COMMERCIAL LAW

Sale of Goods

The decision of the House of Lords in *Ashington Piggeries Ltd.* v. *Christopher Hill Ltd.* [1971] 2 W.L.R. 1051 will be welcomed as an attempt to prevent the Sale of Goods Act 1893 (U.K.) from being allowed to "fossilise the law and to restrict the freedom of choice of parties to contracts for the sale of goods to make arrangements which take account of advances in technology and changes in the way in which business is carried on today." (per Diplock L.J., *ibid.*, 1088-1089).

The facts, by this stage, are well known: Hill Ltd., feeding-stuff compounders, contracted with Ashington Piggeries, who were mink breeders, to compound and supply an animal foodstuff known as "King Size". One ingredient in the compound was herring meal supplied by a third party, Norsildmel. As a result of the presence in the meal of a toxic substance, DMNA, thousands of mink bred by Ashington Piggeries died. Hill sued Ashington for the price of the foodstuff; Ashington counterclaimed against Hill under ss. 13 and 14 of the Sale of Goods Act 1893 (U.K.); and Hill, seeking an indemnity, joined Norsildmel.

At first instance, Milmo J. sustained Ashington's claim against Hill and held that the latter was to be indemnified by Norsildmel. "King Size" did not correspond to its description because of the contaminating agent; and both the implied warranties of fitness for purpose and merchantable quality had been breached. The Court of Appeal reversed this decision, finding that it had not been shown that the goods delivered did not correspond with the description; nor had Ashington succeeded in establishing that a condition of fitness for feeding to mink was to be implied in the contract, since the question of suitability for mink was outside the province left to the seller's judgment. A further requirement of s.14(1) had not been satisfied: the goods were not of a description which it was in the course of the seller's business to supply. "Description" in this subsection was narrowly construed: the Court accepted Hill's submission that if it could not be limited to "King Size", then it could extend no further than "mink food". Since it was not part of the seller's business to supply mink food, there was no breach of s.14(1). Although it was conceded that the foodstuff was not of merchantable quality, the Court held that Ashington had failed to establish that there was an implied condition of merchantable quality in the contract because the goods were not bought from a seller dealing in goods of the contract description. "Description" in s.14(2) was delimited to mean the precise and detailed contractual description under s.13, in preference to a more objective and general meaning. Thus, even if "description" in s.14(1) should be further extended from "mink food" to "animal foodstuffs", this could not be applied to s.14(2), "that description" being "vitamin-fortified mink food [called 'King Size'] made pursuant to [the] formula" (per Davies L.J., [1969] 3 All E.R. 1496, at 1518). While recognising that curious consequences might flow from giving the two phrases as to "description" in the similar sub-clauses of s.14(1) and (2) different interpretations, the Court of Appeal was unable to see how this conclusion could be avoided. In the result, Hill's appeal against Ashington's counter-claim and Norsidmel's appeal against Hill's claim were allowed.

The House of Lords agreed with the Court of Appeal that the sellers were not in breach of s.13, the contamination in the herring meal being

a difference in quality and not in kind. Lord Wilberforce postulated a "market-place" standard of description in deciding that there was no breach of s.13 by the sellers of the foodstuffs: the test to be applied was of a broad, commonsense character to be answered by the criteria of the man in the market. Lord Hodson thought " . . . it is working the word 'description' too hard to say that 'herring meal' was a misdescription." ([1971] 2 W.L.R. 1051, at 1057). Lord Guest distinguished the quantitative approach applied in *Pinnock Brothers* v. *Lewis and Peat Ltd.* [1923] 1 K.B. 690 and *Robert A. Munro & Co. Ltd.* v. *Meyer* [1930] 2 K.B. 312, since, in his view, there was no substantial addition to the commodity described. The occurrence of the chemical reaction producing DMNA in the herring meal seemed to Lord Diplock an event which might affect the quality of the meal, but not its identity. Viscount Dilhorne dissented, agreeing with Milmo J. at first instance, that there was more than a difference in quality in the foodstuff: there was a difference in kind.

However the House did find that there was a breach of s.14(1). Ashington had relied, albeit only partially, on the skill and judgment of Hill. This conclusion, not shared by the Court of Appeal, appears to accord with the realities of the matter: the buyers prescribed the formula but the sellers selected the ingredients; and the unsuitability for mink arose from the choice of the Norwegian herring meal containing the toxic substance. But was the foodstuff of a description which it was in the course of the seller's business to supply? On this issue, the House was unanimous. Both Lord Hodson and Viscount Dilhorne regarded the seller's business as compounding animal foodstuffs, and in producing "King Size" they were only using raw materials which they regularly handled. A consideration of the common law preceding the Act of 1893 indicated to Lord Wilberforce that the purpose of the Act was to limit the implied conditions of fitness or quality to persons in the way of business, as distinct from private persons; he then embarked on a linguistic comparison of the meaning of description in s.13 and s.14(1) and (2), thinking it at least clear that the words in s.14(1) "and the goods are of a description which it is the seller's business to supply" could not mean more than "the goods are of a kind . . . ." It was in the course of the seller's business to supply goods, if he agreed, either generally, or in a particular case, to supply the goods when ordered. Lord Guest and Lord Diplock adopted "kind" as the meaning of "description" in s.14(1).

The matter for decision under s.14(2)was whether the goods were bought by description from a seller who dealt in goods of that description. The majority extended the reasoning applied to s.14(1) to this question. Lord Wilberforce read "goods of that description" as "goods of that kind". But, even if "description" was to be understood in a technical sense, a seller would still deal in "goods of that description" if he had undertaken to supply goods during the course of his business, notwithstanding that he had never previously accepted orders for goods of that description. Lord Guest was not persuaded to restrict the scope of the dealer's business in s.14(2) to the contract description of the goods, and Viscount Dilhorne concluded that since Hill had dealt in all the ingredients which, when compounded, were labelled "King Size", and also in herring meal in large quantities, the case came within s.14(2). A different approach was taken by Lord Hodson and Lord Diplock: they saw a point of distinction between s.14(1) and (2), and

the sellers, although they had supplied similar goods previously, had never dealt in "King Size". This view endorsed the restrictive interpretation placed on "that description" in subs. (2) by the Court of Appeal.

Norsildmel was held liable to Hill in breach of s.14(1) and because under the contract of sale between them, Hill's right to recover damages for breach of contract was not excluded. However the third party was not in breach of s.13: the inclusion in the contract of a reference to Norwegian herring meal of "fair average quality" was not part of the description, but a warranty of quality.

In finding unacceptable the restrictive "description" arguments advanced and adopted in the Court of Appeal, the House of Lords has removed a double-limbed straitjacket of construction that would have tested the hair-splitting propensities of counsel and judges to the fullest extent. The present law governing the sale of goods largely evolved from the mercantile conditions prevalent in the nineteenth century: its survival may very well depend on its application in a manner that does not ignore reality and does not unduly impede the course of modern commercial practice.

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COMPANY LAW

Articles of Association

In *Black, White and Grey Cabs Ltd.* v. *Gaskin and Others* [1971] N.Z.L.R. 552 the facts were as follows: Taxi Company A, in return for a levy, provided its members with certain services from Supply Station C, many of whose shareholders were members of Taxi Company A. Taxi Company B had a similar kind of arrangement with Supply Station D. The two taxi companies merged to form a new larger company, the shareholders of Taxi Company B being admitted as members of Taxi Company A and of Supply Station C. The new members, however, persisted in trading with their old partners, Supply Station D. This was contrary to the wishes of the directors of the new combined company, who had power under Article 87a of the Articles of Association to make rules concerning the control and management of the company. Using this power the directors under Rule 38 made it obligatory for members to deal with Supply Station C alone. Rule 47 provided for fines and penalties for breaches of the rules of the company.

The Court of Appeal had to consider the effect of section 34(1) of the Companies Act 1955, which stated:

> Subject to the provisions of this Act, the memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been executed as a deed by each member and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles.

In delivering the judgment of the Court Richmond J. pointed out that, purely for convenience, matters may be included in the articles of association which do not come within the ambit of section 34(1). The test as to the application of this section, he said, 'depends on whether or not that article purports to confer rights or impose obligations upon