not changed in its essentials during the years which have elapsed since the Molony Committee's inquiry, although it is conceded that there has been a measure of improvement. In the motor vehicle trade contracting out, though still widespread, no longer appears to be "universal". Similarly it has been said that in respect of electrical and mechanical appliances there has been a less "general" tendency to introduce sweeping exemption clauses. In some cases it would seem that improvements have flowed from the pressure both of the Consumer Council and of other associations and groups representing consumers combined with the work of trade associations and the lead given by certain traders.

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[69] Final Report, paragraph 431.

[70] *ibid.* paragraphs 432–434.

[71] *ibid.* paragraph 435.

[72] *ibid.* paragraph 445.

70. It is necessary in considering this topic to distinguish between two aspects of the legal position. The first is the exclusion or limitation of the retailer's liabilities under the statutory conditions and warranties by means of "terms of business" set out in catalogues or other documents, notably those which purport to limit the rights of the purchaser to those conferred upon him by a manufacturer's "guarantee". The second aspect is dissatisfaction with particular provisions of manufacturers' guarantees, even in cases where in strict law the guarantee may not affect the consumer's rights against the retailer. Provisions which restrict the liability of the manufacturer under the guarantee by putting upon the purchaser the burden of paying for labour or transport costs, or which exclude consequential loss or, in some instances, purport to make the manufacturer the judge of the justification of a claim, are cases in point. These two aspects of the matter are interrelated to the extent that the consumer may be, or may believe that he is, limited in law to his rights under the guarantee.

71. Representations to the Working Party relating to both aspects of the problem were conflicting and not easy to evaluate. The evidence they received tended to show that with the exception of certain limited classes of products and types of transaction where there is a purported exclusion of the implied conditions and warranties under the Sale of Goods Act, it is not often that the retailer purports to exclude his liability by a direct and unqualified exemption clause embodied in his contract of sale with the purchaser. That is usually done indirectly by limiting the buyer's rights, or leading the buyer to believe that his rights are limited to those to which he is entitled under the manufacturers' guarantee. The task of evaluation was not made easier by the fact that consumers do not often resort to the courts to assert their rights and often do not take legal advice. In consequence many situations remain untested by judicial decisions.

72. Our Working Party found themselves in agreement with the Molony Committee's main proposal that in sales to private consumers any exclusion of the statutory conditions and warranties should be void. They were led to this conclusion partly by the evidence reviewed by the Molony Committee, partly by the evidence submitted to the Working Party, and finally by such relevant information as members possessed in their individual, professional, official or representative capacities. The Working Party were persuaded that there was general dissatisfaction among private consumers with the way in which the law of sale was affected by exemption clauses, and that there was an increasing demand for better protection. In particular, there was dissatisfaction with the manufacturers' guarantees that were widely regarded as insufficient compensation for those rights which private consumers believed, rightly or wrongly, they had surrendered in exchange for guarantees. Those forms of guarantee which had come to the notice of the Working Party very often excluded consequential loss or damage; this was a serious matter in the case of "high risk" products. Again, the frequent imposition on the customer of liability for the labour costs incurred in the repair or replacement of defective articles or components worked unfairly in many cases, particularly where the labour costs greatly exceeded the price of the replaced component itself. The Working Party were not inclined to attach undue weight to the fact that relatively few complaints by private consumers were coming to the attention of solicitors. This, the Working Party thought, did not mean that there were no real grievances and no injustice;

the paucity of litigation could be reasonably explained on the ground that in most cases relatively small sums were at stake, and that many a private consumer was deterred from taking legal proceedings by the high cost of litigation, the uncertainty of the outcome or the belief that under the terms of the guarantee he had no remedy.

73. Before reaching the conclusion that the Molony Committee's proposal for a general ban on exemption clauses in sales to private consumers was justified and entitled to support, the Working Party considered and rejected a number of other possible solutions. One suggestion was that there should be certain exceptions to the ban on contracting out—for instance, that the exclusion of consequential damage should be permissible, at least in certain specified classes of sale. This was rejected not only because of the difficulty of defining the exceptions, but also because it was felt that as between the retailer and private consumer the burden of liability under the implied conditions and warranties should fall upon the retailer.[73] Secondly, it was argued that, assuming that there was merit in the suggestion that the law should cater for exceptional cases, the only realistic alternative to an unqualified ban was a general test of reasonableness exercisable by the courts on the model of section 3 of the Misrepresentation Act 1967; but this solution was also rejected, on the ground that it would import an element of uncertainty into sales to private consumers whereas certainty and simplicity were of predominant importance in that area of commerce. A third solution would have followed the precedent of hire-purchase legislation by allowing contracting out in sales exceeding a specified price. This was rejected on the ground 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, and even if sales to corporate bodies were excluded (as they are in hire-purchase legislation) there would be anomalous distinctions between small businesses which were incorporated and others which were not.

74. The Working Party also discussed the exceptions which the Molony Committee had suggested to their proposed prohibition of contracting out,[74] and notably the problems posed by second-hand or imperfect goods and auction sales. They reached no unanimity on these points and decided by a majority that the prohibition of contracting out of the statutory conditions and warranties should be absolute and unqualified.

Sales to private consumers; provisional proposals for banning exemption clauses

75. Subject to one question (auction sales) on which we preferred to reserve our position pending further consultations (and which we treat as a separate topic in this Report),[75] we endorsed in our Working Paper the Working Party's proposal for a general ban on contracting out in sales to private consumers. In doing so, we were by no means unsympathetic to the Molony Committee's view that, in fairness, a seller who is genuinely dubious about his capacity to advise about the fitness of an article for the buyer's purpose should be entitled to contract out of section 14(1); and that in the case of second-hand or imperfect

[73] This general proposition is, of course, subject to the retailer's right to exclude, for the purposes of section 14(1), the buyer's reliance on the seller's skill and judgment; see paragraphs 34–37 above.

[74] See paragraph 51 above.

[75] See paragraphs 114–119 below.

goods sold as such, the retailer should be at liberty to contract out of section 14(2). But we thought, as we still do, that the law should take care of these meritorious cases not by exceptions to the general ban on exemption clauses in sales to private consumers but rather by a suitable reformulation of section 14(1) and a suitable definition of merchantable quality. It appeared to us that, on both of these subjects, the proposals put forward in our Working Paper, in terms which were in substance identical with those put forward in our present Report,[76] were adequate.

Consultation on the proposed ban

76. The proposal that in sales to private consumers any purported exclusion of the statutory conditions and warranties should be made ineffective by statute has received substantial support; but the support was by no means unanimous. As was to be expected, all the consumer organisations were wholeheartedly in favour of an unqualified ban; broad support came also from various representative organisations of commerce, including the retail trade; and outright opposition was confined to The Law Society, a distinguished firm of auctioneers and an individual contributor. But in between these two extreme positions there were a fair number of critical comments and alternative proposals. The suggestions included the restriction of the ban to selected fields where there was positive evidence of abuse; the provisions of facilities for the validation of exemption clauses by some such body as the Restrictive Practices Court; the mitigation of the ban by the introduction of a reasonableness test; exceptional treatment for second-hand or imperfect goods; preservation of the seller's right to exclude any reliance on his skill and judgment; and various points of detail.

Conclusions and recommendation on the proposed ban

77. Comments on our Working Paper led us to the same conclusions as the Working Party with regard to the extent and effectiveness in law of exemption clauses in sales to private consumers.[77] The practices of traders are neither static nor uniform and we will not attempt to define with precision the areas in which exemption clauses effective in law are imposed upon consumers.

78. It would be theoretically possible but, in our view, undesirable to limit the control of exemption clauses in sales to private consumers to particular trades or products where it could be shown that the extent of the present use of legally effective exemption clauses demanded the imposition of control. This would leave open the possibility for the less scrupulous among sellers of products not subjected to control to be one move ahead of the legislater. A minority of traders might take advantage of buyers ignorant of their legal rights. For example, a widely advertised manfacturer-to-consumer operation at "cut-prices" but with oppressive conditions in the small print might yield a quick "killing" before legislation—even subordinate legislation[78] could be brought into operation. Legislation to protect the private consumer must therefore be of general application.

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[76] See paragraphs 31–52 above and clauses 3 and 7(2) in Appendix A, pp. 54 and 60-62.

[77] See paragraphs 69–74 above.

[78] If a Minister were to be empowered to extend control by statutory instrument, there would inevitably be delay in ascertaining and considering the case for and against any such extension.

79. Furthermore, it is clear to us that there is widespread public misunderstanding and uncertainty about the purchaser's legal rights against the retailer where the manufacturer's "guarantee" is offered and accepted. It is our view that legislation, in addition to providing a remedy against effective and oppressive contracting out, can perform the important function of clarifying the legal position of the private consumer. Whatever rights a buyer may have against the manufacturer, and they may be valuable rights, it may be the local retailer rather than the distant (possibly overseas) manufacturer with whom the buyer can most conveniently discuss a complaint and perhaps come to terms, or, in the last resort, litigate his claim. In our view the rights of the private consumer against his seller under the statutory conditions and warranties should be expressly and clearly maintained and safeguarded by the law.

80. Accordingly we unanimously recommend that the statutory conditions and warranties implied by sections 13-15 of the Sale of Goods Act should apply to a sale to private consumers notwithstanding any term of the contract express or implied to the contrary.[79]

Extension of the ban to "consumers" other than private purchasers

81. In our Working Paper we invited comment on the view that as the need to protect private consumers was in part based upon the liklihood of their having insufficient ability to judge the quality of goods, there was a case for protecting any ultimate purchaser who does not deal habitually in the goods concerned. Thus when a farmer buys a tractor or a professional man buys a complex piece of office equipment he might be no better able to judge its technical qualities than a private purchaser can judge a refrigerator. In our Working Paper we pointed out that, if this approach were adopted, the proposed ban on exemption clauses would also cover a shipping company's purchase of a liner or an airline's purchase of an aircraft, unless the ban only operated under a given price limit. We concluded provisionally that it would be difficult to frame a satisfactory form of control on these lines. However, certain views expressed on consultation have led us to reconsider the arguments for extending protection to some at least of such "end-consumers" who do not qualify as private purchasers. We deal with the desirability of such an extension in paragraphs 82-84 below, and with the problems of definition in paragraphs 85-95 below.

82. It has been suggested to us that the difference between the position of a private purchaser and that of a purchaser who buys goods otherwise than for private use or consumption, is not solely or necessarily the better ability of the latter to judge the quality of the goods. In many cases it may be impracticable for him to detect latent or technical defects or even to make, with regard to such defects, a more favourable legal bargain than a private purchaser can. A more distinctive factor may well be the ability of the business purchaser to take into account the likelihood of defects, to reduce their incidence by arrangements for re-examination and servicing (which latter may be allowed for in the price paid) and to make suitable dispositions, by insurance and in his costings, to cover the risks which he has to bear.

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[79] As regards second-hand or imperfect goods and the permissibility of oral contracting out of section 14(1) see paragraph 75 above.

83. We have considered in the light of the evidence some of the types of case in which it might be appropriate to extend the proposed protection to purchasers buying otherwise than for private use or consumption. Obvious cases are motor cars, typewriters and electric heaters sold to doctors or members of other professions; here, as a matter of justice and common sense, the sale may, in all material respects, be indistinguishable from a sale to a private purchaser. The same may be true where purchasers engaged in a commercial or industrial business buy goods which, though incidental to the carrying on of the business (e.g., for lighting or heating the business premises), are not of a type which the purchaser acquires for resale or processing. Our attention has also been drawn to the position of local authorities whose purchases include items of small value or of a non-repetitive nature and where the commercial balance is in favour of the seller, either because of his stronger bargaining position or because checking the quality of the goods would involve the purchasing authority in disproportionate cost.

84. It is our conclusion that provision should be made to extend protection from exemption clauses to purchasers in the types of case illustrated in paragraph 83. There are two ways in which this could be achieved. One way would be to extend the definition of "consumer sale" so as to cover cases of this kind. Alternatively, if in accordance with the proposals favoured by some of us protection from exemption clauses were to be afforded to business sales generally by a test of reasonableness applied by the courts,[80] purchasers in the above-mentioned type of case would have the benefit of that protection. It is to the problems of definition posed by these alternatives that we now turn.

Definition of a "consumer sale"

Our provisional proposal

85. We found it necessary in our Working Paper to make a provisional proposal concerning the definition of a consumer sale; without such a definition our main proposal for the prohibition of exemption clauses in this area would have been lacking in precision. This matter had been fully discussed by the Working Party following a close examination of two alternative definitions put forward by the Molony Committee. The first of these was based on the proposition that a sale of goods, in order to be classified as a consumer sale, had to meet two criteria: first, the goods had to be of a type customarily bought for private use or consumption; secondly, the buyer had to be a person who was not buying for the purpose of resale or for letting on hire-purchase or exclusively for use or consumption in a trade or business. Furthermore, sales to public or local authorities were not to qualify as consumer sales.[81] The alternative definition suggested by the Committee was simpler: all sales made by way of retail trade or business, at or from any place whatsoever, were to be treated as consumer sales.[82]

86. In the light of the Working Party's discussions we came to the conclusion that neither of these alternative definitions was satisfactory. Although the Working Party had expressed their readiness to adopt the first definition, we thought it desirable to consider whether the definition should be modified in order to lessen the difficulties of sellers who might not be in a position to

80 See paragraph 108 below.

81 Final Report, paragraph 469.

82 *ibid.* paragraph 470.

know the purpose for which the buyer was acquiring the goods. As for the second formula, it was, we thought, not specific enough and was likely to lead to uncertainty in a number of cases pending the emergence of a firm judicial attitude to the question of what precisely was involved in the concept of "retail trade or business".

87. We recognised that the facts of business life were such that no legal definition, however sophisticated, could adequately cater for all borderline cases: perfection was out of reach. Accordingly, for the purposes of our Working Paper we put forward a tentative definition which, though not perfect, seemed to us to be workable. The definition was as follows:

> "A 'consumer sale' is a sale of goods which are of a type customarily bought for private use or consumption, by a seller acting in the course of his trade to a buyer other than a trade buyer.
>
> A 'trade buyer' is one who carries on or holds himself out as carrying on a trade in the course of which he manufacturers deals in or uses goods of that type, and the onus of proof that the buyer is a trade buyer shall rest with the seller.
>
> 'Trade' includes any trade, profession or business, and a government department or public authority shall for this purpose be deemed to be carrying on a business.
>
> 'Sale' includes an agreement to sell."

This formula, we thought, had the merit of making it immaterial whether the seller knows or is in a position to know the particular use to which the buyer proposes to put the goods. It would suffice for him to know (and that knowledge is relatively easy to come by) whether or not the buyer is or purports to be a trade buyer; and once this is established, it is immaterial whether the particular purchase is for a "private" purpose of the buyer. Although we placed the onus of proof squarely on the seller, we endeavoured to lighten his burden by a fairly wide definition of the term "trade buyer".

Consultation on our tentative definition

88. We have referred in paragraphs 82 and 83 above to the suggested extension, for the purposes of the proposed ban, of the concept of a "consumer sale". In addition we received a number of critical comments; some of these suggested verbal amendments; others urged that, on the model of the hire-purchase legislation, a price limit should be introduced into the definition.[83]

89. Under the cumulative impact of the comments we received on consultation, we have taken a fresh look at, and decided to abandon, the definition tentatively canvassed in our Working Paper. We have formulated two alternative definitions. One would be appropriate for a ban on contracting out in sales to private consumers and in certain business sales of consumer goods in circumstances of the kind illustrated in paragraph 83; this alternative is dealt with in paragraphs 90-94. The other definition would be appropriate if in addition to the ban on sales to private consumers, control of contracting out were to be applied in all other sales; this alternative definition is dealt with in paragraph 95.

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[83] For the reasons (with which we agree) why the introduction of a price limit was rejected by the Working Party, see paragraph 73 above.

"Consumer sale" to include certain business sales

90. We have carefully considered a number of ways in which a suitable definition of a "consumer sale" might give effect to the suggestions referred to in paragraphs 82 and 83, and our conclusions are reflected in the draft clause appearing in Appendix A to this Report under the heading "Alternative A".[84] It will be observed that, in addition to covering sales for private use and consumption, the new definition would operate to extend the proposed ban on contracting out to certain sales to persons buying for the purposes of a business. In this context "business" is widely defined[85] and includes any profession and the activities of any government department, local authority or statutory undertaker. In paragraphs 93 and 94 below we indicate how this proposed definition seeks to separate, or provide the means of separating, those business sales which are to be classed as consumer sales from those business sales to which the proposed ban on contracting out is not to apply and which are the subject of separate consideration in this Report.[86]

Analysis of the proposed extended definition

Consumer goods

91. The proposed definition is based upon the concept of "goods of a type ordinarily bought for private use or consumption". This concept excludes from the proposed ban any purchase of an article or product designed and normally bought for commercial use. In the nature of things there will be some borderline cases, but in our view they are not likely to be numerous.

Private consumers

92. Purchases by private consumers of goods of a type ordinarily bought for private use or consumption are protected by that part of the definition which classifies as a consumer sale the sale of any such goods to a person who does not buy or hold himself out as buying them in the course of a business.

Business buyers of consumer goods

93. The effect of the definition is to divide business buyers of consumer goods into two categories, namely, those who are in the business of dealing in or with the goods purchased; and those who are not. To the first category the proposed ban on contracting out does not apply. Comprised in this category are, first, those who purchase for the purpose of disposing of the goods by sale, hire or hire-purchase;[87] secondly, those who in the course of a manufacturing business consume or process the goods;[88] and thirdly, those who do not hire out the goods in the ordinary sense but make their use available as a service, e.g., a launderette.[89] Buyers in the second category are *prima facie* entitled to the benefit of the proposed ban, because they are not in the business of dealing in or dealing with the goods purchased. It is, however, recognised that business purchasers of consumer goods in the second category do sometimes buy them on a large scale or on trade terms, or otherwise in circumstances in which it may accord with

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[84] See p. 56.

[85] See Appendix A, clause 7(1), p. 60.

[86] See paragraphs 95–113 below.

[87] See Appendix A, new section 55(5)(*a*) (Alternative A) in clause 4, p. 56.

[88] See Appendix A, new section 55(5)(*b*) (Alternative A) in clause 4, p. 56.

[89] See Appendix A, new section 55(5)(*c*) (Alternative A) in clause 4, p. 56.

the interests of both buyer and seller that the contract of sale should modify or exclude one or more of the conditions or warranties implied by sections 13–15 of the Sale of Goods Act. To provide for such cases the draft clause confers a power on the courts to treat a consumer sale in the second category as though it were not a consumer sale—provided the court is satisfied that it is reasonable so to treat it.

94. The onus of establishing that a sale is not to be treated as a consumer sale is placed upon the party which is so contending. In practice, this will be the seller, whose exemption clause is challenged by the buyer. It will be recalled that in discussing one of the definitions put forward by the Molony Committee we referred to the difficulty of assuming that a seller would know the purpose for which a buyer acquires the goods.[90] At first sight it might appear that the extended definition now proposed is open to the same objection; but we suggest that on closer examination it does not impose an unreasonable burden upon the seller. The provisions whereby the ban on contracting out does not apply to business sales in which the buyer can be regarded as dealing in or dealing with the goods purchased, are so formulated as to correspond with industrial and commercial activities which in the vast majority of cases sellers will be able to identify without undue difficulty. Moreover, it is to be noted that a seller is placed outside the ambit of the ban not only where goods are in fact bought for one of the purposes referred to in paragraph 93, but also where they are sold to a person who holds himself out as buying for one of those purposes. In other cases of consumer goods being bought in the course of a business (e.g., electric light bulbs for lighting a shop or factory, or motor cars bought for sales representatives) it will be open to the seller to satisfy the court that having regard to the size and terms of the transaction and all other relevant circumstances it is reasonable for the sale not to be treated as a consumer sale. In practice, these will mostly be cases where the buyer receives a trade discount or other compensating benefit in consideration of his acceptance of an exemption clause.

"Consumer sale" limited to sales to private purchasers

95. If, as some of us advocate, a reasonableness test would apply to all sales other than sales to private consumers (in which latter category an absolute ban on contracting out would operate), a "consumer sale" could be defined rather more simply than in the manner explained in paragraphs 89-93 above and appearing as Alternative A in clause 4 in Appendix A. Such a simpler definition will be found under the heading Alternative B in clause 4 in Appendix A.[91] The essential difference between this definition and the definition appearing under Alternative A is that the former excludes, without qualification, from a "consumer sale" any sale to a person buying or holding himself out as buying goods in the course of a business. The reason for this difference is that all such sales will fall under the general control of business sales proposed in Alternative B.

Control of exemption clauses in business sales

96. The Molony Committee made no positive recommendations on this subject, since they regarded non-consumer sales (or, at any rate sales of non-consumer

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[90] See paragraph 86 above.

[91] See new section 55(5) and (6) in clause 4, p. 58.

goods) as being outside their terms of reference. They disagreed with the view which had been represented to them that the small shopkeeper, among others, purchased supplies and equipment for business use on so limited a scale and with so limited a business experience as to make his problems closely comparable with those of the domestic consumer. They conceded that the problems experienced by the small business might differ from those encountered by the larger concerns. But this, they thought, was only a difference in degree; the small shopkeeper's problems formed part of the pattern of commercial relationships arising between those who have elected to buy and sell as a matter of business, and as such must clearly be set apart from the problems of the purchaser who shops purely in a private capacity.[92] They reported that "The most substantial reservation to conceding that 'contracting out' should be prohibited was the trade plea that it [i.e., the prohibition] should not be confined to consumer business but should extend to all sales of consumer goods from the manufacturer downwards. It was said with some force that if the retailer was put at risk to the consumer he should have corresponding rights against his supplier as a matter of law, so that liability would be passed back to the person at fault, presumably the manufacturer".[93] The Molony Committee pointed out that "consumer goods" cannot always be identified as such until they are disposed of by retail, and are not infrequently worked on after leaving the manufacturer and before retail disposal. They recognised that these arguments might require further consideration: but they were firmly opposed to seeing the satisfaction of consumer need withheld "on account of the claimed necessity to adjust affected interests between other parties whom we judge to be fully capable of protecting themselves".[93]

97. In view of our wide terms of reference it fell to us to give the problem thus outlined by the Molony Committee that further consideration to which they referred. We had to begin by collecting evidence concerning the incidence of exemption clauses in business sales, and accordingly this subject was included among those on which our Working Party call for information.

The Working Party's views on business sales

98. The memoranda submitted to the Working Party showed that there was a practice of contracting out in a wide range of business sales. Contracts for the sale of sophisticated products (such as aircraft, computers and machinery of different types) frequently incorporated clauses excluding or restricting the statutory conditions and warranties. Similarly, where certain classes of goods (e.g., motor vehicles) are sold to retailers or dealers for the purpose of resale, it is common for the manufacturer to write exemption clauses into the contract. However, certain organisations representing large enterprises of the retail trade have pointed out that it happened but rarely that exemption clauses were imposed upon their members.

99. The evidence disclosed only a very small number of cases where unfairness or injustice resulted from these clauses. Such complaints as there were concerned the exemption clauses imposed upon farmers buying agricultural machinery

[92] Final Report, paragraph 3.

[93] Final Report, paragraph 432.

and equipment,[94] and in contracts for the supply of specialised equipment to local authorities. Apart from these instances, and a few more isolated cases, the evidence collected by the Working Party disclosed no strong demand for restraining the present freedom to contract out of the statutory conditions and warranties. In fact, a number of memoranda expressed considerable opposition to any interference with the freedom of contract in the non-consumer area.

100. Relying on this evidence and on the direct experience of a number of its members, the majority of the Working Party took the view that there was no justification for extending the control of exemption clauses to business sales. As, however, a sizeable minority held strong views the other way, it seemed right that, without putting forward any provisional conclusions of our own, we should, in our Working Paper, give a reasonably full account of the arguments which had been advanced for and against the extension of control to business sales, and that we should invite views on a certain number of questions on which, as we thought, the deliberations of the Working Party were not conclusive. There was a wide response to these questions, and in the next following paragraphs we will summarise the results of the consultation.

Business sales; comments on the Working Paper

101. On the principal issue whether there should be any control at all of exemption clauses in business sales, opinions were divided. The strongest plea for some control came, as was to be expected, from the organisations representing retailers and from the consumers' organisations; some of the bodies speaking for local authorities (as well as the Greater London Council itself) also favoured the principle of control. Academic lawyers were divided, but comment from representative organisations of the practising legal profession was strongly opposed to any form of control. On the other hand, those members of the higher judiciary who expressed opinions on this particular issue, as well as the Bar Association for Commerce, Finance and Industry, supported the control of exemption clauses in business sales. The majority of the comments received from trade associations speaking for industrial interests contended for maintaining the existing freedom of contract, and so did the Association of British Chambers of Commerce. But some of the trade associations representing particular commercial interests would accept some form of control, and the British Insurance Association and the National Farmers' Union expressed similar views. On the other hand, certain government departments, in their capacity as buyers, preferred to retain freedom to negotiate terms under which the risk of defects fell upon them in circumstances where it was advantageous for them to self-insure against such defects.

102. We have already noted the general opposition of retailers to restricting the control of exemption clauses to sales to private consumers, and we had many comments from a number of sources, which tended to show that in the event of the control being so restricted, retailers would find themselves in a vulnerable position. The Molony Committee's view that retailers were capable of protecting themselves,[95] while strongly supported by the Association of British Chambers

[94] The National Farmers' Union in its representations stated that so far as agriculture is concerned, "exemption clauses tend to be most savage, and to cause the greatest concern and hardship, with regard to the sale of agricultural machinery and equipment".

[95] See paragraph 96 above.

of Commerce, was not universally shared. It was put in issue by all the retailers' organisations, including the one speaking for the largest units in the retail trade. It was also strongly urged—among others, by a representative organisation of the insurance interest—that given the absence of any control of exemption clauses in business sales, the tendency would be for many more claims to be made upon retailers than upon manufacturers; and yet fairness required that the cost of replacing or repairing imperfect goods should rest with those from whom the defect originated, rather than with those who merely sold to the public. The danger of an increasing number of insolvencies in the retail trade (and these would ultimately put in jeopardy the consumers' chances of recovery) was also stressed. In the final result, the consultation disclosed a preponderant anxiety that the maintenance of complete freedom of contract above consumer level would be unfairly injurious to the legitimate interest of retailers.

103. The Working Party discussed in considerable detail the question what would be the most satisfactory way of controlling exemption clauses in business sales *if* there was to be any kind of control at all. In the centre of that discussion stood the proposal that the control should take the form of a general test of reasonableness on the lines of section 3 of the Misrepresentation Act 1967; the issue to be decided by the court would be whether, in all the circumstances of the case, it was reasonable for the seller to rely on the exemption clause. In our Working Paper we specifically canvassed opinions on this particular form of control. In analysing the replies, we have found that opinion was about equally divided. The consumers' organisations were generally in favour of a reasonableness test though the Consumers' Association stated that its first preference would be to see a general ban, at all stages of the distributive chain, on exemption clauses relating to goods which are of a type customarily bought for private use or consumption. A similar preference was expressed on behalf of the insurance interest. The majority of retailers' organisations declared themselves in favour of a reasonableness test, but other representative bodies of the commercial community, and notably the Association of British Chambers of Commerce, opposed it. We had no direct comment from the principal representative organisations of industry, but such comments as we received from industrial quarters indicated that industrial opinion was, broadly speaking, against a reasonableness test. Support for the idea of such a test came from the Bar Association for Commerce, Finance and Industry,[96] but other organisations of the practising legal profession which sent us comments were strongly opposed.[97] Academic legal opinion was divided. The main reason for the opposition, from whichever quarters it came, can be simply stated. 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 satisfactorily to advise their clients.

Reasonableness test in business sales; the onus of proof

104. Opinion was about equally divided on the subsidiary question whether, if there was to be a reasonableness test at all, the onus of proof should be on the seller or the buyer. Those who would place the burden on the seller

[96] The Association favoured the application of such a test to all sales.

[97] Although the General Council of the Bar of England and Wales expressed their opposition to any general test of reasonableness, they indicated that they would be prepared to give further consideration to such a test if it were limited to certain categories of transactions.

argued that as a matter of principle it was right that he who seeks to exclude a liability which the law imposes on him must accept the burden of justifying his position. The contrary argument took its stand on a different principle : a party to a contract who accepted its terms (in this instance, an exclusion or restriction of the other party's liabilities) must accept the burden of showing that his subsequent challenge of a contractual term is fair and reasonable.

Reasonableness test in business sales : *the time of its application*

105. The consultation revealed a clear conflict of opinion on the question whether, if a reasonableness test were to be adopted for business sales, the court should apply it as at the time when the contract was made, or in the light of all the circumstances including the events which have occurred since the making of the contract (as under section 3 of the Misrepresentation Act 1967). The balance of opinion was clearly in favour of the first of these solutions, mainly on the ground that it would, to some extent, mitigate the uncertainty which was inherent in any kind of reasonableness test. On the subsidiary question whether, if there were a departure from the precedent of the Misrepresentation Act, it would be desirable for the sake of consistency to amend section 3 of the Act the opinions expressed were inconclusive ; but it was noteworthy that a number of contributors were not satisfied that the exclusion of the conditions and warranties imposed by the Sale of Goods Act required the same legislative treatment as the exclusion of liability for misrepresentation.

Prior validation of exemption clauses in business sales

106. The Working Party was much exercised by a variety of proposals which favoured, in one form or another, the reference of exemption clauses to the Restrictive Practices Court (or some other tribunal containing a lay element) for the validation of such clauses in advance, with or without the combination of such procedures with scrutiny by the ordinary courts. They were greatly assisted in their consideration of these proposals by information and advice received from the Registrar of Restrictive Trading Agreements, and by a study of the Israeli Standard Contracts Law 1964. Eventually, our Working Paper canvassed a number of variants, including a procedure whereby the Registrar of Restrictive Trading Agreements would be empowered, on complaint or on his own initiative, to bring before the Restrictive Practices Court clauses which he regarded as unfair, and a possible combination of this procedure with facilities for manufacturers or other interested parties to have standard clauses brought before the Court for advance approval. The consultation disclosed support in differing degrees for each of the variants which had been canvassed. Such support came, notably, from some of Her Majesty's Judges, from a number of academic lawyers and from some of the organisations speaking for the retail trade. But the comments reflecting the views of industry and commerce were generally adverse. It was forcibly argued that to invoke the jurisdiction of the Restrictive Practices Court would be cumbersome, slow and expensive ; that it would be an inappropriate tribunal for the scrutiny of any contracts other than standard contracts ; and that, even in this limited field, the scrutiny would be inconclusive since experience showed that standard contracts were liable to frequent change. It was further argued that a possible combination of preliminary validation of exemption clauses by the Restrictive Practices Court with a power reserved for the ordinary courts to strike down

any clause on the ground that reliance upon it was unreasonable in all the circumstances, would operate as a strong disincentive to any resort to the Restrictive Practices Court. On balance, the views expressed in consultation were strongly against the idea of bringing the Restrictive Practices Court or any similar tribunal into the control of exemption clauses in business sales.

The position of the Law Commissions on the control of exemption clauses in business sales

107. After giving careful attention to the results of our consultation (and the results, as we have endeavoured to show, have been conflicting to a considerable extent), the members of our two Commissions find themselves equally divided on the question, fundamentally one of commercial policy, whether exemption clauses in business sales generally should be subjected to any kind of control at all ;[98] we all agree, however, that if there is to be a general control of business sales it should take the form of a reasonableness test. In the paragraphs which follow we set out the views on both sides. It seems convenient to begin by stating the position of those who are opposed to any form of general control in this area, and then to explain the arguments and the proposals of those of us who see a case for extending control to all business sales.

The case against general control in business sales

108. The arguments against a general control of exemption clauses in business sales are briefly as follows :

(*a*) Freedom of contract is a fundamental principle of our commercial law, and any interference with it must be justified by cogent evidence that in a given area of commerce this freedom has led to injustice or unfairness. The present inquiry has produced a preponderance of evidence in favour of prohibiting exemption clauses in sales to private consumers. There is a widespread demand for this method of consumer protection which cannot be ignored. There is no such demand for the protection of commercial buyers. The evidence has not gone beyond indicating that some commercial buyers are in need of better protection than that which the present law provides ; but they represent too small a minority to justify such a radical reform of the law as would be involved in extending, over the whole field of business sales, the legal control of exemption clauses. Control should not go beyond those classes of sales for business purposes which are covered by the proposals referred to in paragraphs 81—84, 90 and 93 of this Report and embodied in the draft clauses in Appendix A to this Report.[99]

(*b*) The deliberations of our Working Party and the consultation which followed the publication of our Working Paper have shown that there is a substantial body of opinion among those qualified to speak for industry, commerce and the practising branches of the legal pro-

[98] Those in favour of the control of exemption clauses in business sales generally are Mr. Justice Scarman, Mr. Gower, Mr. Marsh and Mr. Martin of the Law Commission and Professor Smith of the Scottish Law Commission. Those against are Lord Kilbrandon, Professor Anton, Professor Halliday, and Mr. Johnston of the Scottish Law Commission and Mr. Lawson of the Law Commission.

[99] New section 55(3), section 55(4)–(8) (Alternative A) in clause 4, pp. 56 and 58.

fession which is opposed to any form of control of contracting out in business sales. There is no justification for either ignoring or overriding these opinions.

(*c*) The argument that if the control of exemption clauses were confined to consumer sales, the retailers' section of trade would find itself in an unfairly vulnerable position, is unconvincing. It is contradicted not only by the Molony Committee's view that retailers are quite able to look after themselves,[100] but also by the view strongly held in important sections of the commercial community that the bargaining position of retailers is even stronger today than it was in 1962 when the Molony Committee reported. Nor is it merely a question of views ; account must also be taken of the realities of commercial life. Manufacturers and wholesale distributors largely depend on retailers for the commercial success of their goods ; it would not only be unfair (and there is very little evidence of unfairness) but also contrary to the best interests of manufacturers and wholesale distributors if the retailer were left to bear full and final liability for defects for which he, the retailer, is not responsible in fact or in the eyes of the consuming public. But there is no need for the law to interfere. It is in the best interests of manufacturers and wholesalers to frame and operate their contracts with retailers in a fair and reasonable way.

(*d*) The question whether there should be any form of control at all is bound up with the question of what kind of control would be feasible. Of the various proposals which were canvassed in the Working Party and on consultation, the only one to receive a fair amount of support was the introduction of a reasonableness test similar to that enacted in section 3 of the Misrepresentation Act 1967. Legislation on these lines would largely destroy that certainty as to the rights and liabilities of the parties which is all-important in commercial contracts. The provision of guide-lines for the assistance of the court would in all probability reduce the uncertainty, but not to such a degree as to make it possible for practising lawyers to advise their clients with any confidence with regard to the ultimate fate, at the hands of the courts, of such exemption clauses as in their clients' view, sound commercial considerations required to be inserted into their contracts. The inevitable result would be an undesirable amount of litigation. Some lawyers familiar with the situation in Germany, where exemption clauses are subject to judicial review through the instrumentality of a test of "good faith" (which, in essence, is a reasonableness test), state that the uncertainty inherent in this part of the law has proved to be a fertile breeding ground of litigation. It is important to avoid the emergence of a similarly unsatisfactory situation in Great Britain.

(*e*) The prohibition of exemption clauses in business sales would cause both manufacturers and wholesalers to insure against liability under the Sale of Goods Act and their insurance costs would be passed on to purchasers in addition to retailers' insurance costs (see paragraph

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[100] Final Report, paragraph 432.

109(*b*)) below. If exemption clauses in business sales were to be permitted subject to a judicial test of reasonableness, the prospect of litigation of uncertain outcome would still render insurance necessary with higher prices all along the line from the manufacturer to the retailer, who would inevitably pass these on to the consumer

The case of controlling exemption clauses in business sales

109. Those of us who take the view that the control of exemption clauses should be extended to all business sales rely on the following arguments :

(*a*) We accept the representations made on behalf of retailers that they need the safeguard of legal protection. If, as the Molony Committee recommended and as we are all agreed, we are in the presence of an urgent social need to change the law in order to give better protection to millions of consumers, it would be morally and socially unjustifiable to reform the law at the expense of a single section of the trading community. The consultation has shown that the Molony Committee's view that retailers were capable of protecting themselves was put in issue, not only by those speaking for the retailers, but also by others, including representatives of the insurance interest. It is common knowledge that despite the growth of multiple stores and supermarkets we are still a country of small shopkeepers who have no powerful trade associations to strengthen their bargaining power. It is equally common knowledge that there is a strong movement towards mergers, with the inevitable consequence that there are fewer and fewer alternative sources of supply available to retailers in relation to any particular product ; this is another powerful factor tending to reduce their bargaining power.

(*b*) The issue whether there should be some legal control of exemption clauses beyond the level of consumer sales affects not only the interests of the retail trade but also the interests of the consuming public. If, as some argued on consultation, the prohibition of exemption clauses in consumer sales alone led to a higher incidence of insolvencies among retailers, the consumers' claims would be placed in jeopardy. If, on the other hand, retailers followed the logical course of protecting themselves by insuring against their liabilities under the Sale of Goods Act, it would in practice be inevitable for the cost of insurance to be passed on to the consumer ; the ensuing increase in the price of consumer goods would be bound to have a general inflationary effect. In any event, it is highly problematical whether products liability insurance (which covers the repair and replacement of defective articles) would be generally available. This type of insurance (so we were informed by representatives of the British Insurance Association and of Lloyd's) as opposed to accident insurance (to cover personal injury and damage to property) is not widely obtainable at present ; and even in the future, when the insurance market would have adjusted itself to a growing demand for this class of business, it might prove to be unobtainable by the great bulk of retailers who deal in a wide range of goods with a relatively small turnover of each type. It would be more convenient and cheaper for insurance of this type to be carried by the manufacturer

who even now often insures against certain types of claims by consumers.

(*c*) Although the majority of the Working Party had pronounced against a general reasonableness test, this proposal has received sufficient support on consultation to prove not only its viability but also its many attractions. In any event, no revolutionary innovation is involved. Section 3 of the Misrepresentation Act 1967 is an important precedent in England ; equally important are the precedents in other jurisdictions in Europe and America. In a number of states of the United States of America the courts, in addition to the technique of adverse construction of exemption clauses, have developed powers of striking down such clauses by reference to considerations of public policy. Moreover, under section 2-302 of the U.S. Uniform Commercial Code,[101] the courts in those jurisdictions which have adopted the section have statutory power to strike down exemption clauses on the ground of unconscionability. All the available information tends to show that this provision has not led to the chaos and uncertainty which some commentators predicted. The argument about uncertainty which is the mainstay of the opposition encountered in our own consultation is greatly exaggerated. The degree of certainty attainable under our present law is not as high as its proponents assert ; our courts have developed sophisticated techniques for controlling exemption clauses by restrictive interpretation of their terms and, until recently, by the application of the doctrine of fundamental breach. There is no reason to believe that commerce in this country could not adjust itself, as it has in other countries, to a power vested in the courts to determine whether reliance upon an exemption clause is or is not reasonable.

(*d*) It would produce highly anomalous results to forbid contracting out of liability for misrepresentation, as section 3 of the Misrepresentation Act 1967 has done in English law, while permitting contracting out of the statutory conditions and warranties in business sales. The two are inextricably interwoven, and where there is a breach of section 13 of the Sale of Goods Act there will necessarily have been a misrepresentation also, as will often be the case where there is a breach of section 14(1) and sometimes where there is a breach of section 15.

(*e*) A brief reference has been made above to the doctrine of fundamental breach. A full treatment of that subject is not within the scope of the present Report, but it is plain that the introduction of a general reasonableness test would, at least for the purposes of the law of sale, go a long way towards bridging the gap created by the recent demotion of the doctrine from a rule of law to a question of construction.[102]

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[101] The code has been adopted in 51 jurisdictions but in two of these section 2–302 has been omitted.

[102] See the decision of the House of Lords in *Suisse Atlantique Société d'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361.

Recommendations for the general control of exemption clauses in business sales

110. For the reasons advanced in the preceding paragraph, those of us who are in favour of extending the control of exemption clauses to all business sales recommend that the Sale of Goods Act should be amended by adding a provision to the effect that, in business sales and sales by auction, exemption clauses will be ineffective to the extent that it is 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.[103]

111. Those of us who are opposed to the control of exemption clauses in business sales generally would agree to such a test of reasonableness being adopted in the event of it being decided as a matter of policy that exemption clauses in all business sales should be subjected to legal controls.

112. It will be observed that in general the formula recommended in paragraph 110 follows the model of section 3 of the Misrepresentation Act 1967. The test, as in that Act, is not whether the exemption clause is unreasonable at the time of contract but whether it is unreasonable to rely on it in all the circumstances of the case. To this extent our proposal goes against the balance of opinion which emerged in the course of consultation[104] to the effect that the reasonableness test should be applied at the time when the contract was made. We have chosen this course because we are persuaded that in many cases the mischief of an exemption clause is not so much that it is unreasonable *per se*, but that a party may seek to rely on it in circumstances where it is wholly unreasonable to do so. Hence we do not wish to ban such clauses outright, but merely to preclude unreasonable reliance on them. However, the test differs from that in the Misrepresentation Act in that the burden of proving that reliance upon an exemption clause would be unfair or unreasonable is placed on the party challenging the clause. Although the opinions expressed in consultation were about equally divided on the question where the burden of proof should lie, we have come to the conclusion that, on a balance of arguments, a departure from the precedent of the 1967 Act would be justified.

113. If exemption clauses in business sales were to be controlled by the suggested test of reasonableness, the degree of uncertainty inherent in such a test could be reduced by the courts following certain guiding principles such as are mentioned in this paragraph.[105] The draft clause which appears in Appendix A of this Report[106] provides that the court should have regard to all the circumstances; and we envisage that the courts would have regard in applying the test to any of the following elements of or surrounding the transaction, insofar as they are relevant in the instant case:

(*a*) the bargaining position of the buyer, relative to the seller and to other sources of supply at the time of the contract;

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[103] See Appendix A, new section 55(4) (Alternative B) in clause 4, p. 58.

[104] See paragraph 105 above.

[105] Clause 8(4), p. 62 in Appendix A, would enable a court to have regard to the whole of this Report including our recommendations. This provision is proposed for the reasons given in the Report on the Interpretation of Statutes of the Law Commission and the Scottish Law Commission (see Law Com. No.21; Scot. Law Com. No. 11; paragraphs 63–73 and Appendix A, clause 1(1)(*d*) and (e)).

[106] See new section 55(4) (Alternative B) in clause 4, p. 58.

(*b*) whether the provision excluding or limiting liability is clear in its wording and scope of operation ;

(*c*) whether the steps taken to bring the provision to the attention of the buyer were reasonable in all the circumstances, including any customs of the trade and any previous course of dealing ;

(*d*) whether the buyer was offered and accepted a material benefit in consideration of agreeing to the provision ;

(*e*) where the provision excludes or restricts liability unless certain conditions are complied with (for example, claiming within a prescribed time), whether it was, in the events that have occurred, reasonably practicable to comply with those conditions ;

(*f*) whether the goods are manufactured, processed or adapted to the special order of the buyer ;

(*g*) the ultimate incidence of risk and liability arising by reason of defects in the goods.

Auction Sales

114. We deal separately with auction sales because they have certain features which call for special consideration. An auction sale, as such, is of course merely a method of selling either to private purchasers or to business purchasers, or to both. In some cases, e.g. in certain classes of commodity sales by auction, sales will clearly be to business purchasers. Other types of auction on the other hand, e.g., those held in some markets, are obviously a method of selling to consumers. But there are many auctions where the purchaser may or may not be a private purchaser, and this practical consideration must clearly affect the question how, if at all, contracting out in auction sales should be controlled. In our Working Paper we merely raised the question of principle whether the proposed ban on contracting out in sales to private consumers should also apply to such sales by auction. We did not specifically invite comments on the question whether control should extend to business sales by auction, since we took the view that the arguments for and against the control of business sales did not depend upon the method of effecting such sales. We give an account of the consultation in paragraphs 115—116 below and indicate our present views in paragraphs 117—119.

115. The main arguments set out in our Working Paper for the exceptional treatment of sales by auction to private purchasers were as follows :

(*a*) In a number of circumstances auctions provide a convenient method of disposing of goods which it would be difficult or less convenient to sell in any other way. In such circumstances the seller may not be in a position to undertake that the goods comply with the statutory conditions and warranties. Sales of surplus army and other goods by the government, sales of furniture and miscellaneous household effects and sales under judicial authority are cases in point.

(*b*) If a distinction were to be drawn between consumer sales and commercial sales it would often be difficult for the auctioneer to know whether the buyer is or is not a trader. If he were a trader he might have greater expertise about the characteristics and quality of the goods than either the seller or the auctioneer.

(*c*) It is well recognised and accepted by bidders in many types of auction sale that there is a speculative element in the transaction and that it would be unreasonable to expect the full benefit of the statutory conditions and warranties.

116. Against the above arguments there could, we suggested, be set the following considerations :

(*a*) The suggested reformulation of "merchantable quality" should provide sufficient flexibility to meet the needs of those sellers who have a limited knowledge of the goods or could only acquire such knowledge by unreasonable expenditure.

(*b*) In describing goods, a seller or auctioneer in England would in any event have to take account of the provisions of the Misrepresentation Act 1967 ; contracting out of those provisions would be void, subject to the discretion of the court under section 3 of that Act.

(*c*) In some cases the goods which are sold by auction are works of art or other articles of exceptionally high value, and the advantage to the seller of stimulating competition among buyers by means of an auction should, in fairness, be counter-balanced by his bearing full responsibility under the statutory conditions and warranties.

(*d*) Freedom to contract out of the statutory conditions and warranties at auction sales might be abused by some sellers of goods.

(*e*) In practice the case for excluding auction sales from control is limited to second-hand or defective goods. Difficulties under this head would be met by the proposed definition of "merchantable quality" which will empower the court to take into account "all the circumstances, including the prices and description under which the goods are sold".

Recommendations on auction sales

117. We are divided on the question whether there should be any control on a sale by auction of the seller's freedom to contract out of the conditions and warranties implied by sections 13-15 of the Sale of Goods Act.

118. Those of us who take the view that the control of contracting out should not go beyond a ban on contracting out in sales to consumers (in the extended sense in which that expression is used in paragraphs 90 and 93 of this Report and defined in Appendix A)[107] are opposed to any control of contracting out in sales by auction. They consider that the arguments against the control of business sales generally apply equally to commercial auctions, notably to commodity auctions, of which a large proportion are conducted according to conditions or customs of trade which are often of long standing and accepted as fair by both buyers and sellers in the trades concerned. Even in the case of sales by auction to private consumers they consider that the arguments set out in paragraph 115 are more compelling than those set out in paragraph 116.

119. A different view is taken by those of us who would wish to extend the control of exemption clauses to business sales generally. They would not wish to interfere with established customs and conditions of trade so long as these continue to be accepted as fair by those concerned. Nor do they

[107] See new subsections (4)–(8) of section 55 (Alternative A) in clause 4, pp. 56 and 58.

propose that in the case of auction sales to private consumers a ban on contracting out should operate as a fixed rule. What they do propose is that the same reasonableness test for which they contend in business sales generally[108] should apply to all sales by auction, no matter whether the buyer is a private purchaser or a business purchaser. Such a power to apply a reasonableness test would enable the courts to strike down exemption clauses where the auction is simply a particular method of selling goods to private purchasers; in other appropriate cases the court could limit the extent to which exemption clauses can be relied upon. But none of this would of course prevent private sellers from contracting out of the conditions implied by section 14 of the Sale of Goods Act, so long as the auctioneer takes reasonable steps to inform the buyer before contract that the goods are offered for sale on behalf of a private seller.[109]

International sales

120. While we regard the control of all or of some exemption clauses to be desirable in contracts of sale whose essential connections are with England or Scotland, there are reasons of principle and of practical expediency which suggest that it would be undesirable to extend the suggested controls to contracts of an international character. In the first place, where goods are exported from the United Kingdom to another country, it is for the legal system of that country rather than for our own to specify how far contractual freedom should be limited or controlled in the interests of consumers or other purchasers. In the second place, contracts of an international character ordinarily involve transactions of some size between parties who are engaged in commerce and who wish to be free to negotiate their own terms. They would stress, and we would agree, that in such contracts contractual freedom is of particular importance. In the third place, it has been represented to us by persons with experience of international commerce that it would be undesirable to make proposals which would place United Kingdom exporters under restrictions which would not apply to some of their foreign competitors. We conclude, therefore, that the control of exemption clauses which we advocate should not apply mandatorily to any contract for the sale of goods which has an international character.

121. The problem of defining such contracts would be a difficult one but for the existence of a definition in Article 1 of the Uniform Law on the International Sale of Goods, scheduled to the Uniform Laws on International Sales Act 1967, giving effect to the relevant Hague Conventions (of 1st July 1964). This definition requires a slight modification (by substituting for its reference to "territories of different Contracting States" a wider reference to "territories of different States"), but otherwise seems to us to be an appropriate model. We recommend, therefore, that parties to contracts for the international sale of goods as so defined should be free to negative or vary the conditions and warranties which would be implied by sections 12-15 of the Sale of Goods Act.[110]

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[108] See Appendix A, new section 55(4) (Alternative B) in clause 4, p. 58.

[109] See paragraphs 53–55 above.

[110] See Appendix A, new section 55(8) (Alternative A) in clause 4, p. 58; new section 55(7) (Alternative B) in clause 4, p. 58; new section 61(6) in clause 6, p. 60 and the definition of a "contract for the international sale of goods," clause 7(1) p. 60.

122. While we have no wish, as we have explained, to limit contractual freedom in sales which have no real connection with the United Kingdom, parties to a domestic sale might be tempted to circumvent the control of exemption clauses recommended in this Report by choosing expressly, or by implication (e.g. by providing for arbitration abroad) a foreign system under which there is no comparable control. There is no settled principle in our private international law which would prevent them from so doing. Since the controls we recommend are, in their application to domestic sales, the equivalent of rules of public policy, it seems desirable to disable parties to a domestic contract from avoiding these controls by a resort to foreign law. We, therefore, propose that where the proper law of a contract for the sale of goods would, apart from a term that it should be the law of some other country, be English or Scots law, or where any such contract contains a term which purports to substitute, or has the effect of substituting, for all or any of the provisions of sections 12-15 and 55 of the amended Sale of Goods Act the provisions of a foreign law, those sections shall apply nonetheless—unless it is a contract for the international sale of goods defined as above explained. We recommend the introduction of such a safeguard into the Sale of Goods Act.[111] We do not, of course, intend to limit contractual freedom in transactions which have no real connection with the United Kingdom, but where the parties (and here we have in mind foreign parties in particular) wish to choose the law of some part of the United Kingdom as the proper law of the contract. This happens not infrequently in practice.

123. The Uniform Laws on International Sales Act 1967 has not yet been brought into operation, but when it is it will be possible for parties to a contract, whether or not it has an international character, to choose the Uniform Law as the law of their contract. Under Article 4 of the Uniform Law on the International Sale of Goods they are allowed to do so to the extent that the choice does not affect "the application of any mandatory provisions of law which would have been applicable if the parties had not chosen the Uniform Law". Section 1(4) of the 1967 Act declares that, for the purposes of Article 4 of the Uniform Law on International Sales, "no provision of the law of England and Wales, Scotland or Northern Ireland shall be regarded as a mandatory provision . . . " In order to prevent abuses, we recommend that section 1(4) of the Act of 1967 should be so amended as to make it clear that sections 12-15, 55 and 55A of the Sale of Goods Act 1893 (as amended) will have to be treated as mandatory provisions within the meaning of Article 4 of the Uniform Law, except in their application to contracts for the international sale of goods, defined in the manner indicated in paragraph 121.[112]

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[111] See Appendix A, clause 5(1), p. 58.

[112] See Appendix A, clause 5(2), p. 60.

PART VI SUMMARY OF PRINCIPAL CONCLUSIONS AND RECOMMENDATIONS[113]

Part II Amendments to section 12 of the Sale of Goods Act 1893

124. (*a*) The proposal made by the Law Reform Committee in paragraph 36 of their Twelfth Report on the Transfer of Title to Chattels cannot be satisfactorily dealt with by amendment of section 12 until a study has been carried out of the rules relating to restitution.
(Paragraphs 13-16).

(*b*) Exclusion or variation of the condition and warranties implied by section 12 should only be possible where it is clear that the seller is purporting to sell a limited title. Even where the seller does make this clear, he should not be permitted to exclude in their entirety the warranties of quiet possession and of freedom from charges or encumbrances in favour of third parties.
(Paragraphs 17 and 18. Clause 1, p. 52).

Part III Amendments to sections 13-15 of the Sale of Goods Act

Section 13

(*c*) It should be made clear that a sale of goods exposed for self-selection by the buyer may be a sale by description.
Paragraphs 23 and 24. Clause 2, p. 52).

Section 14

(*d*) The conditions implied by subsections (1) and (2) of section 14 should continue to be applicable to goods which are supplied under a contract of sale, even if such goods are not themselves the subject of the sale.
(Paragraph 29. New section 14(1) in clause 3, p. 54).

(*e*) The condition of fitness for purpose in section 14(1) should no longer be confined to sales where the goods are "of a description which it is in the course of the seller's business to supply", but should be extended to cover all sales in which the seller is acting in the course of business.
(Paragraph 31. New section 14(3) in clause 3, p. 54).

(*f*) The proviso to section 14(1) should be repealed.
(Paragraphs 32 and 33. New section 14(3) in clause 3, p. 54).

(*g*) The provision in section 14(1) to the effect that the condition of fitness will be implied in a contract of sale only where the buyer makes known the particular purpose for which he requires the goods so as to show that he relies on the seller's skill and judgment, should be replaced by a provision whereby the condition of fitness will be

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[113] The clauses referred to in this summary are those set out in Appendix A.

implied unless the circumstances are such as to show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment.
(Paragraphs 35-39. New section 14(3) in claus 3, p. 54).

(*h*) It should be made clear that the words "particular purpose" in section 14(1) cover not only an unusual or special purpose for which goods are bought, but also a normal or usual purpose.
(Paragraph 38. New section 14(3) in clause 3, p. 54).

(*i*) The expression "merchantable quality" used in section 14(2) should be defined in the terms set out in clause 7(2), pp. 60-62.
(Paragraphs 41-43).

(*j*) The implication of the condition of merchantable quality into a contract of sale should cease to be dependent on the sale being a sale "by description".
(Paragraph 45. New section 14(2) in clause 3, p. 54).

(*k*) The condition of merchantable quality in section 14(2) should no longer be confined to sales in which the seller is a dealer in goods of the relevant description, but should be extended to all sales where the seller is acting in the course of business.
(Paragraph 46. New section 14(2) in clause 3, p. 54).

(*l*) There should be no implied condition of merchantable quality under section 14(2) as regards such specific defects of which notice was given to the buyer before the contract was made.
(Paragraph 49. New section 14(2)(*a*) in clause 3, p. 54).

(*m*) Where a sale by a private seller is effected through an agent acting in the course of business, the conditions of merchantable quality and fitness for purpose should be implied unless reasonable steps have been taken to inform the buyer before contract that the sale is on behalf of a private seller.
(Paragraphs 53-55. New section 14(5) in clause 3, p. 54).

(*n*) Section 14(4) should be transferred to section 55, where it logically belongs.
(Paragraph 55. New section 55(2) in clause 4, p. 56).

Section 15

(*o*) No amendment is proposed to section 15, but it should be made clear that the new definition of "merchantable quality" applies not only to section 14(2) but also to section 15(2)(*c*).
(Paragraphs 57-59. Clause 7(2), pp. 60-62).

Part IV Position of Third Parties

(*p*) The tentative proposal to extend the benefit of the conditions and warranties implied by sections 12-15 should not be pursued at present. Further consideration of this and related problems should await a full study of products liability.
(Paragraphs 60-63).

Part V Contracting out of the conditions and warranties implied by sections 13-15 of the Sale of Goods Act

(*q*) The conditions and warranties implied by sections 13-15 should apply to any sale of consumer goods to a private consumer, notwithstanding any term of the contract to the contrary. This ban on contracting out does not apply to sales by auction; see recommendation (*u*) below.
(Paragraphs 77-80. New section 55(3)(*b*) in clause 4, p. 56).

(*r*) The two Law Commissions are agreed that protection against contracting out should not be limited to sales to private purchasers. The Commissioners are equally divided as to the extent of the protection which should be provided for business buyers. Two alternative schemes are summarised in recommendations (*s*) and (*t*) below.
(Paragraphs 84, 107-109).

(*s*) (i) Some Commissioners would extend the ban on contracting out to certain limited classes of sales of consumer goods to business buyers.

(ii) The proposal under (i) above would operate with a definition of "consumer sale" which includes sales of consumer goods to business buyers except where the buyer can according to certain specified criteria be said to be in the business of dealing in or dealing with the goods bought.

(iii) The ban would apply to sales to business buyers falling within the above definition but the court would be empowered to exclude from the ban any particular transaction if this is reasonable having regard to the size and terms of the transaction and other relevant circumstances.
(Paragraphs 90, 91, 93 and 94. New section 55(3)(*b*) in clause 4, p. 56; new section 55(4)-(8) (Alternative A) in clause 4, pp. 56-58.)

(*t*) (i) Other Commissioners would make protection against contracting out available to all business buyers, by empowering the court to render unenforceable any contracting out provisions in the business sale to the extent that it considered reliance on them not to be fair or reasonable in all the circumstances. The onus of establishing this would fall upon the buyer.

(ii) The degree of uncertainty inherent in such a test of reasonableness could be reduced by the courts following certain guiding principles. A number of such principles are put forward in the Report.

(iii) The Commissioners who favour this control of contracting out in business sales by the exercise of a judicial discretion would confine the ban on contracting out to sales of consumer goods to private purchasers, and the definition of "consumer sale" would accordingly be limited to such sales.
(Paragraphs 95 and 110-113. New section 55(3)(*b*) in clause 4, p. 56; new section 55(4)-(7) (Alternative B) in clause 4, p. 58; clause 8(4) p. 62).

Auction sales

(*u*) The Commissioners are equally divided on the question whether contracting out in auction sales should be controlled. Those who would admit control of limited classes of business sales only are opposed to any restriction of the freedom to contract out in auction sales. On the other hand, those who favour the control of business sales generally, propose that the reasonableness test advocated by them should apply to all auction sales.
(Paragraphs 114-119. New section 55(4) (Alternative A) in clause 4, p. 56 ; new section 55(4) and (5) (Alternative B), in clause 4, p. 58).

International sales

(*v*) International sales should be exempt from any restrictions which may be imposed on contracting out.
(Paragraphs 120 and 121. New section 55(8) (Alternative A) in clause 4, p. 58 ; new section 55(7) (Alternative B) in clause 4, p. 58 ; clause 6, p. 60 ; clause 7(1), p. 60).

Prevention of abuses

(*w*) Strict legislative safeguards are recommended to prevent the evasion of the proposed control of contracting out in any sales other than international sales.
(Paragraphs 122 and 123. Clause 5, pp. 58 and 60).

(*Signed*) LESLIE SCARMAN, *Chairman, Law Commission.*
L. C. B. GOWER.
NEIL LAWSON.
NORMAN S. MARSH.
ANDREW MARTIN.

J. M. CARTWRIGHT SHARP, *Secretary.*

C. J. D. SHAW, *Chairman, Scottish Law Commission.*
A. E. ANTON.
JOHN M. HALLIDAY.
ALASTAIR M. JOHNSTON.
T. B. SMITH.

A. G. BRAND, *Secretary.*
20*th July* 1969.

APPENDIX A

DRAFT CLAUSES

Implied undertakings as to title, etc.

1. For section 12 of the principal Act (implied conditions as to title, and implied warranties as to quiet possession and freedom from encumbrances) there shall be substituted the following section:—

Implied undertakings as to title, etc.

"**12.**—(1) In every contract of sale, other than one to which subsection (2) of this section applies, there is—

(*a*) an implied condition on the part of the seller that in the case of a sale, he has the right to sell the goods, and in the case of an agreement to sell, he will have the right to sell the goods at the time when the property is to pass; and

(*b*) an implied warranty that the goods shall be free from any charge or encumbrance not disclosed or known to the buyer before the contract is made and that the buyer shall enjoy quiet possession of the goods except so far as it may be disturbed by the owner of any charge or encumbrance so disclosed or known.

(2) In a contract of sale 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 seller should not transfer the property in the goods, but 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 seller and not known to the buyer have been disclosed to the buyer before the contract is made; and

(*b*) an implied warranty that neither—

(i) the seller; nor

(ii) in a case where the parties to the contract intend that the seller should transfer only such title as a third person may have, that person; nor

(iii) anyone claiming through or under the seller or that third person otherwise than under a charge or encumbrance disclosed or known to the buyer before the contract is made;

will disturb the buyer's quiet possession of the goods."

Sale by description.

2. Section 13 of the principal Act (sale by description) shall be renumbered as sub section (1) of that section, and at the end there shall be inserted the following sub section:—

"(2) A sale of goods shall not be prevented from being a sale by description by reason only that, being exposed for sale, they are selected by the buyer."

RELEVANT SECTIONS OF SALE OF GOODS ACT 1893

Implied undertaking as to title, &c.

12. In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is—

(1) An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass:

(2) An implied warranty that the buyer shall have and enjoy quiet possession of the goods:

(3) An implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.

Sale by description.

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, and if the sale be by 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.

DRAFT CLAUSES

Implied undertakings as to quality or fitness.

3. For section 14 of the principal Act (implied undertakings as to quality or fitness) there shall be substituted the following section:—

Implied undertakings as to quality or fitness.

"**14.**—(1) Except as provided by this section and section 15 of this Act and subject to the provisions of any other enactment, there is no implied condition or warranty as to the quality or fitness for any particular purpose of goods supplied under a contract of sale.

(2) Where the seller sells goods in the course of a business, there is an implied condition that the goods are of merchantable quality, except that there is no such condition—

(*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.

(3) Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known to the seller any particular purpose for which the goods are bought, there is an implied condition that the goods are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly bought, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the seller's skill or judgment.

(4) An implied condition or warranty as to quality or fitness for a particular purpose may be annexed to a contract of sale by usage.

(5) The foregoing provisions of this section apply to a sale by a person who in the course of a business is acting as agent for another as they apply to a sale by a principal in the course of a business, except where that other is not selling in the course of a business and the agent takes reasonable steps to bring that fact to the notice of the buyer before the contract is made."

RELEVANT SECTIONS OF SALE OF GOODS ACT 1893

Implied conditions as to quality or fitness.

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, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular 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; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed:

(3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade:

(4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

Sale by sample.

15.—(1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

(2) In the case of a contract for sale by sample—

(*a*) There is an implied condition that the bulk shall correspond with the sample in quality:

(*b*) There is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample:

(*c*) There is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

DRAFT CLAUSES

Exemption clauses.

4. Section 55 of the principal Act (exclusion of implied terms and conditions) shall be renumbered as subsection (1) of that section and at the end there shall be inserted the following subsections:—

"(2) An express condition or warranty does not negative a condition or warranty implied by this Act unless inconsistent therewith.

(3) Notwithstanding anything in subsection (1) of this section, any term—

(*a*) which is contained in or applies to a contract of sale and which purports to exclude or restrict, or has the effect of excluding or restricting, the operation of all or any of the provisions of section 12 of this Act or any liability of the seller for breach of a condition or warranty implied by any such provision; or

(*b*) which is contained in or applies to a contract for a consumer sale and which purports to exclude or restrict, or has the effect of excluding or restricting, the operation of all or any of the provisions of sections 13 to 15 of this Act or any liability of the seller for breach of a condition or warranty implied by any such provision;

shall be void."

Alternative A

"(4) In this section "consumer sale" means a sale of goods (other than a sale by auction) by a seller in the course of a business where the goods—

(*a*) are of a type ordinarily bought for private use or consumption; and

(*b*) are sold to a person who does not buy or hold himself out as buying them in the course of a business for one of the purposes mentioned in subsection (5) below.

(5) The said purposes are—

(*a*) disposing of the goods by way of sale, hire or hire purchase in the course of the buyer's business;

(*b*) consuming or processing them in the course of that business;

(*c*) using them for providing a service which it is an object of that business to provide.

RELEVANT SECTION OF SALE OF GOODS ACT 1893

55. Where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract. Exclusion of implied terms and conditions.

(6) In the case of a consumer sale where the goods are sold to a person who buys or holds himself out as buying them in the course of a business but for a purpose other than one mentioned in subsection (5) above, the court may treat the sale for the purposes of this section as not being a consumer sale if satisfied that, having regard to the size and terms of the transaction, and all other relevant circumstances, it is reasonable to do so.

(7) The onus of proving that a sale falls to be treated for the purposes of this section as not being a consumer sale shall lie on the party so contending.

(8) This section is subject to the provisions of section 61(6) of this Act."

Alternative B

"(4) Any term which is contained in or applies to a contract of sale of goods other than a consumer sale and which purports to exclude or restrict, or has the effect of excluding or restricting, the operation of all or any of the provisions of sections 13 to 15 of this Act or any liability of the seller for breach of a condition or warranty implied by any such provision shall not be enforceable to the extent that it is shown that it would not be fair or reasonable in the circumstances of the case to allow reliance on the term.

(5) In this section "consumer sale" means a sale of goods (other than a sale by auction) by a seller in the course of a business where the goods—

(*a*) are of a type ordinarily bought for private use or consumption; and

(*b*) are sold to a person who does not buy or hold himself out as buying them in the course of a business.

(6) The onus of proving that a sale falls to be treated for the purposes of this section as not being a consumer sale shall lie on the party so contending.

(7) This section is subject to the provisions of section 61(6) of this Act."

Conflict of laws.

5.—(1) After section 55 of the principal Act there shall be inserted the following section:—

Conflict of laws.

"55A. Where the proper law of a contract for the sale of goods would, apart from a term that it should be the law of some other country or a term to the like effect, be the law of England and Wales or Scotland, or where any such contract contains a term which purports to substitute, or has the effect of substituting, provisions of the law of some other country for all or any of the provisions of sections 12 to 15 and 55 of this Act, those sections shall, notwithstanding that term but subject to section 61(6) of this Act, apply to the contract."

(2) In section 1(4) of the Uniform Laws on International Sales Act 1967 (which provides that no provision of the law of any part of the United Kingdom shall be regarded as a mandatory provision for the purposes of the Uniform Law on the International Sale of Goods so as to override the choice of the parties) for the words from "no provision" to the end of the subsection there shall be substituted the words "no provision of the law of England and Wales, Scotland or Northern Ireland, except sections 12 to 15, 55 and 55A of the Sale of Goods Act 1893, shall be regarded as a mandatory provision within the meaning of that Article."

International sales.

6. In section 61 of the principal Act (savings) there shall be inserted after subsection (5) thereof the following subsection—

"(6) Nothing in sections 55 or 55A of this Act shall prevent the parties to a contract for the international sale of goods from negativing or varying any right, duty or liability which would otherwise arise by implication of law under sections 12 to 15 of this Act."

Interpretation.

7.—(1) In section 62(1) of the principal Act (definitions) at the appropriate points in alphabetical order there shall be inserted the following definitions:—

"business" includes a profession and the activities of any government department, local authority or statutory undertaker:

"contract for the international sale of goods" means a contract of sale of goods made by parties whose places of business (or, if they have none, habitual residences) are in the territories of different States and—

(*a*) the contract involves the sale of goods which are at the time of the conclusion of the contract in the course of carriage or will be carried from the territory of one State to the territory of another; or

(*b*) the acts constituting the offer and acceptance have been effected in the territories of different States; or

(*c*) delivery of the goods is to be made in the territory of a State other than that within whose territory the acts constituting the offer and the acceptance have been effected.

For the purposes of this definition Northern Ireland, the Channel Islands and the Isle of Man shall be treated as different States from Great Britain."[114]

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

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[114] This part of the definition will require modification if legislation amending the Sale of Goods Act is to apply to Northern Ireland.

"(1A) Goods of any kind are of merchantable quality within the meaning of this Act if they are 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 their price, any description applied to them and all the other circumstances; and any reference in this Act to unmerchantable goods shall be construed accordingly."

Short title, citation, construction, commencement, saving and extent.

8.—(1) This Act may be cited as the Sale of Goods Act 1969.

(2) This Act and the principal Act may be cited as the Sale of Goods Acts 1893 and 1969.

(3) In this Act "the principal Act" means the Sale of Goods Act 1893.

(4) In ascertaining the meaning of any enactment as amended by this Act regard may be had to a report of the Law Commission and the Scottish Law Commission recommending that that enactment be amended.

(5) This Act shall come into operation at the expiration of a period of one month beginning with the date on which it is passed.

(6) This Act does not apply to contracts of sale made before its commencement, except that section 55(3) [and (4) of Alternative B][115] of the principal Act as amended by this Act applies to terms agreed on before the commencement of this Act, if applied to contracts made after its commencement.

(7) This Act does not extend to Northern Ireland.

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[115] The words in brackets serve to indicate an additional reference which will be necessary if Alternative B (p. 58) is adopted.

APPENDIX B

JOINT WORKING PARTY ON EXEMPTION CLAUSES IN CONTRACTS

Joint Chairmen	The Hon. Lord Kilbrandon	(Chairman of the Scottish Law Commission)
	Mr. Andrew Martin, Q.C.	(The Law Commission)
	Professor T. B. Smith, Q.C.	(The Scottish Law Commision)
	Mr. L. C. B. Gower	(The Law Commision)
	Mr. M. Abrahams	(The Law Commision)
	Mrs. E. L. K. Sinclair	(Board of Trade: till February 1967)
	Mr. S. W. T. Mitchelmore	(Board of Trade: from February 1967)
	Miss G. M. E. White	(Board of Trade: till August 1968)
	Mr. M. J. Ware	(Board of Trade: from August 1968)
	Mr. J. A. Beaton	(Scottish Office)
	Mr. J. B. Sweetman	(Treasury Procurement Policy Committee)
Appointed after consultation with the organisation shown in brackets	Mr. Stephen Terrell, Q.C.	(The Bar Council)
	Mr. M. R. E. Kerr, Q.C.	(The Bar Council: appointed February 1967)
	Mr. Peter Maxwell, Q.C.	(The Faculty of Advocates)
	Mr. W. M. H. Williams	(The Law Society: resigned February 1968)
	Mr. J. H. Walford	(The Law Society: appointed February 1968)
	Mr. G. R. H. Reid	(The Law Society of Scotland)
	Mr. R. G. Scriven	(Association of British Chambers of Commerce)
	Mr. W. E. Bennett	(The Confederation of British Industry)
	Professor G. J. Borrie	(The Consumer Council)
	Mrs. Beryl Diamond	(The Consumer Council: resigned February 1967)
	Mrs. L. E. Vickers	(The Consumer Council: appointed February 1967)
Secretary:	Mr. R. G. Greene	(The Law Commission)
Assistant Secretary:	Mr. J. A. W. Strachan	(The Law Commission)

APPENDIX C

LIST OF ORGANISATIONS AND INDIVIDUALS WHO GAVE EVIDENCE TO THE WORKING PARTY* OR WHO REPLIED TO OUR WORKING PAPER

Agricultural Engineers Association Ltd.
Association of British Chambers of Commerce.
Association of Municipal Corporations.
P. S. Atiyah Esq.
Bar Association for Commerce, Finance and Industry.
J. W. Bourne Esq.
British Antique Dealers' Association.
British Compressed Air Society.
British Electrical and Allied Manufacturers' Association Ltd.
British Insurance Association.
British Petroleum.
British Security Industry Association Ltd.
Cattle Food Trade Association Inc.
Chartered Auctioneers' and Estate Agents' Institute.
Chartered Institute of Patent Agents.
Christie's.
The Honourable Norman A. Citrine.
Committee of Associations of Specialist Engineering Contractors.
Consumers' Association.
Consumer Council.
County Councils Association.
Mrs. D. C. Davies.
J. Dempsey Esq., M.P.
Professor A. L. Diamond.
The Honourable Mr. Justice Donaldson.
C. D. Drake Esq.
Eastern Produce Shippers' Association.
Electricity Council.
English Electric Valve Co., Ltd.
Faculty of Advocates.
Finance Houses Association.
Forestry Commission.
G. E. Garrett Esq.
General Council of the Bar of England and Wales.
Glasgow Bar Association.
R. M. Goode Esq.
Greater London Council.
A. Hotter Esq.
Institute of Legal Executives.

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*This list includes those whose evidence related to the sale of goods. The names of those who gave evidence on exemption clauses in other contracts will be set out in a subsequent report.

Institute of Weights and Measures.
International Computers Ltd.
S. Kalman Esq.
Law Society.
Law Society of Scotland.
J. D. Liddell-King Esq.
Lloyd's.
R. A. Lynex Esq.
J. McKee Esq., J.P.
Mail Order Traders' Association.
The Right Honourable Lord Justice Megaw, T.D.
J. D. Miles Esq.
Milk Marketing Board.
Ministry of Agriculture, Fisheries & Food.
Motor Agents' Association
Motoring Organisations.†
Multiple Shops Federation.
Municipal Passenger Transport Association.
National Chamber of Trade.
National Citizens' Advice Bureaux Council.
National Coal Board.
National Farmers' Union.
National Federation of Consumer Groups.
National Union of Small Shopkeepers.
Parliamentary Committee Co-operative Union.
Potato Marketing Board.
The Right Honourable Lord Reid, C.H.
Retail Alliance.
Retail Credit Federation.
Retail Distributors Association Inc.
Scottish Law Agents Society.
Security and Fire Alarms Association Ltd.
Shell International.
Sir Rupert Sich, C.B., (Registrar of Restrictive Trading Agreements).
Society of British Aerospace Companies Ltd.
Society of Conservative Lawyers.
Society of Motor Manufacturers and Traders.
Society of Public Teachers of Law.
Transport Holding Company.
Treasury Procurement Policy Committee.
G. Treitel Esq.
Wool Textile Delegation.

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†Automobile Association, Royal Automobile Club and Royal Scottish Automobile Club.

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