STANDARD FORM CONTRACTS

By
C.I. Patterson, L.L.B.

1. The Utility of Standard Forms

Everyone would agree that the parties to a contract should state the terms of their bargain clearly and precisely.

Consider now the application of this principle to the complex relationships required by modern commerce. I would not go so far as to suggest that the great industries of shipping, transport, travel, insurance and finance (to specify only a few) would collapse if they were prohibited from using standard forms of contract. But there can be no doubt that the operations of these industries would be enormously impeded if it were required that every contract should be fully bargained out between the parties face to face in the presence of a scribe who would write down everything that was said. One of the problems is that the business is too complicated to be transacted as a series of separate bargainings at the pace required. I was consulted some years ago by a New Zealand trader who wanted to sell goods to Japan. I gave him, I think, good value for money in explaining to him carefully the importance of stipulating the proper law of the contract. I told him about the Lex Loci Contractus and the Lex Loci Solutionis. I felt confident that on this point at least the parties would not fall into difficulty. Some months later the businessman came to me complaining that the Japanese had not paid him. I asked him to produce the contract. He proffered a series of letters. The first of them could fairly be identified as an offer on his part to sell the goods. There was an impeccable description of the goods and the price. Other commercially important terms were laid out with precision. The last sentence of the letter read,

> "It is our great pleasure to forward our quotation as above. Lex Loci Contractus."

The Japanese reply was in English. The last sentence of that letter read,

> "We trust that good relations between us will ever prevail, Lex Loci Contractus."

My client shamefacedly said that he had used the Latin tag in a draft of his letter to remind him to talk with the Japanese authorities here to see whether there was any difficulty in making a contract with the Japanese subject to New Zealand law, but in the haste of the matter he had forgotten about it. I do not know what the Japanese thought. Maybe their idea was that the Lex Loci Contractus was some benevolent deity resident in New Zealand whose blessing upon commerce is usually invoked here. So a great battle ensued which would have been entirely avoided if one of the usual forms of international quotation had been employed stipulating the law of the contract.

It is fashionable to look upon standard form contracts with a jaundiced eye. I think this is wrong and claim that standard form contracts have a useful place. I would point out that lawyers are the most slavish adherents to standard forms and that much of the practice of the law depends upon the dextrous use of precedents.

The truth of the matter is that there is nothing wrong with the use of standard forms which are appropriate to the bargain of the parties. If the form

correctly records the bargain, the use of the form is beneficial because it achieves a degree of precision in the definition of the contractual terms which could certainly not be achived by negotiation. Problems arise, not from the use, but from the abuse, of standard forms. So I propose in this paper to discuss some of the problems presented when it is said that a standard form contract does not express the bargain of the parties.

2. The Bargain of the Parties

The law has its own notion of the bargain of the parties. The law does not require a genuine meeting of minds. The law will not try to see into the mind of a purchaser to find out what he personally meant, or to see into the mind of the seller to glean his intentions. The law looks at what the parties have said and done objectively. The approach is like that of an officious by-stander who sees and hears the parties in negotiation and forms his own conclusion of the terms of their contract. There are in the reports some curious applications of this principle. ***Galbraith*** v ***Mitchenhall Estates Limited*** [1965] 2 Q.B. 473 is a case to ponder. Mr Galbraith, a workman, wanted a caravan. After selecting the one he wanted, he signed a long printed form which he assumed was a hire purchase agreement. In fact, it was a lease. He had no right to purchase the caravan. He fell into arrears with his payments. The owners of the caravan took it away from him. He applied to the Court for relief against the conduct of the owners of the caravan. On the face of it they had behaved badly. The retail price of the caravan was £1,050. Under the lease Mr Galbraith had promised to pay the initial cash payment of £550.10.0d., to be followed by sixty monthly payments of £12.10.0d. each, a total of £1,300.10.0d. He paid the £550.10.0d., but paid none of the monthly payments. After he had had the caravan for four months, it was taken from him, and sold for £775. The owners kept that money, so they had received altogether £1,325. Mr Galbraith claimed relief under the Hire Purchase Acts.

The learned Judge said,

> "The memorandum of agreement sets out the terms of this hiring at some length – a matter at any rate, of over 1,000 words, in miserably small print. The plaintiff never read that print at all; he just signed the document. That the proffering of the terms of this agreement – as a simple hire agreement and not a hire purchase agreement – was in some measure contrived so as not to attract the protective provisions of the Hire Purchase Acts, is a fair inference from the evidence put before me."

Nevertheless the learned Judge held that the terms of the writing constituted the contract of the parties. It is difficult to see how, consistent with established principle, he could reach any other conclusion.

I think it is important to bear this principle firmly in mind in all discussion of the effect of standard form contracts. The law says that it is idle for a person to complain that he personally did not intend to be bound by what is expressly said in the contract. The law will only notice the fact that the thing is said. If it is said, it is binding.

3. Existing means of mitigating the severity of Standard Form Contracts

Anyone concerned with an assertion that a standard form contract does not correctly set out the bargain of the parties is well advised to consider four techniques which the law has devised to deal with this kind of problem. There are established rules relating to:–

(a) The interpretation of contracts;
(b) The rectification of contracts;
(c) Misrepresentation;
(d) The setting up of "collateral contracts".

A brief survey of all of this material can only be attempted in this paper and I would emphasise that the subject becomes quite complex.

4. Rules as to the Interpretation of Contracts

I do not think that the law has deliberately adopted any principle regarding the interpretation of standard form contracts different from its general rules. I think there is undoubtedly a tendency for Judges to construe printed forms more adversely against the composer of the form than would be the case if the contract had been set down in handwriting or typewriting. This tendency is most apparent in the case law on the interpretation of insurance policies where there is an established rule that the terms of the policy should be read contra proferentem. I do not think the idea has reached beyond insurance policies, and I do not know of a case in which the concept has been applied for example to a hire purchase agreement. But I think it is fair to say that in approaching a problem arising out of a standard form contract, the Judges will often begin their enquiry with a sympathetic attitude towards the signatory to the standard form put forward by the other party. A standard form contract is like clothing bought "off the peg"; it can never fit as well as a made to measure suit. So it is natural I think for a Judge to make a tacit assumption that the standard form may not exactly fit the particular bargain of the parties and to be more ready to assume that the printed language may fairly be moulded a little to conform more closely to the particular transaction. So one can find some rather surprising conclusions as to the interpretation of language where the language is that on a printed form. Our Court of Appeal has held, reversing the judgment of our Supreme Court, that words on a printed form of contract that "the wool, meat and skins are uninsured, and are held at owners risk" did not exempt the custodian of the wool, meat and skins from liability for damage to them caused by his negligence. (***Producer Meats*** v. ***Borthwicks*** [1964] N.Z.L.R. 700)

Although it may be stating the obvious to say that the first thing to do when confronted with a standard form contract is to read it, that is good advice often overlooked by lawyers as well as laymen. The experienced commercial lawyer is only too well aware of the many shades of meaning which can be imparted to the written word, and where the question is to find the meaning, it is necessary first to consider closely and carefully what meaning can be assigned to the written word.

It was at one time thought, and by some lawyers still is thought, that clauses known as "exemption clauses" should be more strictly construed than other clauses. I do not think that this is a correct approach. The House of Lords has emphasised in the ***Suisse Atlantique*** case that the contract should be read as a whole with a view to ascertaining the intention of the parties from the entirety of their language. I think, with respect, that that is the correct rule and that any attempt to apply different rules of construction to different parts of the contract is fraught with difficulty.

But the most surprising thing about the interpretation of contracts is, to my mind, the rule known as the "parol evidence rule". It is a firmly established notion of English and New Zealand law that extrinsic evidence is not admissable

to aid the interpretation of a written contract. There are some exceptions which do not, however, derogate from the main theme. It is permissible to consider evidence of the commercial setting of the contract, but the negotiation leading to the contract may not be considered in aid of the interpretation. This rule is based on the notion that when the parties have set down their contract in writing, they should be taken to have recorded all the agreed terms. If the rule is considered closely, it must be seen, I think, as a useless tautology. Extrinsic evidence is excluded because it is assumed that the writing records the entirety of the bargain. However, that assumption can only be true if the writing does in fact record the entirety of the bargain. Whether or not the writing does in fact record the bargain can only be ascertained by considering whether or not there are indeed extrinsic terms which have been carried into the writing. I do not know of any modern case which has deliberately examined this question in relation to an assertion that an agreed term has been omitted from the writing.

In the most recent New Zealand case, ***West*** v. ***Hoyle*** [1972] N.Z.L.R. 996 the Supreme court adopted without criticism the orthodox statement of the rule as follows:—

> "Where the parties have embodied the terms of their contract in a written document, the general rule is that extrinsic evidence is not admissible to add to, vary, subtract from or contradict the terms of the written instrument . . . The instrument itself is the only criterion of the intention of the parties; so extrinsic evidence is excluded even though such evidence might clearly show that the real intention of the parties was at varience with the particular expressions used in the written instrument".

It was noted that there were two exceptions to the general rule; first that extrinsic evidence may be used to understand the meaning of the written terms where those are ambiguous, and secondly it was noted that there may be a "collateral contract". In the particular case the learned Judge was able to find that there was a "gentleman's agreement" between the solicitors for the parties which constituted a contract for breach of which the plaintiff was entitled to damages.

It is a major thesis of this paper that the parol evidence rule creates more difficulties than it solves and that it should be repealed by legislation.

5. The Rectification of Contracts

The law has recognised for a very long time that a mistake may occur in transcribing the contract of the parties. On proof that the written instrument does not correctly record their bargain, the court will grant the relief of rectification to correct such mistakes. The remedy is sparingly applied however. The task confronting a litigant seeking to show that the written instrument is erroneous is a formidable one and his pleadings are usually received with scepticism. Astute Counsel usually include a plea for rectification as an alternative to a plea for the interpretation of the contract in the manner sought by their client. Thus it is possible to pave the way for the introduction of extrinsic evidence. I do not think it is necessary for the purpose of this paper to discuss the remedy in detail. It is sufficient to note that in a particular case a pleading for rectification does enable the litigant to side step the parol evidence rule.

6. Misrepresentation

The law has also recognised that a contract may be procured by an incorrect statement of fact which induces a party to enter into a contract under misconception. Where that has been done, the Courts recognise that the party to the contract who has been misled has an option. He may affirm the contract, in which event the contract will survive as binding on both parties. Alternatively he may denounce the contract in which event the contract ceases to be binding on either party.

However, it has been firmly decided that the victim of misrepresentation cannot recover damages unless the misrepresentation was fraudulent. Our law is that damages are not available for innocent misrepresentation. The Contracts and Commercial Law Reform Committee of New Zealand has recommended that this situation should be changed. The recommendations have not so far been carried into law. This is, I think, unfortunate because it must surely be obvious that the choice of adopting or abandoning a contract may often be a hard one, especially where some monetary adjustment would provide a remedy appropriate to the position of both parties. That, however, is a different topic from the theme of this paper. I refer to misrepresentation simply for the purpose of illustrating that here is another technique enabling the introduction of extrinsic evidence as to the course of dealing between the parties which may, too, be used as a means of sidestepping the parol evidence rule.

Most standard form contracts include a statement to the effect that the writing records the entirety of the bargain together with an acknowledgement, sometimes, that no inducing statements or representations have been made. One Judge has disregarded such a clause in a misrepresentation case by simply holding that the clause was not promissory in character, it merely purported to be a statement of fact which could not be binding because it was untrue.* He was satisfied that in fact there had been a misrepresentation and no words to the effect that there had not been a misrepresentation could, in his judgment, receive any credence. Mr Justice Turner pointed out however, in the discussion of the paper by Mr E.J. Summers "Consensus and the Written Contract" at the last New Zealand Law Conference that the parties to a contract may deliberately decide to contract that a given state of affairs shall be treated for the purposes of their contracts as if it did not exist. Certainly where it is doubtful that a given state of affairs exists, a provision of a contract that the state of affairs shall be deemed to be non-existent would no doubt be binding.

An interesting recent legislative attempt to deal with clauses of this kind in written contracts is contained in Section 39 of the Hire Purchase Act 1971. This Section provides as follows:—

> "In any proceedings it shall be a question of fact whether any representation, statement, or warranty was made or given to the purchaser or prospective purchaser, whether orally or in writing, by the vendor or dealer or any person acting on behalf of the vendor or dealer in connection with or in the course of negotiations leading to the entering of a hire purchase agreement and whether, if it was made, it constituted a term of the agreement or was relied on by the purchaser. The Court shall not be precluded from inquiring and determining those questions by any provision in the agreement or in any other document unless the Court considers that in all the circumstances of the case, including the

subject-matter and value of the transaction and the respective bargaining strengths of the parties, it is fair and reasonable that the provision should be conclusive between the parties."

Here is a direct negation of the parol evidence rule. To my knowledge the Section has not been before the Courts to the present time and the first decision upon it will be received with wide interest.

7. Collateral Contracts

There are a number of cases in which the Courts have held that an oral agreement constitutes a collateral contract even though the same parties have entered into a written contract relating to the same subject matter. Perhaps one of the strongest examples of this mode of dealing with the problem is ***Strongman (1945) Limited*** v ***Sincock*** [1955] 3 All E.R. 90. There an architect had employed a builder to do certain building work for him. The necessary building permits for the work had not been obtained. The builder did the work but the architect refused to pay for it. Clearly the builder could not recover payment under the building contract. That contract was illegal and any action upon it was doomed to failure. However the builder's advisers discovered one important piece of evidence, namely that it was the universal practice that the necessary building permit would be obtained by the architect if an architect was concerned in the work. It was found as a fact that the architect had given an assurance to the builder that he, the architect, would obtain all the licences which were necessary. The assurance, the English Court of Appeal held, constituted a binding contract of itself. So the builder was entitled to recover damages for breach of that separate contract. These damages represented the loss the builder had suffered from being unable to sue upon the building contract itself. So the builder got paid for the work he had done.

The existence of a collateral contract has been readily found where enforcement of the main contract has been precluded by illegality. In that setting, it furnished a useful tool for the securing of justice. Now that the New Zealand legislature has relaxed the harsh and unjust rules of the common law relating to illegal contracts by enabling the Courts to grant relief by way of validation, compensation or restitution, the need for lawyers to "manufacture" a collateral contract to overcome the problems of illegality should abate. It is now possible to go to the business directly by asking the Court to declare the contract lawful. (Illegal Contracts Act 1970).

I ask you to notice the collateral contract as another means of achieving justice to the parties to a written contract despite the parol evidence rule.

8. The Parol Evidence Rule should be Repealed

I think I have said eough now to show that the notion that the parol evidence rule secures certainty in ascertaining the legal relationship of the parties is illusory. If the document mistakenly records the bargain, it can be rectified; if the document records a contract procured by misrepresentation, it may, at the option of the innocent party, be set aside; if the document omits a promise, the promise may be elevated to legal status as a collateral contract. All of these

concepts require the admission of extrinsic evidence. A determined litigant assisted by an astute Counsel will see that the whole story is told to the Court, and if that story shows that the justice of the case rests with him, it would be a hardy Judge who would deny justice for the sake of adherence to the printed form. In my opinion there is no need for these nice distinctions. I think the law should enable the Courts to receive directly evidence tending to prove the terms of the contract, and that the written word, especially if the writing is in a printed standard form, should be treated as an important piece of evidence. It is probably the most important piece of evidence, but it should not, I think, be regarded as the only piece of evidence.

Lord-Devlin examined this idea in his essay on the Construction of Charter Parties (Samples of Law Making p.56). He said,

> "In theory it may be said that justice requires that the real agreement by the parties should be ascertained by investigating all available sources. In practice, if that is going to involve an inquiry into all sorts of earlier conversations, the terms of which may be disputed, the commercial man can never know where he stands. He ought to be able to take his document to his lawyer and say: 'Tell me what the law says this means, and then I know what my agreement is and what I am bound to do.' It must also be remembered that many contracts are relied upon by third parties who must take them at their face value and cannot know what may have transpired outside them. For these reasons the English lawyer says it is he who is being practical. The principles of English law exclude what might be an elaborate and costly inquiry into all the dealings between the parties; they enable a man to find out quickly where he stands; they make it safe for third parties to act on the documents they are shown. It may be that in the individual case justice is more surely obtained by excluding nothing from the field of inquiry. But as a practical matter, is it not better for the community as a whole that the law should be right ninety percent of the time and arrive at its decision speedily and cheaply, than that it should be right in every case after a long and costly trial? This may not be fiat justitia, ruat caelum, but that has never been a maxim of our commercial law."

It seems to me that in this passage his Lordship is stating two propositions:—

(a) that the parol evidence rule secures certainty.

(b) That the rule is necessary for the security of third parties, such as assignees, who at present are entitled to rely on the terms of the written word.

I do not think the first proposition is true; I have pointed out a number of ways in which the so-called certainty of the written word can be overcome in finding the real relationship. As to the second proposition, I think it is undoubtedly necessary to protect assignees from the destruction of the contract rights apparent on the face of the document. I think this can simply be achieved by enacting that when an assignee has relied upon the terms of the document, rights and obligations arising extrinsically should not be binding upon him unless he has notice of them. Already similar rules are in existence for the protection of a holder in due course of a bill of exchange.

This thesis is the view of the minority of the Contracts and Commercial Law Reform Committee in their report on misrepresentation. It is my opinion that the minority, of which I am one, was right, and that these views should be carried into the law.

9. A Different Approach: Should Standard Form Contracts be treated like By-Laws?

One of the complaints most frequently heard against standard form contracts is that they commonly contain clauses oppressive to the other contracting party. As one would expect, Lord Denning has spoken with his usual enthusiasm on this topic. He has suggested that standard form contracts should be treated like by-laws and quashed to the extent that they are unreasonable. I think this notion is as bad as any other his Lordship has put forward. But as I understand that one of the commentators on this paper holds the view that the Court should be given power to disallow terms of standard form contracts if they are unreasonable, I think that out of deference to the commentator I will say something about this. Lord Denning said (The Road to Justice, 89 et seq.),

> "We live in the days of standard forms of contract . . . Most people do not read the conditions . . . (They) have no real opportunity of accepting or rejecting the conditions."

His Lordship then offers many examples to illustrate his assertion. He continues,

> "The thing to notice in all these cases is that it is of a very one-sided affair. The Companies impose terms which the customer has no opportunity of accepting or rejecting. He is bound whether he likes it or not . . . There is no trace here of freedom of contract. The conditions amount to nothing more nor less than an illustrative code governing the relations between the Companies and the public whom they serve. There is nothing to stop the companies inserting any terms they like except their own sense of fairness and propriety. This is not as it should be . . . The one way which I can see to remedy this state of the law is for the Court to treat these conditions as they would by-laws, and to hold them valid if they are reasonable and invalid if they are unreasonable. That is a suggestion which has been made from time to time, but it has so far not been accepted."

I am bound to say that his Lordship does have a point. There are cases, not I think a great number, of the oppressive use of standard forms as a means of imposing harsh conditions. But I do not think that the remedy is to treat these forms in the way proposed by his Lordship. there are two problems presented by his thesis: —

(a) His Lordship would require the Judge to decide what is reasonable in a commercial situation. That is very difficult to do. Mr Dugdale has referred to the difficulties in the paper he delivered to the last New Zealand Law Conference regarding judicial discretion. I do not think the community should be asked to accept the proposition that a Judge, albeit of the Supreme Court, is a fount of all reason touching every aspect of the community's affairs. I do not think the Judges themselves would relish this task.

(b) His Lordship does not condescend to tell us what the fate of the other terms of the contract would be after some of them have been quashed for

unreasonableness. I do not know the answer to that question. Presumably his Lordship intends that the rest of the contract will survive, and it is apparently of no consequence to him that he would thereby thrust upon the parties a contract which neither of them intended to make.

10. Conclusion

I think the main problem presented by standard form contracts arises when the forms do not fully represent the bargain of the parties. I think the mischief caused by insisting upon the written word could reasonably be overcome by abolishing the parol evidence rule, thus enabling the admission of evidence of the real agreement. If that evidence merely supplemented the written word, there would be no obstacle to finding the supplementary terms. If that evidence contradicted or qualified the written word, the court would then be presented with the problem of deciding which should prevail. It would reach that decision on the basis of the intention of the parties according to objective tests. If the Court was satisfied that the parties had indeed agreed upon a term which is negated by the printed word, then the Court would be able to say that the real agreement should prevail. That is not very far removed from the problem presented by contradictory terms in the same instrument. *(Glynn* v. *Margetson* [1893] A.C. 357, *Hollis* v. *White Sea Timber* (1936) 56 L.1 L.R. 78). In such cases the Court has to give sense to the whole.

I therefore propose that the parol evidence rule should be abolished at least in relation to contracts in printed forms. I would support only one exception, namely that the rule should be retained in relation to Deeds, for it can probably be assumed that the parties mean what they say in a Deed.

1. *Lowe* v *Lombank Limited* [1960] 1 All E.R. 611.

COMMENTARY ON MR PATTERSON'S PAPER

by
B. Coote

As I see it, the first thing we have to beware of in discussing common form contracts is that we don't get too worried about the use of common form contracts as such.

Standard contracts have been around for centuries and it is difficult to see how, for example, the insurance and transport industries could function efficiently without them. Standard terms are implied by statute in, for example, the real property and company law fields and even if every contract were freshly negotiated almost certainly the draftsman would have recourse to standard precedents.

Nor am I worried about any supposed threat to the concept of agreement as an essential element in contracts. It seems to me that to enter into a sale of land on the basis of a standard agreement for sale and purchase or to enter into a contract for employment at 10% above award rates is no less an agreement because not all the precise terms of the form of agreement/S.&P. used or of the industrial award as the case may be are familiar to the parties.

Nor am I worried about the use of standard forms as such between parties of unequal bargaining power. Even if every such contract were negotiated afresh, the relative strength of the parties would just as surely be reflected in the terms of the ultimate agreement, so that while I agree that the parties to a standard form contract should be allowed to prove the actual bargain between them, it would not be in itself an answer to the inequality of bargaining power.

As I see it, the real argument against standard forms is the argument against freedom of contract itself.

The question really at issue is the extent to which parties should be allowed freedom to impose terms on one another. And remember that society does have an interest here in the sense that it is society which, through the law, makes contracts binding and imposes sanctions for their breach. And of course the law does already limit freedom of contract to a large extent. Common law and equity between them already afford protection to those who have been misled or defrauded, those who have been the victims of breaches of trust and those who have received nothing at all of what they have bargained for. The law already protects persons like children, drunks, lunatics and married women. Again, parliament has stepped in to protect some types of tenant, buyers on hire purchase and those who borrow from moneylenders. And the law disallows unreasonable restraints on a person's right to earn a living.

But, in general, the common law has until now been true to the concept of freedom of contract and common form contracts are not a negation of that concept, but a manifestation of it.

A consequence of all this is that while reform in the area of common form contracts tends to be thought of as a matter of lawyer's law, in reality it turns on broad questions of social policy.

Do we want to require that contracts shall be reasonable? If so do we distinguish between, e.g., consumer contracts and commercial contracts or do we

require that *all* contracts be reasonable?

Or are we content to achieve lesser aims, such as enforcing safety standards, or compelling full disclosure, so as to enable people to make more informed choices?

Should reform take the form of controlling advertising and packaging? Or of laying down safety and quality standards?

Do we draw the line at what is harsh and unconscionable, or do we impose the strict requirement that every contract be reasonable? And who is to decide what is reasonable or unreasonable?

Are the penalties to be civil or criminal? Is enforcement to be by private individuals or by the state? Is it to be a matter of court proceedings or of self-help? And if court proceedings, what sort of court?

The problems posed by these questions are so vast that if we were to accept their implications in full, we would be paralysed by the sheer size of the task. The steps we take at any particular time are likely to be dictated as much by public opinion as by logic.

And public opinion, which has this century accepted a public responsibility for the care of the aged, the ill, the handicapped and the infirm, now seems ready to accept responsibility for the protection of consumers. Business men may have to wait a little longer before the welfare state affords them a similar measure of concern.

An example of this concern for the consumer is the recent Hire Purchase Act. In recent years, too, there have been law reform reports on inland transport, lay-by sales, and misrepresentation. A start is being made on insurance contracts, and a report has nearly been finished on moneylenders.

A project which is presently in hand and with which I am associated is the question of exception clauses in sale of goods contracts. Because of the sort of factors I have already mentioned the project is taking a good deal of time and effort. I imagine it is obvious that simply to ban or control the use of exception clauses in itself would be of little benefit to anyone. Exception clauses are, after all, only drafting devices. Ban them, and other devices will be used. The initial problem is to define positively the rights which consumers ought properly to have. And that is not at all easy since consumer goods and the circumstances under which they are sold vary so much. One can reduce the drafting problem by using abstract standards like 'merchantable quality' and 'fitness for purpose' or, worse, 'reasonableness'. The trouble with such standards is that because of their very vagueness frequently only a court can decide whether in a particular case the relevant standards have been complied with. And of course most consumer cases are too small for a court case to be worth while.

In my view the standards for consumer goods need to be made as concrete as possible and ought to be enforceable by the consumer as far as possible without recourse to the court.

The way to do this, I believe, is for parliament to impose on manufacturers or retailers or both something not unlike the better guarantees already given by manufacturers. The manufacturer and retailer would be required, for a reasonable period after the sale, to repair or replace defective parts or the whole article if this were necessary. And if the manufacturer or retailer is unable to comply within a reasonable time, the buyer should have the right to return.

COMMENTARY ON MR PATTERSON'S PAPER

by
J.G. Jamieson

Having had little time to read a paper upon which I am supposed to comment I am in greater difficulty through the delineation of the problem so ably given by Professor Coote. In my view he explains it in a manner which gets to the real core of the matter.

I agree with Mr Patterson and Professor Coote that there is nothing unique or "special" about standard contracts – they are merely a common expedient way of recording a contract.

It is true there are standard contracts in degree. Lawyers use precedents, adapting the precedents to fit the facts in front of them. This, of course, is an adaption of standard form principles. If they use the form wisely, fitting it to the facts rather than the facts to it, this is an illustration in defence of standard form contracts.

But the real problem is that of the parties entering into a contract they did not really intend to enter into at all! This is probably most common in the retail field for it is there that people will obligingly sign forms for the salesman "because he is so nice". Although it does, however, apply in other spheres. Indeed the cases cited by Mr Patterson in his paper in illustrating his comments on standard form contracts, do not appear to be thrown up by contracts which were standard in the accepted sense at retail level.

I agree with Professor Coote that the "standard" of these contracts lies in inequality of bargaining power but not entirely. Much of it lies in ineffective bargaining ability. I cannot subscribe to the view that oppressive terms in standard contracts result from a specific "stand over" tactic in respect of the particular terms themselves. While on a credit sale the vendor's representative may likely say in respect of the whole contract "sign this or you do not get the goods," it is also likely that neither the buyer nor the seller have read or understand the contract and its fine print. In result the parties have a contract containing terms which neither negotiated nor understood.

This is rather different from the situation outlined by Mr Patterson where the parties agree to a contract but the ensuing written document contains only some of the terms. The abolition of the Parol evidence rule would certainly rectify a situation where the writing was not, in fact, the whole deal but does not rectify the situation where the contract contains terms which neither party has considered at all and it is normally these terms which are the oppressive or unfair terms in a standard contract at the retail level.

So it seems that there is a social problem arising from some "standard" contracts in the enforcement of oppressive terms which neither party understood or even considered at the time that the contract was entered into.

If there is to be a remedy for this kind of situation (and I agree with Mr Patterson that the examples he gives are devices developed by the law who mitigate unfairness through the operation of its strict rules) then possibly it may be found in an adaption and expansion of Section 37 of the Hire Purchase Agreements Act 1971 which does give the Court power to relieve against the harsh and "unconscionable" exercise of the powers conferred by the agreement.

I know of no action under Section 37 or in the preceding legislation and thus have no guide as to how the court views the meaning of the words "harsh" or "unconscionable".

I do not have a draft of the expansion or adaptation that I suggest. It may be that the terms "harsh" and "unconscionable" are too severe and may be interpreted in too restrictive a manner in determining whether a particular case is reviewable or not. I prefer the term "unreasonable" perhaps with some definition of criteria related to the relative bargaining powers of the parties and in this way the Court could review those oppressive terms included in a contract that neither party have thought about or even considered.

This may seem a somewhat tall order for the courts and I think Mr Patterson probably has this view when he refers to Mr Dugdale's paper at a recent legal conference on the subject of the breadth of judicial discretion. However, it is not new for the law to intervene on a bargain interpreted so to be on the existing state of the law as to interpretation of written contracts and on social grounds at that.

In the lasser-faire period of last century when the principles of interpretation of contracts were confirmed, the principles of non-enforcement of penalties as opposed to liquidated damages provided in contracts was developed as was the doctrine of restraint of trade. Both were developed on the basis of public or social policy — on what the Courts thought the community required. And every law student knows Pearce and Brooks where in 1866 the Judges of Appeal decided that it was against public policy to force a prostitute to pay for the building of a carriage from which to the knowledge of the carriage builders she wished to solicit custom although the contract itself was not illegal.

So it seems that the intrusion of the Courts view of public policy in relation to contracts is not a new thing and those same Courts acknowledge that public policy is a changing thing.

Whether the Courts have some power of review of oppressive terms of standard contracts in some circumstances perhaps depends on what role one assigns to the Courts and in particular whether the role is limited to the enunciation of the law certain, a view to which I do not subscribe.

Law is a social instrument. It changes and evolves as society changes and evolves as one can see tracing through the law reports themselves. So if law is a social instrument, then perhaps Judges have a social role to the administration of it and should be able by some statutory enabling power to examine from a social point of view contracts not only miswritten as to the parties intentions but where, in fact, they contain oppressive clauses which were not the parties intentions at all, typified by the fine print in what we have been calling the "standard form" contract.

COMMENTARY ON MR PATTERSON'S PAPER

by
L.B. Marquet

As the Chairman has said, I would like to take a slightly different view on this subject. I feel I am wearing two hats. I am a law student but for the past four and a half years, I have been the Legal Research Officer at Consumers' Institute.

From the layman's viewpoint, the comments of Mr Patterson and of those who have followed him have concentrated on the legal remedies which could be available in the event that the written word does not show what was agreed between the contracting parties. With respect, I suggest that the former speakers have tended to overlook the actual position of consumers. Consumers, for the most part, are not lawyers; they do not deal with law in its proper form each day of their lives; they do not know how to interpret legal situations; they probably would not know what the difference is between common law and statute, for example.

I can only draw on my own experience at the Institute in postulating a view different from that which has been given already. It is all very well talking about the parol evidence rule saying that its abolition would make things easier. However, it overlooks the fact that consumers are not prepared to take their cases anywhere near the courts. Again, it is all very well saying that there should be a statutory remedy, but if that remedy is not used it is, I suggest, of little use in the consumer field or in any other field for that matter.

In the field of standard form contracts, most of the relevant legislation is dead before it reaches the statute book in that the contract itself will be couched in legalese – a foreign language to the consumer. If someone does manage to grasp a little of what the words actually mean, it is still unlikely that he would realize the full legal results which will flow, say, in the event of breach.

I do not disagree with any statement which says that standard form contracts are a fact and a necessity. In the consumer field especially they have become very important being, as they are, a short method of arranging hire purchase, layby, credit sales etc. Nevertheless, the consumer is by no means in a strong bargaining position should he wish to change terms in a standard form. If he does strike out a clause it is almost certain that he will be told that either he takes the terms as he finds them or there is no contract at all. It is interesting to note that N.A.C. does not promise to get you anywhere at any time, stated or not. In the hire purchase field the 1971 Act has redressed the balance a great deal but it still does not go far enough. This afternoon, I would like to suggest yet another way of dealing with this problem. I am not sure that there is any real difference between Mr Patterson's solution and that of Lord Denning. My impression is that the same effect would be achieved – it may simply be a question of approach. It is my submission that protection be afforded the consumer before the standard form is actually used in the marketplace. When I first thought about this idea I was inclined to hold a concept whereby standard form contracts would be reviewed, in blank, before a Supreme Court Judge. I suggested this to certain officials in the Department of Justice. Immediately, there were visions of judges legislating and being quire blatant about it. At the

time, I could see little difference between striking out a clause in context of an action brought in the ordinary way (legislation?) and striking out a similar clause in a standard form submitted to the Court for review. With respect, I still cannot see the real difference between the two situations. I have re-thought my original idea a little. What I would ask you to consider is the creation of yet another administrative tribunal — New Zealand's eighty third. It would consist of a legally qualified chairman, a Consumer Council assessor and a further assessor to represent the trading/manufacturing interests.

A person or organization wishing to use a standard form contract would be required by law to submit the final draft to the tribunal before it was used in the marketplace.

Interested parties could then be given an opportunity in which to make submissions on any or all of the clauses in the contract. The tribunal would then decide, by a majority vote, whether the form could be used as submitted or used with such amendments as the tribunal directed.

The underlying concept here is that there would be a way of "redressing the balance" or improving the form ***before*** it was made available for general use. I submit that were such a procedure to be adopted, the number of complaints about standard form contracts would decrease markedly. Moreover, I submit that it would cut down the amount of litigation but you may wish to challenge me on that issue. What was said here this morning about small claims courts is relevant. Both subjects, standard form contracts and small claims courts, are consumer-orientated in a large measure and I cannot help but feel that the two must be seen as being complementary. I would go so far as to say that the business of the small claims courts would decrease were some form of vetting procedure to be introduced for standard form contracts.

I have come here this afternoon to float an idea. I do not suggest that it is an infallible means of overcoming the difficulties which arise from the use of standard forms. I would suggest, however, that a general piece of legislation in this area is not the answer we should be looking for. In my view, that type of legislation would only serve to create further litigation and fail to deal adequately or appropriately with the problem which I believe exists.

I think it would be better were each standard form to be submitted, in blank, to an independent authority before it is used. At that stage, there is time in which to examine it in terms of its likely effects and its reasonableness towards both parties.