Papers from the Commercial Law Seminar

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Legal Research Foundation Incorporated
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INTRODUCTION

The Foundation in calling the seminar from which these papers are drawn a "Commercial Law Seminar", chose a title that could only be regarded as comfortably wide. However, there was a theme to the five papers presented, different as they were. They all pertained to the law governing persons involved in commercial transactions, and hopefully will be of interest to lawyers who specialise in that sphere, whether or not they use their expertise in the Court room or in the Board room.

The seminar took place on Thursday, the 1st of September 1977. The papers were presented in the basic form in which they appear here. The speakers were all experts in their particular fields. Peter Hillyer Q.C. has been involved in many of the more important reported commercial judgements of the last decade, David Vaver and Richard Sutton are both senior lecturers at Auckland Law School. Francis Reynolds was a visiting lecturer at Auckland Law School and is a Reader in Law at Oxford University. Professor Aubrey Diamond, who at the time was visiting the University of Melbourne, is the Director of the Institute of Advanced Legal Studies at London, and is a former British Law Commissioner. The seminar was attended by many non-lawyer members of our commercial community and attracted a surprisingly large audience of approximately 150 persons.

The purpose of the seminar and this booklet is to provide an up-to-date statement on some complex and developing areas of commercial law. It is hoped that readers will find it useful and illuminating. The Foundation is most grateful to the five speakers for giving so generously of their time and knowledge, thus making the seminar, and, we are sure, this booklet, a lasting contribution to legal research in the area of commercial law.

R.J. Asher,
Director,
Legal Research Foundation.
When the average person even these days hears the word copyright he thinks of rights relating to literary works or artistic works such as books or paintings. Up to a couple of years ago the average lawyer also thought the same way. When one considers the lethal nature of the rights conferred by the Copyright Act, it is surprising that since 1962 (when the current Act was passed) only six cases have appeared in the New Zealand Law Reports on copyright. When further one considers how common piracy is in industry, it is even more surprising because copyright is not confined to books or works of art, the provisions of the Act are such that any person who copies another man’s work must be very careful lest he be guilty of infringement.

I think that people have also always recognised that copyright would exist in musical works and two of the reported cases deal with these, Australian Performing Rights Association Limited v. Koolman and Another\(^1\) and J. Albert & Sons Pty Ltd v. Fletcher Construction Company.\(^2\) More in the artistic and literary fields were two others, Martin v. Polyplas Manufacturers Limited\(^3\) which concerned engravings of coins and International Credit v. Axelson\(^4\) which concerned a Credit Control Manual.

It was however, in my view, not until the case of P.S. Johnson and Associates Limited v. Bucko Enterprises Limited and Others\(^5\), that copyright litigation came down from the lofty plane it had occupied and became involved with industry. The reason of course was that under the 1962 Act a plan ceased to be “a literary work” as it had been under the 1913 Act and was included in the definition of a drawing and a drawing was an artistic work “irrespective of artistic quality”.

The work of art in Johnson v. Bucko was a drawing of a lavatory pan connector. Mr Johnson had developed this type of rubber sleeve which joined the outlet from a lavatory pan to the soil pipe leading outside the house. It had a pattern of ribs and was so shaped as to fit the different diameter pipes.

Mr Johnson had applied for a patent for his idea but at the time of the case it had not been granted. Mr Buckley had been advised that the connector was not patentable and thought he was free to go ahead and copy it. Unfortunately for him his adviser apparently hadn’t considered the possibility of protection under the Copyright Act and Mr Buckley got hold of a copy of Mr Johnson’s drawing and possibly one of his connectors, had a mould made from them and started up in competition to Mr Johnson.

Mr Johnson sued for breach of copyright and His Honour Mr Justice Chilwell held that there was copyright in the drawing, that Mr Johnson’s company owned the copyright and that Mr Buckley and his company had infringed. He granted injunctions, an enquiry as to damages on the basis of conversion and ordered

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delivery up of all pan connectors in the possession, power or control of the defendants.

The next copyright case in the books is *Auckland Medical Aid Trust v. Commissioner of Police*. This turned on the right of the Crown to use documents in which copyright existed and is on rather a narrow point.

The latest case of which I am aware however, again brought the Copyright Act down into the market place and will I think have wide repercussions. This is the case of *Beazley Homes Limited and others v. Arrowsmith and Others*, a decision of His Honour Mr Justice McMullin. Beazley Homes Limited produced plans for and built low-cost houses. Mr Arrowsmith had been Beazley’s agent in Hastings and had joined up with Mr Allison who had been one of Beazley’s franchise builders. Mr Arrowsmith sold and Mr Allison built houses which were copied from and substantially similar to the Beazley plans and houses.

Beazleys sued for breach of copyright and His Honour held that there was copyright both in the plans and in the houses and that Mr Arrowsmith and Mr Allison had infringed. It was suggested that copyright could not subsist in such mundane things as plans for group houses and that in any event a small alteration in the plan was enough to prevent infringement. His Honour held however, that there was sufficient originality to attract copyright and once copying was proved, substantial reproduction was all that was necessary. This case and *Johnson v. Bucko* show, I think, a development in copyright law in New Zealand.

I propose to look at the Copyright Act 1962 particularly with these two cases in mind. This means I shall be dealing only with what are known as “artistic works”. Copyright it must be appreciated lies in the form in which an idea is expressed not in the idea and it must be proved that the infringer copied. Compare for example patents which are concerned with ideas and which give protection even against a person who subsequently to registration, arrives independently at the same idea.

The Copyright Act 1962 is a code and no copyright subsists other than by virtue of the Act (s.5.). Broadly speaking copyright subsists in every unpublished original literary, dramatic, musical or artistic work of which the author was a New Zealand citizen or domiciled or resident in New Zealand at the time the work was made. If the work has been published and the first publication of the work took place in New Zealand or the author was a New Zealand citizen or so domiciled or resident, copyright will also subsist. It is necessary therefore to see first whether the work has been published and this is defined in Section 3 in the case of artistic works to mean if reproductions of the work have been issued to the public.

In the *Beazley Homes* case McMullin J. inclined to the view that the plans were published because they were available for perusal at the offices of Beazley agents. He thought also that the houses were published works because substantial numbers of them were erected in New Zealand at the request of purchasers. If they were not published however, he held that copyright still subsisted in them because the authors were resident in New Zealand at the time the works were made (s.7.). If works do not come within Section 7 it is

7. Supreme Court Napier, 27th June 1977 (A 14/75).
necessary to consider Sections 49 to 51 which deal with artistic works etc., published in other countries or by citizens of other countries. Foreign works and authors have generally the same protection under a convention order made in 1964.

Next the work must be "original". This is a very difficult concept because as I have said, the copyright applies to artistic works and not to the ideas upon which those works are founded. It is original skill and labour in execution which is protected, not originality of thought. Simplicity complicates thinking about originality. In the Beazley Homes case McMullin J. was dealing with very simple houses but he said:

"Similarities in other designs do not therefore preclude a claim being made for originality. Indeed it seems to me that there may be some force in the Plaintiff's claim that because the range for skill and design is limited, the need for their exercise is greater".

In the Johnson v. Bucko case Chilwell J. referred to:

"The exercise of time skill labour and judgement to translate Mr Johnson's thoughts [shown in a sketch] into a detailed engineering plan containing all the precise information required for the engineering shop to produce the die or mould. The product drawing was not a copy of any other drawing. It was an original execution".

Having surmounted the originality hurdle the person claiming the copyright must then establish that the work protected is an artistic work and as I have said, this is where the development of the law is taking place, because a plan is a drawing and a drawing is an artistic work irrespective of artistic quality. Any sketch therefore provided it fulfills the other criteria I have mentioned may attract copyright and that may restrict the reproduction of that work in any material form (s.7(3)) and give the exclusive right to do so to the owner of the copyright or any person authorised by him. Let us analyse these different requirements.

Reproduction in the case of an artistic work includes a version produced by converting the work into a three dimensional form (s.2) provided (and this is a very funny section) that the maker of an object of any description which is in three dimensions shall not be taken to infringe the copyright in an artistic work in two dimensions, if the object would not appear to persons who are not experts in relation to objects of that description to be a reproduction of the artistic work (s.20(8)).

The section has been the subject of much comment but the reason is, I think, clear. What is protected is the expression of the idea in the artistic work. If a person would have to be an expert to see that the three dimensional object is a reproduction of the two dimensional plan it is more the idea which has been taken than the expression of the idea. For example, the plan of the hull of a boat comprises a number of curved lines which certainly don't mean very much to me. I would not, I think, be able to say that a particular hull was a reproduction of a particular plan because I'm not an expert in boat design - but I would think that an expert would be able to pick the reproduction.

The answer in the case of a pirated boat hull may be that the hull or the mould is a sculpture which again doesn't have to have artistic quality to be an artistic work. Copyright would then subsist in the hull and it would not be necessary to overcome section 20(8).
In *Johnson v. Bucko*, Chilwell J. held that he was not left in the position where he could not say the connector made by Buckley was a reproduction of Johnson’s drawing. Note the double negative — it demonstrates where the onus lies. Note also that the judge is entitled to and usually does bring his own non-expert eye to bear. He is not confined to evidence which may be given at the hearing by non-experts. In the *Beazley Homes* case McMullin J. went to look at them and had no difficulty as a non-expert in holding that the houses built by Mr Allison were three dimensional reproductions of Beazley’s plans.

I mentioned that the exclusive right to do the restricted acts was confined to the owner or persons authorised by him. Who then is the owner? Section 9 provides the answer. Dealing still with artistic works of the nature I have been talking about the owner is the author of the work except:

1. where someone else commissions the author to make the drawing and pays or agrees to pay for it in which case that person is the owner of the copyright

or 2. where the work is made in the course of the author’s employment under a contract of service or apprenticeship, the employer is the owner of the copyright.

In the course of the *Beazley Homes* case two pitfalls emerged in this regard. One of the plans concerned was drawn, pursuant to a commission by an independent plan drawer for Beazley Homes prior to 1962. Under the old 1913 Act copyright remained with the author. Had it been under the 1962 Act it would have been owned by Beazley Homes. As it was, Beazleys were unable to claim infringement of that plan. The other pitfall arose because although another plan was drawn by an employee of Beazley Homes, he had drawn it for his own home and in his own time and not therefore in the course of his employment. He retained the copyright and it was necessary to join him as a plaintiff in the action.

Having established that there is a work in which copyright can subsist and that it does subsist in the work and that the plaintiff is the owner of the copyright, it finally remains to establish that the copyright has been infringed.

As I have said in the cases I have been referring to, this means reproducing the work in any material form. Funnily enough it doesn’t say in the Copyright Act that a person may not copy but it is abundantly clear that it must be proved that the alleged infringer did so. “The copyright work must be the source from which the infringing work was derived” (*Frances Day and Hunter v. Bron*). This of course is a question of fact to be proved in any way that any fact can be proved. Because however it is very seldom that direct evidence of copying is available — e.g. evidence that the alleged infringer was seen copying the artistic work or evidence that he said he copied it, proof of copying is normally by what I call the multiplication of co-incidences.

In the *Beazley Homes* case copying was denied but when a transparency of the Beazley plan was put over the Arrowsmith plan, they fitted so exactly that there was no doubt that the one could not have been produced without the other, McMullin J. said:

“When the Arrowsmith plans are placed on top of the Beazley plans a striking likeness is immediately demonstrated and in my view the

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8. [1963] Ch. 587.
Arrowsmith plans are no more than copies of the Beazley plans with alterations, some for the better, made to them. They appear to be substantial tracings but even if they are not actually traced, it is impossible to escape the inference that the designer of the Arrowsmith plans 6 and 8 copied the Beazley plans, making changes from time to time, some of which may have been intended as genuine improvements (which they are) and some intended to confer a measure of distinction between the two."

What then is the effect of the dissimilarities? They do not demonstrate that a plan has not been copied nor do they mean that copyright has not been infringed. The question is whether a substantial part of the work has been reproduced (s.3). If it has there has been a breach of copyright. Whether it is substantial of course is a matter for the judge but once it has been established that a work has been copied it always seems to me that the copier must go a long way to "uncopy" his work.

Finally, what remedies are available? I mentioned earlier that the rights conferred were lethal and I do not resile from that word. In addition to an injunction the owner may obtain damages or an account of profits and an order that (except in the case of a building) the infringing copy be delivered up or destroyed. It is necessary to consider carefully the advantages which may be obtained from the alternative remedies of damages or account of profits.

Damages are measured by the loss suffered by the owner of the copyright whereas an account of profits measures the gain made by the infringer. These are of course not necessarily the same, nor do they even bear any relation to each other. It usually cannot be postulated that the owner of the copyright would have sold one of the artistic works in place of each one sold by the infringer. If the court thinks having regard to the flagrancy of the infringement and the benefit accrued to the defendant that the plaintiff would not otherwise obtain effective relief, it may award additional damages. These would seem to be in lieu of exemplary or aggravated damages.

Normally an account of profits is granted on the principle that a wrongdoer should not be permitted to keep his ill-gotten gains and this will be the case even if the person wronged has suffered no real loss. Because of this principle however, an account of profits is not usually granted if the wrongdoer didn’t know that he was doing wrong. Such a person is only liable to compensate for loss suffered by the wronged person. Funnily enough however, the opposite is the case with copyright. Under s.24(2) if the defendant was not aware and had no reasonable grounds for supposing that he was infringing, damages will not be granted but the owner of the copyright is entitled to an account of profits.

Section 25 of the Act however is the one with real teeth in it. This provides that the owner of the copyright shall be entitled in effect to damages for conversion of any infringing copy. This again does not apply to an innocent infringer but the person who deliberately copies may find that he must pay to the owner of the copyright the full price he received, for any infringing article he sold, less only the cost of sale. In other words he doesn’t account only for profits. He pays up the full net sale price, This of course could be ruinous.

To confine my remarks sufficiently to fit into the limited time available I have had to leave out vast areas of the subject, I hope however I have said enough to demonstrate how interesting and valuable a weapon this can be in these days of advancing technology and therefore increasing industrial espionage.
I would like to conclude by saying that in my respectful opinion (although I know that not everyone agrees with me) the use of the Copyright Act in the way I have mentioned is not only legitimate but desirable. Some wish to confine its scope to the traditional artistic works but I think that the theft of a man's skill and labour by copying his drawing, is as reprehensible as stealing his motor-car or his money. If the Copyright Act is not to be used to protect him, some other law reform will have to be introduced which will waste the body of law which has been built up and is being adapted, as the common law so frequently does, to meet the needs of our changing society.
THE LAW OF TRADE SECRETS
A SHORT REVIEW
David Vaver*

What is a trade secret?¹ Most firms which have been in operation for any period of time acquire some expertise in their business, otherwise they do not survive. If the firm is a manufacturer, it may have unusual manufacturing plant which it may have developed itself or modified from ordinarily available plant. It may have developed special recipes for doing things. Take the formula for Coca-Cola or Listerine or Maggi soups. The composition of all these products is a closely guarded secret. Possibly special plant is also used in blending. Possibly, too, where the constituent products are commonly known, e.g., for Maggi tomato soup, the proportions of the constituents, when they should be added, how long they should be treated, etc., are part of the knowhow possessed by the firm which makes its product a success or gives it a competitive advantage. But secrets are not confined just to such matters. I am content to adopt the description offered by Turner, The Law of Trade Secrets, (1962), p.4:

"The subject-matter capable of protection may be an industrial secret like a secret machine, process, or formula, or it may be industrial knowhow (an increasingly important ancillary of patented inventions); it may be information of any sort; it may be an idea of a scientific nature, or of a literary nature (such as the plot of a story or the theme of a television series), or it may be a slogan or suggestion for a method of advertising; lastly the subject-matter may be the product of work, or expenditure of money, or of trial and error, or the expenditure of time."

In addition there must be some element of secrecy. Matters of public knowledge or of general knowledge in an industry cannot be the subject-matter of a trade secret. Relevant factors seem to be (1) the extent to which the information is known outside the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken to guard the secrecy of the information; (4) the value of the information to the holder of the secret, and to his competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.²

*Senior Lecturer, Faculty of Law, University of Auckland.


Rationale

Why does the law grant protection to such things at all? After all, we have a fairly sophisticated patent system whereby the State grants 16-year monopolies for novel processes and manufactures. The system has existed in England for centuries and in this country since the early colonial days. The purpose of the patent law is primarily not to grant monopolies as such. It is to advance the economic life of the State by requiring public disclosure of new inventions so that others may learn of them and be spurred on to further discovery to the public good. Nor can the inventor play "dog in the manger". He cannot indefinitely prevent others from using the disclosed invention when he himself does not. A system of compulsory licensing of the invention is included in the legislation to prevent this sort of patent abuse. The price the State is prepared to pay for such disclosure is the grant of a limited monopoly to the discloser of the invention.

Trade secret law on the other hand works in the opposite direction. It permits the holder of the secret to keep it clandestine and use it for his own purposes. It does not oblige him to disclose or use the secret. It does all it can to assist him in keeping knowledge private. It calls the secret "property" and talks in terms of the holder of the secret having "proprietary rights" in it. He can play "dog in the manger" and trade secret law is prepared to use all its resources to allow him to do so. What possible justification is there for such an apparent contradiction?

The legal basis of the jurisdiction has been variously put. Occasionally, there is an express contract requiring confidence. In such cases the court's strong pull towards sanctity of contract (note the religious overtones) is the avowed policy favouring protection of the secret. The familiar covenants against disclosing confidential information entered into by employees with their employer are the prototype here. In other cases, there is no express contract of confidence between the parties but the relationship between the parties exudes the odour of confidence. Again, the employer-employee relationship provides a good example. Even where there is no express covenant regulating the position, the employee is held to owe a duty of good faith arising out of his contract not to use or disclose his employer's trade secrets during or after the termination of his employment. The courts have little hesitation in implying a term to this effect in the contract of employment. But there are situations where there is no contract between the parties and, strain as it might, a court cannot erect or imply one without driving a coach-and-four through the contract text books. The classic case here is Prince Albert v Strange. Queen Victoria and Prince Albert had made drawings and etchings for their private amusement. Impressions of them came into the hands of the defendant who proposed to exhibit and publish them, and also to make and publish a catalogue of them. Prince Albert succeeded in obtaining an injunction against this proposed activity. The court seems to have drawn the inference that the defendant must have known that the impressions had been obtained without authority. Lord Cottenham LC gave a number of grounds for his decision. One of them was that equity would restrain breaches of confidence independently of contract. The right to hold the drawings private was treated as a property right.

This theme was elaborated by Holmes J. in *E.I. Dupont de Nemours Powder Co. v Masland*: "The word ‘property’ as applied to trade marks and trade secrets is an unanalyzed expression of certain secondary consequences of the primary fact that the law makes some rudimentary requirements of good faith." More recently Lord Denning MR has said: "The jurisdiction is based not so much on property or on contract as on the duty to be of good faith." And again: "The law on this subject does not depend on any implied contract. It depends upon the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it." So on this view the court is enforcing here, as in other areas of the law, a minimum standard of good commercial ethics – of fair dealing. There is also the tacit recognition that many trade secrets play, at a different but not necessarily lower level from patents, a significant economic role. If protection were not given, encouragement would be given to the faithless employee and the industrial spy; knowledge would necessarily be fragmented amongst many employees instead of concentrated in a few, thereby creating inefficiencies and higher costs; the spread of technology through licensing would be discouraged.

One further comment should be made here. Basing himself on the more modern cases, one commentator has suggested that we may be seeing the birth of a new tort of breach of confidence, rather than the mere development of the old equitable principles. This uncertainty as to the true basis of the jurisdiction has led the English Law Commission to recommend in its Working Paper the introduction by legislation of a new statutory tort of breach of confidence in replacement of the current doctrines. It is no mere academic argument to establish whether the cause of action sounds in equity or tort. If the action is equitable, then equitable defences such as lack of clean hands, laches, etc., will be relevant to the proceedings in all their phases: e.g., lack of clean hands will be an absolute defence to the action whether an injunction or damages are claimed. The cases themselves have done little to clear up the confusion. This paper is not the place to attempt such a reconciliation, but the matter will again be noticed when we return to the question of remedies.

**The Law**

The following requirements appear essential to the cause of action:

1. The information must be confidential.
2. It must have been imparted in confidence by the plaintiff to the defendant, or the defendant must have acquired it in breach of a duty of confidence.
3. The defendant must have used or disclosed the information without consent, and possibly also to the defendant’s detriment.
4. The disclosure or use cannot be excused or justified.

Let us examine each of these requirements one by one.

5. (1917) 244 U.S. 100, 102.
1. Information Must Be confidential

Note that novelty is not required. The information need not be such as would support a patent application. Frequently it is mere "knowhow" or a customer list. Also there are confidences which cannot be industrially applied, e.g., secrets about a person's private life, which are equally entitled to protection.

Difficulties may however arise where the information is partly private and partly public. If the information is generally known initially, it cannot be confidential. But what if part only is known? In *Seager v Copydex Ltd* the plaintiff had invented and patented a carpet grip called the "Klent" grip. He later also invented an improved version called the "Invisigrip" which he did not patent. The plaintiff went on television and talked about his "Klent" grip, and the defendant contacted him about it. Negotiations occurred between them with a view to the defendant's marketing the "Klent" grip, but in the course of them the plaintiff revealed information (oral and written) about his "Invisigrip". The negotiations broke down, but the defendant marketed a grip which resembled the "Invisigrip" and even applied for a patent in its own name for it. The plaintiff sued claiming an injunction and an inquiry as to damages, basing his claim on a breach of the duty of confidence. The English Court of Appeal found the defendant liable. No doubt the defendant could have used information available to the public, e.g., by inspecting the patent register or by examining the "Klent" grip which the plaintiff had put on the market. But part of the product which it produced was made as a result of information imparted to it by the plaintiff in confidence. Lord Denning MR said: "When the information is mixed, being partly public and partly private, then the recipient must take special care to use only the material which is in the public domain. He should go to the public source and get it: or at any rate, not be in a better position than if he had gone to the public source. He should not get a start over others by using the information which he received in confidence".

Suppose information is imparted in confidence but it subsequently becomes public knowledge. Is it any longer confidential information? It appears not. In *Lysnar v Gisborne Harbour Board* the plaintiff imparted in confidence to the defendant a plan for improving the defendant's harbour, but he subsequently published full particulars of it in a locally circulating newspaper. The Court of Appeal held that any confidentiality in the plan was thereby lost. As Sim J. put it: "The respondent thus communicated his scheme to the whole world. It thereupon became public property, and each member of the public was entitled to make any use he pleased of the scheme." Similarly if the information is revealed in a published patent specification. The House of Lords has held that such publication by the owners of the confidential information removes the cloak of confidentiality from the information, so that no action will lie for breach of confidence: *Mustad v Allcock*. There an ex-employee had joined

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13. [1967] 1 W.L.R. 923 where the facts are more fully reported than in [1967] 2 All E.R. 415.
16. ibid., 53
another company and informed them of a method of constructing a machine for making fish-hooks. His former employer had kept this information secret and the employee had signed an agreement against disclosing such information. The plaintiff brought an action against the ex-employee and his new employer seeking an injunction and damages. Before trial the plaintiffs obtained a patent for the invention. The House of Lords held that this prevented an injunction being obtained against the defendant employee disclosing the information revealed by the patent to his new employer. Insofar as he might disclose matters not revealed by the patent, an injunction might lie for those: but the onus was on the plaintiffs to prove that such separate information might be imparted, which they had failed to do. The House did not deal with the question of damages: possibly insofar as information had been disclosed before the patent was published giving the defendant company a headstart, damages might have been claimed for that.

On the other hand, knowledge of the grant of a patent itself might be confidential information. In Cranleigh Precision Engineering Ltd v Bryant\(^\text{18}\) the defendant employee had invented a method of constructing above-ground swimming pools. In the course of his employment he learnt of a patent for a similar swimming pool, but did not tell his company about it. He left the plaintiff’s employ and set up in business for himself, buying the other patent. In an action for breach of his duty of confidence, he claimed that the information he had acquired was not confidential because of the existence of the other patent. The court granted the plaintiff an injunction against the defendant’s use of the patent he had acquired. Knowledge of the existence of the patent had come to him in the course of his employment with plaintiff. He had used this knowledge to the detriment of the plaintiffs in breach of the duty of confidence which he owed them, Mustad’s case was distinguished on the ground that there the employee could not be restrained from divulging trade secrets of the employer: what the employer had himself made public through the patent was no longer a trade secret. In a similar American case\(^\text{19}\), the court decreed that the defendant assign the patent he had acquired to plaintiff upon payment of the price for which defendant had acquired it.

The problem as to what amounts to confidential information often arises in the context of an employment contract. When an employee moves on to new employment, what knowledge can he legitimately take with him to his new employer? The factors set out at the beginning of this article are relevant here in determining what the first employer is entitled to regard as being his property. The law here must attempt to balance interests favouring the mobility of labour against the quasi-proprietary rights protected by the law of trade secrets. Broadly speaking, the line seems to be drawn at the sort of information an able employee might acquire in the course of his experience in the trade (which he is entitled to carry away with him) and information which is secret to the extent that an employee would not have acquired it had he not been in the employment of that employer.\(^\text{20}\)

\(^{18}\) [1964] 3 All E.R. 289.
\(^{19}\) Shellmar Products Ltd v Allen-Quelley 36 F.2d 623 (1929).
2. The Information Must be Imparted in Circumstances Importing an Obligation of Confidence

On most occasions this should not present any great difficulty. Information given in a commercial or industrial context with some avowed object in mind, such as a joint venture or the manufacture of articles by one party, would obviously be considered to be given in confidence.\textsuperscript{21} Similarly with information passing under a licence to manufacture goods,\textsuperscript{22} Away from the commercial sphere information imparted during contractual relationships such as that of a client and his banker, accountant or solicitor, or that of a patient and his doctor, is obviously imparted in confidence. A good working test has been suggested by Megarry J.: "It may be that, that hard-worked creature, the reasonable man, may be pressed into service once more; for I do not see why he should not labour in equity as well as law. It seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given him in confidence, then this should suffice to impose upon him the equitable obligation of confidence."\textsuperscript{23} This will not be a universal solvent. Suppose someone, without solicitation, sends in an idea for an advertising campaign to an advertising agency which subsequently uses the idea: would this be sent under an obligation of confidence? Would the agency be bound to pay a reasonable price for the idea? The answer is by no means easy in English law. Such problems have been solved in the United States by using theories of unjust enrichment and implied contracts.\textsuperscript{24} Perhaps a New Zealand court would be prepared to imply a contract: the offer of an idea and the acceptance by use of the idea would imply a contract to pay a reasonable sum for its use.

3. Unauthorised Use of Information

Again this causes little theoretical problem, although proving that the defendant has in fact used one’s trade secret when the plaintiff is not permitted to inspect his factory is frequently quite difficult in practice. Theoretical and practical difficulties do however arise with what has become known as the "springboard" type of case. Suppose A gives B an idea in confidence which B does not use, but which gives B another idea which he does use? The courts have held that this may amount to a breach of the duty of confidence. The authorities are fully reviewed in \textit{Conveyor Co. v Cameron Bros}\textsuperscript{25} where Moller J. stated the applicable principles as follows: (a) It is enough to provide a plaintiff with a cause of action if the offending article is "evolved" from the plaintiff’s designs, so long as the particular defendant has "made use of" the confidential information. (b) Although a defendant may honestly believe that the offending article is the result of his own ideas, he will be liable to the plaintiff if he has unconsciously made use of confidential information given to him by the plaintiff as a springboard for activities detrimental to the latter. In the \textit{Conveyor Co.} case the licensee had disassembled a conveyor trolley which it wished to manufacture. Assisted by drawings from the plaintiff supplied at the licensee's request,

\textsuperscript{22} \textit{Conveyor Co. v Cameron Bros} [1973] 2 N.Z.L.R. 38.
\textsuperscript{23} \textit{Coco v Clark} (supra), 48.
\textsuperscript{24} \textit{Dawson & Palmer, Cases on Restitution}, 2nd ed. (1969), 210ff.
\textsuperscript{25} [1973] 2 N.Z.L.R. 38.
the licensee made the trolley. Some amendments in design were made by the licensee. The court enjoined the licensee from continuing manufacture of the trolleys after the termination of the agreement. Although the trolley was in the public domain, the licensee would have had great difficulty in manufacturing it simply from its stripping down of the trolley and proceeding by “reverse engineering”: it had “benefited to no small extent” from the confidential information given it by plaintiff.

The problem here, of course, is how the defendant is to shake himself of the confidential information. Suppose that in the Conveyor Co. case the defendant could physically have managed to manufacture the trolley through reverse engineering and by a process of trial and error had got everything right. Suppose that the trial and error amounted to 3 months’ work and $20,000 worth of time. It is clear that plaintiff would have had no cause of action against the defendant. And suppose that in the course of all that the defendant had made substantial improvements to the design? Again, no liability. But suppose that the information had been imparted during negotiations which broke off? What is the defendant then to do? How can he rid his mind of the ideas which plaintiff has imparted to him? Is he supposed to hire a designer to go over the same ground again? Is he somehow to give instructions to that designer free of the information he has acquired? Or is he simply to pay over the $20,000 it would have taken him in research and development to reach the result? Or a reasonable royalty? Megarry J. adverted to these problems in Coco v A.N. Clark:

"I also recognise that a conscientious and law-abiding citizen, having received confidential information in confidence, may accept that when negotiations break down the only honourable course is to withdraw altogether from the field in question until his informant or someone else has put the information into the public domain and he can no longer be said to have any start. Communication thus imposes on him a unique disability. He alone of all men must for an uncertain time abjure this field of endeavour, however great his interest I find this scarcely more reasonable than the artificiality and uncertainty of postponing the use of the information until others would have discovered it."

4. Just Cause for Use or Disclosure

The obligation of confidence is not absolute. Occasions may arise when confidentially acquired information may be used or disclosed. If, e.g., the use of the trade secret involves the use of ingredients in a manner or in proportions forbidden by law, the holder of the secret may be unable to obtain an injunction against an unauthorised acquirer and user of the secret. Instances when information may be revealed are multiplying. It is undoubtedly too restrictive to say, as one judge has, that disclosure is only permitted when it is in the public interest, and “public interest, as now recognised by law, does not extend beyond misdeeds of a serious nature and importance to the country”. The secret love-lives of the pop singers Tom Jones and Engelbert Humperdinck (the

26. In some cases the court is prepared to hold that a licensee is free to use the information after the termination of the licence, as a matter of construction of the contract: Regina Glass Fibres v Schuller [1972] R.P.C. 229.


Second] hardly qualify for this test, and yet disclosure thereof by their ex-manager to a tabloid newspaper has not been enjoined: "If a group of this kind seek publicity which is to their advantage, it seems to me they cannot complain if a servant or employee of theirs afterwards discloses the truth about them. If the image which they fostered was not a true image, it is in the public interest that it should be corrected... As there should be 'truth in advertising', so there should be truth in publicity." 30 At the present time the occasions upon which disclosure or use may be permitted remain fluid and the reasons for disclosure will be examined on a case-by-case basis. Lord Denning has compendiously put the matter thus recently:

"[The Court] will enforce the stipulation if it is reasonable in reference to the interests of the parties and reasonable in regard to the interests of the public... But the courts will not enforce it if the stipulation is wider than is reasonable: nor if the possession [sic] of the information afterwards gives it away wide-spread to others and thus himself drives a hole in the blanket of confidence...: nor if the keeping of it confidential would be contrary to the public interest: or if there is just cause or excuse for disclosing it. In short, it may perhaps all be summed up thus: The Court will not enforce a stipulation for confidence if it was not reasonable at the time of making it, nor if afterwards, owing to subsequent happenings, it became unreasonable that it should be enforced." 31

Remedies
(i) Injunction

Of all the remedies for breach of confidence the injunction is the traditional one. It will certainly lie where the recipient of the information is dishonestly using it. Thus, suppose that in Seager's case the defendants had broken off negotiations with the intention of appropriating Seager's secret. The court would most likely have enjoined them from using it. Equally if a new employer urges his employee to disclose the secrets of his former employer. For one thing, this might amount to the tort of inducing breach of contract, i.e., causing the employee to break his contract of fidelity with his old employer, if the new employer knows the employee was under such an obligation, or acted not caring whether he was or not. 32 Of course, if the new employer does not know that he is inducing a breach of contract (or does not proceed reckless of the position), the tort is not committed. The question then becomes whether he may be enjoined despite his lack of knowledge that the employee is passing on trade secrets to him. In Cooksley v Johnson 33 the New Zealand Court of Appeal held that there was no authority for the proposition that "an innocent person, to whom the information was communicated by the defendant, and who had acted on it without any knowledge that the plaintiffs had any rights in it, would [be] held liable for its use". They denied that there was any analogy between tangible goods and intangibles such as information:

"In the case of chattels the person who deals with them must do so at his

32. This seems the basis of the holding in NZ Needle Manufacturers Ltd v Taylor [1975] 2 N.Z.L.R. 33 against the employer.
33. (1905) 25 N.Z.L.R. 834.
own risk, if it should turn out that the person with whom he deals has no title. But chattels can never become public property. There must always be an owner, and a prudent person can protect himself in his dealings with them. Information, on the other hand, is as a general rule public property. The affairs of life could not be carried on if it were incumbent upon every person to whom information has been communicated to inquire before he acted upon it whether or not there were facts which gave some other person a right of property in that information. No case is likely ever to go to this length."

The same must be true in equity. Equity may well enjoin an innocent recipient before he has acted to his detriment, but the tendency of the modern cases is to deny injunctive relief where the defendant has innocently changed his position to his detriment, e.g., by starting production, building a factory, etc. Further, if confidential information involves but a small part of the finished product and the harm of an injunction would outweigh any benefit to the plaintiff, such relief may also be refused, perhaps even in the case of a dishonest defendant. Damages would be an adequate remedy.

Further problems arise with the length of time an injunction should operate. Suppose the secret is made public. Should not the injunction be discharged at least when the plaintiff himself publishes the secret? And why not if the secret becomes common knowledge from other sources? A slightly more difficult variant is the secret which by the time of action has become public. Should the defendant be enjoined? One might argue that the discretionary remedy of injunction should be refused and the defendant should be made only to pay damages equivalent to the value of the headstart his illegitimate acquisition of the secret gave him over others.

(ii) Damages

The problem of whether or not the action for breach of confidence is tortious or equitable arises when damages are awarded. If the action is equitable, then the jurisdiction to grant relief arises by virtue of the court’s power to grant damages in lieu of an injunction. This power is not necessarily co-extensive with the power to award damages at common law. Nevertheless in Seager v Copydex (No.2) the English Court of Appeal has laid down that damages should normally be awarded on a tortious conversion basis, i.e., the market value of the information taken, assuming a willing buyer and a willing seller. So, if the information is simple, the sort a consultant might provide, the damages would be a sum equivalent to a reasonable consultancy fee. If, on the other hand, it is special information, e.g., the sort which involved an “inventive step” justifying a patent application, then damages would be much higher. In Seager’s case where the information seemed to involve an inventive step, the damages might well be calculated in the same way as for the infringement of a patent, e.g., capitalisation of royalties over a period. In addition, the taking of information

34. ibid. 852.
might affect the plaintiff in other ways, e.g., by affecting his own selling programme. This would attract an additional sum of damages. Once damages were paid, the information would become the property of the defendant.

(iii) Account
The taking of accounts is a common equitable remedy which frequently supplements the grant of an injunction. By an account the defendant is made to disgorge the profits he has made during the time he knew or ought to have known that he was infringing the plaintiff’s rights. It normally does not lie against an innocent acquirer of information or against an acquirer for the period of time that he remains innocent. The purpose of the account is to strip the defendant of the nett profits attributable to the product. If the information was only a minor part of the success story of the product, then an apportionment ought to be made. It is probably for these sorts of reasons that an account is not a popular remedy. Working out nett profits is a complicated business at the best of times. Frequent arguments may arise as to what costs and overheads are properly to be taken in account, and in what proportions. It is often much easier to prove the plaintiff’s loss than the defendant’s gain, and for this reason damages will generally be a better remedy. And, of course, if the defendant has made a loss on the product, an account is worthless.

(iv) Delivery Up
The defendant may be ordered to deliver up any articles made as a result of using the information. Again conceptual problems arise here. If one analogises from patent law, delivery up should be for the purposes of destruction, since the property in the goods themselves (as distinct from any proprietary rights in the ideas from which they were made) lies with the defendant. On the other hand, if one analogises the breach of confidence action to a breach of trust, then the property in the goods is trust property which belongs to the plaintiff beneficiary. Upon delivery up, the plaintiff is free to deal with the goods as he wills and is not bound to destroy them. This area cannot be regarded as settled. It may be that one or other analogy may be available depending upon the nature and uses the information is put to, and the original relationship between the parties.

Conclusion
It is interesting to note that as a result of the uncertainties and complexities surrounding many of the aspects of breach of confidence law the English Law Reform Committee thought in its Working Paper that legislation was needed. By contrast its New Zealand counterpart the year before optimistically concluded that “the existing actions available at common law and equity provide a satisfactory remedy in those cases outside the patent system where protection is desirable”, and that no change in the law was required. Curiously enough, by

1977 the same New Zealand Committee when dealing with the analogous question of when a witness may be compelled to reveal to a court information given him in confidence considered that legislation was desirable, being somewhat reluctant to concede that the law on the point was reasonably clear and satisfactory.\textsuperscript{46} Perhaps the question of whether legislative interference is necessary to deal with trade secrets should not be considered a closed chapter in New Zealand yet.

\textsuperscript{46} N.Z. Torts & General Law Reform Committee, \textit{Report on Professional Privilege in the Law of Evidence} (1977), 10; but see \textit{D. v NSPCC} [1977] 2 W.L.R. 201, H.L. which was not available to the Committee.
Although there are many of them in use, there are still mysteries in the legal relationships arising out of the use of a small piece of plastic, 85mm. by 54mm. in size and embossed with someone's name and reference number. These cards are usually known by the name of the issuing company, such as the American Express card or the Diner's Club card, or by a proprietary name attached to the card by the issuing company, such as the Bank Americard, Master Charge, Barclaycard (Visa), Access or Bankcard.

There is another type of plastic card, looking very similar, that is much in use in Europe but that must be distinguished from the credit card. This is the "cheque card" or "cheque guarantee card". This is for use in association with ordinary cheques, and if used in accordance with the instructions constitutes a contract guaranteeing that the cheque in respect of which it is used will be paid by the bank whether or not funds are available in the account. It eliminates the risk in taking a cheque as payment from a stranger, and also enables the holder to cash cheques at any bank participating in the scheme.

My own cheque card bears the following rubric on the back:

The issuing Banks undertake that any cheque not exceeding £30 in any one transaction will be honoured subject to the following conditions:

(a) The cheque must be signed in the presence of the payee.
(b) The signature on the cheque must correspond with the specimen signature on this card.
(c) The cheque must be drawn on a bank cheque form bearing the code number shown on this card.
(d) The cheque must be drawn before the expiry date of this card.
(e) The card number must be written on the reverse of the cheque by the payee.

Also available for use at all offices of the major British and Irish banks and at banks abroad displaying the Eurocheque Symbol.

There has been no civil litigation concerning cheque cards, but a cheque card with similar wording to my own was discussed by the House of Lords in Reg. v Charles. It was said by Lord Diplock in this case that "the use of the cheque card in connection with the transaction gives to the payee a direct contractual right against the bank itself to payment on presentment, provided that the use of the card by the drawer to bind the bank to pay the cheque was within the actual or ostensible authority conferred upon him by the bank". Lord Edmund-Davies added something to the question of the creation of the direct contractual right when he said: "by producing the card so that the number thereon could be endorsed on the cheque he in effect represented, 'I am authorised by the bank to show this to you and so create a direct contractual relationship between the bank and you that they will honour this cheque'".

*Professor of Law, Director of the Institute of Advanced Legal Studies, London.

The analysis does not appear to present much difficulty. The wording on the card — and, indeed, on literature issued by the bank to publicise the cheque card scheme — constitutes an offer to honour cheques drawn in accordance with the conditions. This is an offer to the world at large. It is accepted by conduct by the payee of the cheque when he takes the cheque preferred to him as payment in accordance with the conditions set out. The contract that thus comes into existence between the bank and the payee is of course different from the contract arising out of a normal bill of exchange between the acceptor and the holder since it is not one arising out of the cheque itself, but it would enable the payee to sue the bank for the amount of the cheque. Presumably the bank would be liable for the amount of the cheque even if the signature on the cheque were forged: the condition “The signature on the cheque must correspond with the specimen signature on this card” probably means no more than that the two signatures must look reasonably alike.

So much for the cheque card, which I have mentioned in order to dispose of shortly. My main concern in this paper is with the credit card, which is not used in association with cheques but in association with different clips of paper variously known as sales vouchers, sales drafts, charge slips, accounts, invoices and no doubt several other names. These slips of paper, which I shall call “vouchers”, are not like cheques carried around by the customer or card holder, but a stock is kept by the shopkeeper who normally fills in the relevant details.

The main division between types of credit cards is between the two-party credit card and the three-party credit card. The cards I referred to in my opening paragraph are all three-party cards. The three parties are the card-issuing company who takes the initiative in setting up the credit card scheme, the customer to whom the credit card is issued, and the shopkeeper, retailer, or other supplier of goods or services, who takes the credit represented by the card in payment for goods or services supplied. In the interests of consistency I shall refer to the card-issuing company as the credit company, to the customer as the card holder, and to the supplier of goods or services as the dealer. Thus the credit company issues a card to the card holder. When the card holder wishes to buy goods from a dealer who subscribes to the scheme he presents the card. The dealer fills in a voucher (usually in triplicate) and by the use of a simple pressure machine imprints the embossed symbols on the card onto the voucher, which is signed by the card holder. One copy of the voucher is then handed to the card holder as his record of the transaction, one copy is retained by the dealer, and one copy is sent to the credit company by the dealer for payment to him.

In this three-party system (I shall call it that, though more than three parties may well be involved and “Multi-party” might be more accurate), there are two formal contracts on the credit company’s standard forms. One is between the card holder and the credit company, and the other between the dealer and the credit company. Whether there is a contract between the dealer and the card holder in each individual transaction is a matter for discussion later, but if there is one it is not a formal contract. It will be noted that the credit card can be used only as a means of paying a dealer who has already joined the scheme by entering into a formal contract with the credit company (whereas a cheque can of course be used to pay anyone).

The two-party credit card is a simpler but more limited document. The dealer is the issuer of the credit card, which can be used only at his premises. There is,
therefore, no separate credit company. The card may be issued by a dealer who has only one shop so that it can be used only at that shop — usually a department store — or it may be issued by a dealer who has a chain of stores for use at any shop in the chain. In this situation the card serves essentially to identify the card holder as a person who has opened a credit account with the dealer, and it is likely that the relationship between the card holder and the dealer is exactly the same as that between any customer who has opened a credit account and the dealer or shopkeeper who grants credit without using any card or other identifying symbols. Problems may however arise in the two-party card situation peculiar to the use of the card, as for example where the card comes into the hands of a third party who uses it to obtain goods or services and to charge them to the card holder’s account. This paper will not discuss the two-party credit card at length as most of the problems which arise are more conveniently discussed in relation to the three-party credit card.

The Problems that Arise

There are several problems worth discussion in relation to the use of credit cards. They involve the nature of the relationship between the credit company and the card holder, the relationship between the credit company and the dealer, and the relationship between the dealer and the card holder. Where there is some legal regulation of credit transactions of a particular type, it may of course be necessary to determine whether the card transaction falls within the scope of the legal regulation. In this paper I shall concentrate on the relationship between the credit company and the card holder.

Credit Company and Card Holder

Our starting point for the relationship between credit company and card holder must of course be the contract between them. On application for a credit card the prospective card holder will usually sign a form supplied by the credit company. Sometimes this will set out the terms of the contract in full. Sometimes it will purport to incorporate conditions to be found elsewhere. For example, an Australian application form for an American Express card says “The Applicant agrees to be bound by the terms and conditions accompanying the Card(s) . . . when issued and any amendment thereto . . . Subject to the terms and conditions referred to above, the Applicant assumes liability for all charges to the account by use of the Card(s) . . . or otherwise”. The application form used in Australia for Bankcard does not contain any agreement to be bound by conditions, but merely contains a statement that the answers given are true and complete “and have been made to the Bank to enable it to determine whether or not to grant the application and if so the conditions on which a Bankcard will be offered to me”.

If the terms are not set out on the application form — or, possibly, even if they are — the card when supplied will be accompanied by the terms and conditions subject to which it is issued. Where the credit card scheme is launched by a mass mailing of unsolicited credit cards, which has happened in many places, the cards will likewise be accompanied by a copy of the conditions. It may be stated in the conditions that use of the card will be deemed to be an acceptance of the conditions, but even if it is not the probability is that use of the card would be interpreted as an acceptance of the offer contained in the
supply of the card and if the conditions accompanied the card they might well be held to have been brought to the card holder's notice and accepted by him. It is quite common to enclose the card in a folder setting out the conditions so that the card can only be removed from the folder by opening the folder so as to expose the conditions. 4

If the conditions bind the card holder they will certainly contain a provision imposing upon him an obligation to pay the credit company for all debts incurred by the use of the card. Even if they do not bind him, however, or even if the conditions are silent, there will certainly be such an obligation arising by implication out of his use of the card. The interesting question is as to the basis in law of the card holder's obligation to pay. The question is not entirely academic. It may be relevant to (a) the application of credit regulation and (b) the card holder's rights against the credit company or dealer, as we shall see.

There are at least three possible explanations of the card holder's liability to the credit company: the assignment theory, the direct obligation theory, and the restitutionary theory.

The Assignment Theory

The card holder buys goods from the dealer. Under the contract of sale the card holder is under an obligation to pay the price. Instead of paying cash he produces the credit card, thereby informing the dealer that the credit company will pay in his stead. He signs the voucher confirming his obligation to pay for the goods. The dealer forwards the voucher to the credit company who pays the money (sometimes deducting a discount) to the dealer. The submission of the voucher to the credit company represents an assignment to the credit company of the dealer's right to payment under the contract of sale. This is the essence of the assignment theory.

It is evident from this account that under this theory the liability of the card holder to the credit company does not rest upon his contract with the credit company. If the credit company were to sue the card holder the action would, on this theory, be an action for the price of goods sold. Only if the voucher is a negotiable instrument (there seems to be no evidence that the commercial community treats it as such) would the credit company have a better right to the price than the dealer. Consequently if there would be any defence to an action for the price brought by the dealer that defence would be valid against the credit company.

The Direct Obligation Theory

Here we find that there is not necessarily any obligation on the card holder to pay the price to the dealer. He is supplied with the goods on production of the credit card and the dealer looks to the credit company to pay the price. The credit company pays the dealer under the contract between them, and then claims the money from the card holder not as an assignee of the dealer's rights against the card holder but under the card holder's direct contractual obligation to the credit company to reimburse them any money paid to a dealer arising out of the use of his card.

4. For a discussion of "offer and acceptance" see K.M. Sharma, "Credit Cards in Australia: Some Predictable Legal Problems" (1972) 3 Lawasia 106 at pp.118-120.
The Restitutionary Theory

The direct obligation theory is based on a contractual obligation. The restitutionary theory is based on a quasi-contractual obligation: the credit company has paid the dealer the price of the goods supplied to the card holder, and the credit company thus has an action under the old common counts for money paid to the use of the card holder at his request.

The literature contains some discussion of these competing theories. As far as case law is concerned, two New Zealand decisions raise the issues. In both, the question was whether the Moneylenders Act 1908 (N.Z.) applied to the credit company. In neither case was a credit card used, but the documents in question appeared to serve a similar function. Both were criminal cases.

In *Goldberg v Tait*, the accused carried on a business of the type known as a "cash-order" or "cash-coupon" business. In England this would be known as "check-trading". He issued to customers orders or coupons addressed to dealers. The operative words of the order were: "Please supply to [customer's name]...goods to the value of [specified amount] and charge to our account". These orders were supplied to customers on payment of 10 per cent of the face value, the customer thereafter paying 5 per cent of the face value each week for twenty weeks, making a total payment of 110 per cent ("you pay only 2s in the £1").

It will be seen that the transaction is not dissimilar to the credit card transaction. In each, the customer (card holder or order holder) is supplied with goods by the dealer. In each, the customer produces his document (credit card or order) to the dealer. In the one case the credit card is used to complete a voucher which is signed by the customer (card holder). In the other the order is signed by the customer and handed to the dealer. In each case the dealer submits the voucher or order to the credit company for payment. In each, the dealer is not concerned with the arrangements between the credit company and the customer as to payment by the customer.

The Full Court held that the accused was carrying on the business of moneylending and, not having registered as required by the 1908 Act, was guilty of an offence. The defence argued that the transactions were not loans of money but sales on credit. The difficulty in this argument was, however, that manifestly the accused had not sold goods to anyone. He had paid the dealer for goods supplied to the customer. A similar transaction was described in an earlier Australian case, *Allchurch v Popular Cash Order Co. Ltd* as being in effect the

7. See Report of the U.K. Committee on Consumer Credit (the Crowther Report), 1971 Cmdn. 4596, paras 2.1.53, 2.1.58, 2.4.1-2.4.7, 2.5.5 and 4.1.64.
8. The additional payment of 10 per cent over twenty weeks was equivalent to an annual rate of 55 per cent calculated in accordance with the Schedule to the Money-Lenders Amendment Act 1933 (N.Z.). As the accused also received a discount from dealers this rate was effectively increased to about 75 per cent. The English practice was to charge 1s. in the pound for twenty weeks, not 2s. in the pound; of this, the Crowther Committee said that the annual rate of about 25 per cent was "not unreasonable": para. 2.4.3
same as if the customer had paid the dealer with cash 11 or a cheque 12 previously handed to him by the credit company rather than a special "cash order" document.

Goldberg v Tait 13 and Allchurch v Popular Cash Order Co. Ltd 14 both support the direct obligation theory. Moreover, in Goldberg v Tait both Stanton J. 15 and Hay J. 16 expressly reject the restitutionary theory, pointing out that on that explanation the credit company would be entitled to no more than reimbursement of the amount actually paid to the dealer — deducting the discount from the price and without any interest.

In Cash Order Purchases Ltd v Brady 17 there was rather more substance in the argument that the cash order transaction was a sale of goods by the credit company. The customer was asked to sign a document addressed to the credit company commencing: "I agree to purchase from you goods as stocked by your Vendors" and ending: "Cash Order Purchases Ltd hereby agree to sell to you...such goods as shall be selected by you..." A separate contract with each dealer provided for the sale by the dealer to the credit company of goods selected by the credit company's customers. Nevertheless the Full Court held that the court could go behind the documents and that the true nature of the transaction was that it was a loan.

How far can these cases help us in analysing the credit card transaction? As far as is known, none of the credit card contracts is drafted on the basis of a sale to the credit company, as in Cash Order Purchases Ltd v Brady, 17 although that device is commonly and successfully used in hire-purchase transactions. Since the use of the credit card is not confined to sales of goods but extends to transactions such as hire of goods and supply of services the sale fiction would not be apt — indeed, in Brady's case the impossibility of applying the contractual forms to the use of cash orders to pay dentists was a factor in persuading the court that the contracts could not be taken at their face value. 18

In some of the American cases, the documents have deliberately been drafted on the assignment theory and this has been accepted by the courts. If the documents represent the deal in that way it is difficult to see why, in the absence of an attempt to evade mandatory legislation, the court should not give effect to the documents. If the documents are not drafted so as to settle the theoretical basis, it is thought that the direct obligation theory most accurately represents the true nature of the transaction and that Goldberg v Tait 19 and Allchurch v Popular Cash Order Co. Ltd 20 lead to the loan of money explanation.

But there is one reason why these cases may not settle the question of moneylending completely. This is because not all credit card systems operate on an extended credit basis. Most bank credit cards — BankAmericard, Barclaycard,
Access and Bankcard, for example — incorporate in their conditions provisions for repayment to be made within a specified period — usually 25 days — from the date of the monthly statement, or later at the option of the card holder. If payment is deferred there may be minimum payment, calculated as a percentage of the debit balance, payable each month. Interest (1½ per cent or 2 per cent per month) is charged on money not paid within the 25 days. It is thought that these credit cards fall within the reasoning of the cases discussed and are to be regarded as loan devices. A loan does not cease to be a loan because the borrower has the option of repaying early.

Some other credit cards, however, do not offer a credit facility as a matter of course. This applied to American Express cards and Diners’ Club cards. In the absence of special arrangement the monthly account is payable by the date shown on the monthly account. Does the loan explanation hold for such non-credit credit cards? It is submitted that it does. Credit cards are not just cards which establish one’s creditworthiness, they inevitably involve a period of credit being given by the credit company. By the time a voucher is submitted by the dealer, processed by the credit company, and appears on a bill received by the card holder, some days or weeks — often over a month — will have elapsed. The card holder then has some days in which to remit the money to the credit company. During all this time he has had the benefit of the goods or services without paying for them, and in most cases the dealer will have received payment from the credit company which will not seek to wait for payment from the card holder. Thus there is clearly a period during which the credit company is likely to have “lent” him money.

The significance of establishing whether there can be said to have been a loan by the credit company to the card holder is, as demonstrated by the South Australian case and the New Zealand cases discussed above, that in those jurisdictions with moneylending legislation the credit company may find that it is subject to the requirements of registration and statutory control over contracts.

Thus in New Zealand the Moneylenders Act 1908 applies to a “money-lender”, which is defined in section 2 as including “every person whose business is that of moneylending”. Prima facie, therefore, it would seem that a credit company which issues credit cards is a moneylender within that Act, unless it falls within one of the exceptions. There are seven exceptions, and on the assumption that the credit company is not a licensed pawnbroker nor a building society or friendly society, whether it is governed by the Act would depend on whether it is carrying on the business of banking or insurance, a trading bank, trustee savings bank or private savings bank as defined in the relevant legislation, or bona fide carrying on “any business in the course of which and for the purposes whereof he lends money at a rate of interest, ...not exceeding ten per cent per annum” (1908 Act, s.2(d)). It appears therefore that a bank issuing credit cards is not within the Act but that if credit cards are issued other than by a bank, not in the course of a business for the purposes of which the credit cards

21. A current American Express application form states: “In normal circumstances, we require that you pay your bill in full when you receive it. But there may be times when you wish to extend payments for airline tickets or a vacation. With our “Sign & Fly” and “Sign & Travel” plans you can extend your payments for up to 12 months at a favourable interest rate.”

22. See United Dominions Trust Ltd v Kirkwood [1966] 1 All E.R. 968.
are issued, the Act will apply. A similar conclusion can be drawn from the United Kingdom legislation, where the relevant exclusion for persons carrying on other businesses does not refer to any maximum rate of interest. In the United Kingdom it is possible to obtain a certificate from the Department of Trade that the business of banking is being carried on, such a certificate being conclusive evidence for the purposes of the Moneylenders Acts 1900 to 1927.23 In Victoria, incidentally, sections 36 to 46 of the Moneylenders Act 1958 specifically deal with “cash orders”. It is thought that a credit card would not fall within the definition of “cash order” in section 36.

Under the Consumer Credit Act 1974 in the United Kingdom the Moneylenders Acts are in the process of being repealed. That Act expressly applies to credit cards issued by a person carrying on a consumer credit business: section 14. This involves a discussion of two matters: the way in which credit cards are referred to in the Act, and the question whether the card is issued by a person carrying on a consumer credit business.

The credit card is within the class of documents referred to in the Consumer Credit Act 1974 as a credit-token. A credit-token is defined in section 14(1) as —

- a card, check, voucher, coupon, stamp, form, booklet or other document or thing given to an individual by a person carrying on a consumer credit business, who undertakes —
  - (a) that on the production of it (whether or not some other action is also required) he will supply cash, goods and services (or any of them) on credit, or
  - (b) that where, on the production of it to a third party (whether or not any other action is also required), the third party supplies cash, goods and services (or any of them), he will pay the third party for them (whether or not deducting any discount or commission), in return for payment to him by the individual.

The term “credit” is defined by section 9(1) as including “a cash loan, and any other form of financial accommodation”, but in addition section 14(3) provides that “Without prejudice to the generality of section 9(1), the person who gives to an individual an undertaking falling within subsection (1)(b) [of section 14] shall be taken to provide him with credit drawn on whenever a third party supplies him with cash, goods or services”. The essence of section 14(1)(b), which is clearly intended to apply to three-party credit cards, is the undertaking to pay the third party, but despite section 14(3) it is not clear that the issuer of a credit card necessarily gives such an undertaking to the card holder. The current conditions of use for Barclaycard, for example, which form the contract between the bank issuing the credit card and the card holder, say nothing about the bank paying the third party. That undertaking will be found in the contract between the bank and the dealer, the third party, who is more likely to be a company than an individual.

As can be seen from the opening words of section 14(1), a credit card is only within the definition if it is given to an individual, and only if it is given by a person carrying on a consumer credit business. A “consumer credit business” is defined in section 189(1) as “any business so far as it comprises or relates to the provision of credit under regulated consumer credit agreements”. A regulated

23. Companies Act 1967, s.123.
Consumer credit agreement is any consumer credit agreement which is not exempt agreement within section 16 (see sections 8(3) and 189(1)) and we can take it that section 16 has no application here. A consumer credit agreement is, roughly, defined by section 8 as an agreement between an individual ("the debtor") and any other person ("the creditor") by which the creditor provides the debtor with credit not exceeding £5,000. It would be easier to read sections 8 and 14 together if the credit-token did not have to be issued by a person carrying on a consumer credit business, but there is no doubt that the intention is to catch credit card agreements where the card holder is an individual. There is no exemption for banks as such.

Two further questions in the relationship between the credit company and the card holder must be mentioned. The first is one that has occasioned much discussion in the literature: how far is a card holder liable for purchases made by use of his card by other people? The second is whether the card holder’s obligation to the credit company is affected by mishaps in the transaction with the dealer.

**Use of Card by Others**

There are two main situations to be considered where the card is used by a person other than the card holder: use authorised by the card holder, and unauthorised use.

Credit-card contracts that I have seen do not contemplate that the credit card which has been issued to a card holder will be used by someone other than the card holder in person. This normally follows from the fact that the credit card carries the holder’s specimen signature; moreover, there is normally express provision for the issue of supplementary cards on the card holder’s account for the use of other persons such as members of his family or employees.

Nevertheless, if the card holder were to hand his card to another and purport to confer authority to use it, there seems to be little reason to doubt that any debts incurred by the user so authorised would bind the card holder. The one difficult question that might arise in these circumstances would be where the card holder authorised another to use the card up to, say, $100, and the limit was ignored. Analysis in terms of apparent or ostensible authority would not be easy, but as a matter of policy it might be just to hold the card holder fully liable in such circumstances.

What if the card is used without the card holder’s authority? The issue has been much discussed and perhaps I need do no more than indicate the problems.

In the absence of any express term in the contract the question arises whether the card holder owes a duty to the credit company to take reasonable care of the card, whether the dealer owes a duty to the card holder and the credit company to take reasonable care to see that the card is properly used and whether the credit company owes a duty to the card holder to take reasonable precautions against abuse.

In practice, there always is a term in the contract. At one time the conditions purported to throw onto the card holder all the risk of improper use if the card was lost or stolen until notice of the loss was given to the credit company. As a result of pressure from consumer organisations and governments, of legislation, and of a desire to make credit card use more attractive, most such conditions now impose a maximum amount on the card holder’s liability before notification of loss. This is a relatively modest amount — N.Z. $100, Aus.$50, U.K. £30 — and is perhaps unlikely to lead to much more litigation. It may be therefore that the legal questions are no longer of great importance, but it appears likely that if such a term exists liability will not be affected by the fact that the card holder took reasonable care of the card, though an argument might still be raised on causation if it could be shown that the dealer or credit company had been negligent.

Defects in Goods

The last question I wish to touch on is whether the credit company’s rights against the card holder are affected by defects in the transaction between the card holder and the dealer. What if the goods supplied were unmerchantable and the card holder purported to reject them or to claim damages for breach of contract; what if the dealer were guilty of misrepresentation and the card holder purported to avoid the contract? Could the card holder refuse to pay the credit company, or set off a claim for damages?

Conditions of use often deal with this. Most credit card schemes incorporate a procedure for a refund voucher to be voluntarily issued by the dealer, and a typical clause reads: “Unless a refund voucher is issued and sent to the Bank then (subject to any rights vested in the card holder by statute) the account will be payable in full and no claim by a card holder against the supplier may be the subject of set off or counter-claim against the Bank”. This is from a United Kingdom contract, and the reference in brackets is included having regard to the implied conditions and warranties which cannot be excluded in consumer sales and the liability for the dealer’s breaches of contract which is imposed on the credit company in certain cases by the Consumer Credit Act 1974. But this raises a whole new problem that I had hoped to avoid: is the transaction between the dealer and the card holder a sale of goods at all? What is the consideration for the supply of the goods? Is it a price agreed to be paid by the card holder (so that he will remain liable if the credit company fails to pay) or is it merely production of the credit card and signature of the voucher, so that the only contractual obligation to pay money to the dealer is on the part of the credit company under the contract with the dealer? It is always good to leave some questions unanswered in a talk on a relatively new subject. Perhaps this is as good a point to end as any other.

28. Such as the Consumer Credit Act 1974 (U.K.), ss. 83 and 84.
The words ‘agent’ and ‘agency’ are notoriously slippery to define, but in general it is probably acceptable to say that an agent is one who acts for another. The common law takes this in what may be termed a legalistic way, in saying that an agent is one who has had power conferred on him to act for another so as directly to alter that other’s legal position. This emphasis on the power of the agent has been prominent since the work of the American writers Hohfeld and Seavey in the inter-war period: thus the Restatement, s.12, states: “An agent or apparent agent holds a power to alter the legal relations between the principal and third person and between the principal and himself”. But reasoning of this sort can of course be traced much further back.

This concentration on the power of the agent makes the basic common law doctrine very simple, at any rate in contractual situations, where it is primarily applicable. The agent directly affects the legal position of his principal and himself (normally) drops out of the transaction. “There is no doubt whatever as to the general rule as regards an agent, that where a person contracts as agent for a principal the contract is the contract of the principal, and not that of the agent; and, prima facie, at common law the only person who may sue is the principal, and the only person who can be sued is the principal.”

This doctrine is one of great power, and appears to have many advantages over civil law doctrines in this area by virtue of its simplicity. Thus, though the difference between the relation of principal and agent and the power of the agent was clearly made in Germany as long ago as 1866, the utilisation of the distinction does not appear to have been entirely successful. The common law doctrine indeed proceeds further than normal representation situations and applies also though the agency is undisclosed: the undisclosed principal is liable and entitled on the contracts of his agent, provided that the agent had authority. There are, of course, difficulties in this doctrine, which is even by common law reasoning anomalous, and which appears to represent in the last resort a policy decision that the principal may intervene in the bankruptcy of his undisclosed agent, and likewise be held personally liable in such a situation.

There are indeed signs that lawyers in the later nineteenth century began to be unhappy about it: “it has often been doubted” said Blackburn J. in 1872,

*Reader in Law, Oxford University, Fellow of Worcester College.
3. See, e.g., Towle v White (1873) 29 L.T. 78, 79 per Lord Selborne L.C.
6. See Müller-Freienfels, op. cit. supra; Schmitthoff, 1970 I Hague Recueil des Cours 120 et seq. It seems that the separation may have been more effectively built upon in Swedish law: see Grönfors, “Powers of position in the Swedish law of agency”; 6 Scandinavian Studies in Law 95 (1962).
8. See Bowstead, Agency, 14th ed., Comment to Article 82.
“whether it was originally right so to hold; but doubts of this kind come now too late”.  

This may account for the limits put on the doctrine by notions of election;  

by cases stemming from *Humble v Hunter*;  

and by *Armstrong v Stokes*, the case in which the above doubts were expressed. But whatever the merits and difficulties of the doctrine, the generality of the basic principle of agency facilitates it: it is said that its simplicity is admired by continental lawyers.

The common law has some difficulty over making a principal liable for the unauthorised acts of an agent, for the power of the agent is normally accounted for on the basis that it was conferred on him by the principal. One might expect the civil law, with its distinction between authorisation and power, to deal with the matter with more facility, but this does not appear always to be so. The common law overcomes the difficulties by a somewhat vague application of the notion of estoppel or at least of the objective theory whereby persons are held to the expectations which their acts reasonably create. There is, however, an uneasy frontier here: the doctrine of vicarious liability in the law of tort appears to be more widely based and has for many years been little difficulty with unauthorised acts, even those done in fraud of the employer. Thus suggestions are from time to time made that the idea of authorisation in agency should be abandoned in favour of wider reasoning more akin to that found in tort cases. In *Branwhite v Worcester Works Finance Ltd*, one of the many cases on liability of a finance company for the acts of a motor dealer, Lord Wilberforce said:  

“It may be that some wider conception of vicarious responsibility other than that of agency, as normally understood, may have to be recognised in order to accommodate some of the more elaborate cases which now arise when there are two persons who become mutually involved or associated in one side of a transaction.” But this was a dissenting speech, and no such doctrine was applied; similarly the House of Lords has recently held the vendor of property not liable on the unauthorised acts of an estate agent.


13. *Supra*, note 10; see also *infra*, text at note 52.  


15. “No one can become the agent of another person except by the will of that other person”: *Pole v Leask* (1863) 33 L.J. Ch. 155, 161 per Lord Cranworth.  


21. At p.587. See also *Heaton’s Transport (St Helens) Ltd v Transport & General Workers Union* [1973] A.C. 15, 99-100, a case on the liability of a union for shop stewards: the Court of Appeal distinguished between vicarious liability and agency but the House of Lords refused to do so. Similar suggestions have been long current in the United States: see *e.g.* Meorns, 48 Va. L. Rev. 50 (1962). The breadth of agency courses in that country some years ago tended to promote such reasoning: see the discussion between Conard and Mechem in 1 J Legal Ed. 540 (1949); 2 J Legal Ed. 203 (1949).  

Nevertheless, the simplicity of agency doctrine undoubtedly makes such extension possible; there is perhaps less doctrinal separation of tort and contract than in the civil law.\textsuperscript{23}

However, it may be suggested that this concentration on the legal power of the agent, which has long been the preoccupation of writers on the subject, has despite its simplicity, a defect. With its consequent assumption that the agent normally drops out of the transaction, it attracts attention away from his position and thus leaves certain important questions unattended, or at least under-emphasized. Three aspects of the agent’s position, two of them illustrated by recent cases, may be suggested as ripe for consideration. They are as follows:

(i) There are various intermediaries who are often in common speech referred to as agents, and discussion of whose position would be expected in a book on agency; yet they may have no power to affect the principal’s legal position. Are they then not agents, so that, e.g., the fiduciary duties of an agent do not apply to them? It is usually thought that this is not so; yet how then is the position of one to whom these duties apply to be defined?

(ii) There are various situations where an agent deals as such, but where the commercial expectation might be that he is personally liable, whether as well as or instead of his principal. Traditional analysis makes these cases appear exceptional; but they may require a more sympathetic analysis.

(iii) There are other situations where the person who uses the services of an agent may expect and wish that the agent deal on his own account, yet also intend that the relationship between him and his representative be that of agency rather than some other, such as that of seller and buyer. Is it, and should it be, possible for an intermediary to deal as principal with the outside world while remaining an agent towards his own principal?

1. **The intermediary who has no power to affect his principal’s legal position.**

The obvious example here is the position of an estate agent in England. He has normally no power to contract on behalf of his principal;\textsuperscript{24} and indeed the received analysis of the position of any estate agent but one acting under a ‘sole agency’ agreement is that he is the offeree of a unilateral contract, has no duty to do anything, and makes no contract with his principal till he produces a purchaser who buys the land, or is ready, willing and able to do so (depending on the terms of his particular contract).\textsuperscript{25} In other jurisdictions his position may be different, particularly as regards authority to sell: but he will suffice for an example. Such a person does not appear to be legally an agent at all, and the point is from time to time made. Yet it is not unreasonable to assume that the general principles as to the contractual and fiduciary duties of agents apply to him, and there is authority that they do. In *Regier v Campbell-Stuart*\textsuperscript{26} the defendant agreed to give the plaintiff particulars of houses suitable for purchase. He purchased a house through a nominee for £2,000 and resold it to the plaintiff for £5,000 disclosing that it was his but representing that he had paid £4,500 for

\textsuperscript{23} Müller-Freienfels, 6 Am. J Comp. L 165, 169 (1957).

\textsuperscript{24} Hamer v Sharp (1874) L.R. 19 Eq. 108.


it. It was argued for the defendant "The scope of the defendant's agency was limited to informing the plaintiff about suitable houses. He was not an agent for the purpose of making any contract. Before the plaintiff and the defendant entered into the contract for resale, she was informed by him that the property belonged to him and that he himself was the vendor. That was sufficient to determine the relationship of principal and agent." Not surprisingly, the defendant was held liable to account for his profit, Farwell J. saying "I cannot doubt that at any rate up to the time of sale there did exist the relationship of principal and agent between the plaintiff and the defendant. No doubt the scope of that agency was limited."

The traditional definition of an agent does not, however, cover such an intermediary, nor many other persons whose function it is to introduce business; nor those who make contracts for their principals at certain times but presumably remain under fiduciary duties for the rest of the time (e.g. stockbrokers), or whose functions as a contract-making agent have terminated, but whose fiduciary duties persist. More overt discussion of the functions and duties of (what may be called) representatives is required in order that it may be determined to what type of person the fiduciary duties of an agent attach.

2. Situations where the third party might expect the personal liability of the agent.

There must obviously be situations where the third party deals with a known agent, but may not regard the normal legal construction of the event, whereby the agent drops out of the transaction, as appropriate. This may, to take some examples, be because the principal is simply the agent's one-man company, the solvency or continued solvency of which is not beyond doubt; because the principal is unidentified at the time of dealing (as by reference to "our principals" or "our clients", etc.); or because the principal is out of the jurisdiction. There are lines of cases which can assist here. Thus persons acting for companies not yet formed have been held to contract personally; and in 1968 in *The Swan* Brandon J. held the director of a one-man company personally liable on a contract placed for his company, for repairs to a boat, on the basis that he was the owner of the boat. A number of nineteenth century cases accept usages that agents dealing in particular types of trade are personally liable. Finally, the agent of an undisclosed principal is personally liable.

27. By Mr E. Holroyd Pearce, later Lord Pearce.
28. Professor Brian Coote has drawn my attention to the fact that a failure to make clear the sense in which the terms 'agency' and 'agent' are used is responsible for confusion in cases concerned with the extent to which third parties can rely on exclusion clauses: see *The Eurymedan* [1974] 1 N.Z.L.R. 505, [1975] A.C. 154; *The Suleyman Stalskiy* [1976] 2 Lloyd's Rep. 609.
31. *e.g.*, *Fleet v Murton* (1871) L.R. 7 Q.B. 126.
liable: and sometimes in such cases the principal can be treated as undisclosed. 33

However, apart from the decision in The Swan above referred to, these lines of authority have not been developed. Thus in Teheran-Europe Co. Ltd v S I Belton (Tractors) Ltd 34 the English Court of Appeal held the ‘foreign principal’ rule outdated. This may well have been appropriate in view of the standing of, and easy communication with, many foreign and international business concerns. But one might expect some tendency to develop a role of personal liability for agents of unidentified principals. This the English Court of Appeal has recently shown itself disinclined to do. In The Santa Carina (1977) 35 brokers on the Baltic Exchange placed an order over the telephone for the bunkering of a ship at Penang with the plaintiffs, who were also brokers on the Baltic Exchange and acted for a bunkering concern. The bunkers were supplied but not paid for, and the shipowner for whom they had been ordered became insolvent. The plaintiff sought to hold the defendant personally liable. At first instance they succeeded. 36 Mocatta J. took the view that much business was done on the telephone between persons who do not state whether they are acting as a principal or as agent, and that the “business requirements of the situation” require personal liability: he also likened the contract to a written contract signed by an agent without reference to agency, on which the agent would be liable. 37 The Court of Appeal, while affirming that it is a question of a fact in each case as to what was intended, preferred to apply normal doctrine of agency, that where a contract is made by a known agent he incurs no personal liability. Lord Denning M.R. quoted a dictum of Diplock L.J. from the Teheran-Europe case that in such a situation the third party “may be willing to treat as a party to the contract anyone on whose behalf the agent may have been authorised to contract.” 38 This may well be a correct decision on the facts: indeed Lawton L.J. said that the argument had suffered from a surfeit of case law. 39 But the possibility of the agent’s liability is one that needs thought. Is it not possible to lay down general rules for such a situation? If not, the starting point adopted by the law is crucial. If it is that the agent drops out, then the result will be non-liability in the absence of other factors. But is this the normal commercial expectation, or would it be expected that the agent should be liable unless there are specific indications that he had undertaken no personal liability? 40 If there should be a rule that he is liable, should he be liable as sole principal (as Mocatta J. seems to have envisaged), 41 or additionally to his principal? 42 If the latter, 33 e.g., Teheran-Europe Co. Ltd v S.T. Belton (Tractors) Ltd [1968] 2 Q.B. 545, where there were frequent references by buyers to ‘our clients’ but Lord Denning M R treated the principal as undisclosed rather than unidentified.

34. Supra.
37. For a recent example of which see The Virgo, [1976] 2 Lloyds Rep. 136, where agents who signed a charterparty were held liable despite the presence of a clause: “This vessel is chartered by and on behalf of General Organisation for Supply Goods, Cairo”.
39. At p.484.
40. As in Restatement, Second, Agency, s.321.
41. See p.226: “The party placing an order though in some ways, of course, an agent, and not being a user of bunkers for his own ship...is nevertheless under an obligation to see that the supply of bunkers is available.” For another recent example of this interpretation see Format International Security Printers Ltd v Mosden [1975] 1 Lloyds Rep. 37. For a statutory example of a similar policy, See Sea Carriage of Goods Act 1940, s.11.

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should his liability be in some form of collateral contract\textsuperscript{43} (which might mean that though he could be sued, he could not be sued) or as joint and several contracting party (a construction that might be more difficult to achieve)\textsuperscript{44}. In this area there is a troublesome set of cases which suggest that where agent and principal are potentially liable, the third party must elect whom to sue: \textsuperscript{45} it is arguable that these cases are an aberration,\textsuperscript{46} but they nevertheless remain to plague practitioners.

This then is a second area where attention given to the position of the agent might, if not lead to a new formulation of the law, at least elucidate the problems involved.

3. Situations where the principal may wish the agent to deal on his own account, while remaining liable to his principal on the basis of agency.

In a number of articles Dr D.J. Hill, an expert on transport law, has drawn attention to the desirability of the common law recognising a category of what continental lawyers would call “indirect representation”\textsuperscript{47}: of situations where the principal wishes the agent to deal on his own account, but nevertheless wishes his own relationship with his representative to be on an agency basis — viz, the agent is remunerated on commission; does not contract to produce results but to use his best endeavours; and is not in a position commercially adversary to that of his principal, but owes him fiduciary duties which may result in the principal being entitled to the remedies of a beneficiary against his trustee — an important point in bankruptcy situations.

43. On existing case-law the agent probably does not promise that he has a principal: if he has not he may instead be treated as contracting personally — Kelner v Baxter (1866) L.R. 2 C.P. 174 (but see Black v Smallwood (1966) 117 C.L.R. 52, 64-65; Hawkes Bay Milk Corp Ltd v Watson [1974] 1 N.Z.L.R. 236). He promises that he has authority: Collen v Wright (1857) 8 E. & B. 647. He does not promise that his principal will pay, for it has been held that if his principal is insolvent the action for breach of warranty of authority may produce no damages: Re National Coffee Palace Co. (1883) 24 Ch. D. 367, 372. Sometimes he may be held to promise his own liability if he does not name a principal: Grissell v Bristowe (1866) L.R. 4 C.P. 36. And sometimes he may be treated as a surety for his principal: Imperial Bank v London & St Katharine Docks Co. (1877) 5 Ch. D 195, 200; Fleet v Murton (1871) L.R. 7 Q.B. 126, 132. See in general Bowstead, \textit{op. cit.,} Article 112. A del credere agent answers to his own, principal for the default of the third party, and only for liquidated sums: \textit{Ibid.,} p.14.
44. Principally on the ground that it is an unusual interpretation to put on a situation where principal and agent do not indicate in any way that they are plural contracting parties: see, e.g., Murray v Delta Copper Co. Ltd [1925] 4 D.L.R. 1061, 1067. There may also be difficulties in suing: see Jung v Phosphate of Lime Co. Ltd (1867) L.R. 3 C.P. 139. Support could perhaps be obtained from cases like Fleming v Bank of New Zealand [1900] A.C. 577 (where a customer was held able to sue the bank for dishonouring a cheque contrary to an agreement secured by a warrant deposited by the customer’s agent); and from dicta in Coulls v Bagot’s Executor and Trustee Co. Ltd (1961) 119 C.L.R. 460. The liability of partners is joint: Partnership Act 1908, s.12.
45. e.g., Clarkson Booker v Andjel [1964] 2 Q.B. 775; Barrington v Lee [1972] 1 Q.B. 326 (noted, 88 L.Q.R. 184 (1972)).
46. Reynolds, 86 L.Q.R. 318 (1970); Bowstead, \textit{op. cit.,} Article 86. In undisclosed principal cases the only clear cases are based on merger; in unidentified principal cases most of the problems seem really to relate to the question, “With whom was the original contract formed?”
A number of cases in the later nineteenth century, many associated with Blackburn J., do in fact seem to recognise the position of such a representative. Most noteworthy is his exposition of the role of the 'commission merchant' in Ireland v Livingston. But there are other cases which allow the remedies of an unpaid seller to such an agent while still regarding him as an agent. The now obsolete cases on the non-liability of a foreign principal seem to have the same idea in mind. Finally, the agent of an undisclosed principal may be regarded as acting on this basis, and the common law makes him liable accordingly: but it also makes the principal liable and entitled. Perhaps this was why, as above mentioned, Blackburn J. expressed doubts about the doctrine in Armstrong v Stokes and held the principal not liable on the contract because he had paid his agent — a decision regularly doubted in later cases. The position of the nineteenth century factor, which is associated with the undisclosed principal doctrine, is also relevant.

A certain amount of support can be produced from more recent cases for this interpretation as regards a buying agent: most notably the judgement of Salmond J. in Bolus & Co. v Inglis Bros Ltd, where he accepted this as a possible construction of the arrangement whereby a New Zealand merchant procures goods of an English manufacturer through an intermediary in England. There is little support in selling agency situations. More recent cases have however tended to assume in both situations that if the agent deals on his own account he is an independent principal: if he is a distributor of goods he buys from his principal and resells, if he is a person concerned in the obtaining of goods he buys and resells to his principal. Thus, as Dr D.J. Hill has again pointed out, the position of a confirming house has not received adequate analysis, though reasonable decisions may have been reached on the facts.

49. e.g., Cassaboglou v Gibb (1883) 11 Q.B.D. 757.
50. e.g., Elbinger Actiengesellschaft v Claye, supra, note 32.
51. Supra, note 10.
52. Irvine & Co. v Watson & Sons (1880) 5 Q.B.D. 414; Davison v Donaldson (1882) 9 Q.B.D. 623. See discussion of these cases by Higgins, 28 M.L.R. 167 (1965).
55. See Towle & Co. v White (1873) 29 L.T. 78; International Harvester Co. of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co. (1958) 100 C.L.R. 644. But the nineteenth century factor could be a selling agent: see above, note 53.
57. 'Confirming house transactions in Commonwealth countries', 3 J. Maritime Law and Commerce 307 (1972) (a most valuable article).
58. e.g., Rusholme & Bolton & Roberts Hadfield v S.G. Read & Co. [1955] 1 W.L.R. 146; Sobell Industries v Cory Bros & Co. [1955] 2 Lloyd's Rep. 82, in both of which confirming houses whose overseas correspondents cancelled their orders were held liable to suppliers. In Anglo-African Shipping Co. of New York Inc. v J. Mortner Ltd [1962] 1 Lloyd’s Rep. 610 a confirming house which had accepted personal liability was held entitled to recourse against its principal: but the Court of Appeal, which split 2-1, was only willing to consider two possible analyses — that it was a true agent (Sellers and Danckwerts L. JJ.) or that it bought for resale (Diplock L.J., dissenting).
A recent case brings this problem to life, this time in connection with selling agency. In *Aluminium Industrie Vaassen B.V. v Romalpa Aluminium Ltd* (1976), Dutch manufacturers sent aluminium foil to English distributors under standard terms which to a common lawyer appear of an unusual nature. The ownership in the foil was to remain in the manufacturers until the distributor had "met all that is owing to" the manufacturers. Where the foil was made up into new objects or mixed with other material, the distributor was to hold the product as fiduciary owner, as "surety", again for the full payment of what was owed to the manufacturer, though with a power of sale. The distributor went into liquidation and the manufacturer claimed the proceeds of sale of certain aluminium sold by the distributors, which had been held by the receiver in a separate bank account.

Although the clauses concerned were not skilfully drafted, the English Court of Appeal, affirming Mocatta J., held that the intention of the whole scheme was that the distributors held the manufacturers' foil as the manufacturers' property, and later held the proceeds of sale on trust for the manufacturers under the principle of *Re Hallett's Estate*. The decision is a complex one because the clauses were strangely drafted: the above account is over-simplified. It has caused considerable disquiet in England because of repercussions on accountancy, receivership and banking practice, and because it appears a successful device to give trade creditors a higher priority in bankruptcy than that which the law allocates to them. It is obvious also that the mere mechanics of its application, especially as regards mixed goods, may give trouble. It will only be examined here from the point of view of agency.

Viewed from this aspect, what the decision appears to allow is that a manufacturer utilises the services of a distributor who acts to the outside world as a seller, but yet who is, as regards the manufacturer, an agent who accounts on an agency basis. Should this intention be permitted and implemented? If so, it goes far to recognise the situation recognised by Blackburn J. in the 1870's but rarely acknowledged since. In favour of such recognition is the simple argument that it gives effect to the intention of the parties; that the law should not be dominated by arbitrary categories; and that this is only a slight extension of the device of the trust receipt, the document whereby a pledgee can release goods to his pledgor as agent for sale and trustee of the proceeds, while retaining his pledge interest.

Against this are the arguments that the device alters the established priorities in bankruptcy: and that it dresses up what is essentially an adversary relationship of buyer and seller as being the confidential relationship of principal and agent.

60. (1880) 13 Ch. D.696.
61. There is a valuable article on the case by H.C. Rumbelow in 73 Law Society's Gazette (London) p.837 (1976). The existence of goods held under *Romalpa* clauses may make accounts misleading, hamper the activity of receivers, and render it difficult for banks to assess security. There is implication also for factoring companies (for some debts factored may not belong to the company concerned) and conceivably, if the profits are those of the principal, in taxation.
63. See *North Western Bank v Poynter* [1895] A.C. 56; *Re David Allester Ltd* [1922] 2 Ch. 211; *Benjamin's Sale of Goods* (1974), ss.1422 et seq.
The special fiduciary duties of an agent, and the fact that the principal can sometimes assert against him proprietary claims both at common law and in equity, stem from this relationship, which arguably should not be available for adoption by the free act of the parties in a commercial context.

One final problem remains. If there is an agency relationship, does not this mean that the manufacturer is liable and entitled as undisclosed principal? It has been suggested above that the undisclosed principal situation is to some extent the common law's analysis of the position of the independent intermediary not authorised to create privity of contract between his principal and a third party. If so, the common law might in a case like Romalpa hold the principal liable, for example for breach of warranty of quality. Roskill L.J. did not think this would be so. "I see no difficulty" he said 64 "in the contractual concept that, as between the defendants and their sub-purchasers, the defendants sold as principals, but that, as between themselves and the plaintiffs, those goods which they were selling as principals within their implied authority from the plaintiffs were the plaintiffs' goods which they were selling as agents for the plaintiffs to whom they remained fully accountable...The fact that they so sold them as principals does not, as I think, affect their relationship with the plaintiffs: nor (as at present advised) do I think...that the subpurchasers could on this analysis have sued the plaintiffs upon the subcontracts as undisclosed principals for, say, breach of warranty of quality." Certainly the Dutch sellers would be surprised to be held so liable, yet if the English company are agents, are not the Dutch sellers undisclosed principals? Perhaps it was considerations of this sort that made Blackburn J. wonder "whether it was originally right so to hold", that the undisclosed principal was liable and entitled. 65

All of these are questions to which attention needs directing. My suggestion is that the common law doctrine too readily assumes that the agent drops out, and too readily ignores his position; and that writers devote all their energy towards the problem of the principal's position. In commerce generally it may be that this approach contains unsatisfactory assumptions. "In no branch of international trade", says Professor Schmitthoff, "is the cleavage between theory and reality greater than in the law of agency". 66 The proposition need not, perhaps, be confined to international trade. One of the cures for the problem is to look more closely at the agent.

64. At p.690.
THE CONTRACTUAL MISTAKES BILL 1977

Richard Sutton*

Introduction

I must begin by confessing two good reasons why I should not be giving this paper at all. As one who has been involved with the reform of the law of mistake from its early stages, it is difficult for me to discuss it except in terms of glowing admiration. Moreover, as one who has contributed an article on the subject, I have perhaps already said enough about statutory reform in this area, and should let others have their say. It is therefore with some misgivings that I stand before you today.

Nevertheless, I welcome this opportunity to comment on the Bill, which you have in front of you. The main objectives have already been set out in the Report of the Contracts and Commercial Law Reform Committee. The previous law, and possible methods of reform, have been discussed in my own article. What I want to do today is talk about the problems facing the draftsman of the legislation, and what he has done to cope with those problems. This is a major reform, and it often happens that drafting difficulties obscure the broader aims of such reforms, especially in their early years. If we recognise the difficulties, realising that they are often due not so much to inept drafting as to the inherent nature of the subject matter and the basic approach which has been taken in reforming the law, the advantages of a new law can be realised more quickly. I hope what I have to say will help you come to grips with the reform as it is now drafted.

The most important part of the Bill is Clause 6. Here we step out into the unknown by giving far more extensive remedies in cases of mistake. I have always thought that the existing remedies are inadequate. Modern advances in legal technique, especially in the law of restitution, enable us to adjust our remedies much more closely to the needs of the particular case. Clause 6 should make it a great deal easier to raise, plead and argue a case of mistake once artificial restrictions on the remedies available are removed. Before we get to that point, though, we must ask ourselves, what is a mistake? And what happens to those other legal doctrines that we often use where the parties are mistaken? Technically, these questions are the most difficult for a legislator to answer.

1. The meaning of “mistake”

The Bill has, as you will see, gone through two stages of drafting. The first was done under the aegis of the Contracts and Commercial Law Reform Committee and appended to its report. That bill was introduced into the House, but when it reached the Statutes Revision Committee substantial changes were made. The part of the bill which was most severely affected was the definition of “mistake” in Clause 2.

In its original form, the definition in Clause 2 was meant to remove all doubts about what is a “mistake” in law. All matters about which a person might, in the

*Senior Lecturer, Faculty of Law, University of Auckland.

ordinary sense, be "mistaken" were included. The old, unsatisfactory distinction between errors of fact and errors of law was done away with. With it, went the tenet that an error about the interpretation of a document was a "mistake of law" and hence had no remedy. Actually, these doctrines have little sway in modern law. The rule that there could be no relief for a mistake of law\(^3\) was abrogated by statute in 1958.\(^4\) Though that reform did not in terms apply to mistaken contracts, such modest authority as there is on the subject derives its force entirely from the now reformed law of money paid under mistake and could hardly survive in New Zealand after the 1958 legislation. In any event, courts of equity assert a jurisdiction to give a remedy for a mistake of law where the mistake concerns "private rights".\(^5\) The exception, it seems, largely eats up the rule. So Clause 2 was largely a "tidying-up" operation, getting rid of outmoded doctrine and removing speculation about the meaning of "mistake". To this end, various other possible sources of argument were removed, by providing that errors of opinion, errors of calculation and errors of expression in documents could come within the ambit of the reform, as long as the requirements set out in the Bill were otherwise complied with. If you look in the contract textbooks, you will find nothing to say that such errors cannot be operative in appropriate cases, but on the other hand you can find nothing to say that they can. The original Clause 2 forestalled any argument on the point. The new Clause 2 has a much less clearly defined purpose. It still recognises errors both of fact and law, and specifically declares that an error in interpretation of a document is a "mistake of law" which may now have its remedy under the Act. But all mention of the other types of mistake is simply deleted. Why? Several guesses might by made. One is that the terms "law or fact" were thought to cover all possible kinds of mistake, so the other words in the old Clause 2 were otiose. Another guess, is that the words "law or fact" were intended to circumscribe some new definition of mistake. Some types of error (who knows what?) will remain excluded from the legislation, so that no matter how important they are to the contract in question, they cannot be a ground for relief under the new legislation. Yet a third guess is that Clause 2 now refers back to the previous law to determine what is a sufficient "mistake" to justify the court's intervention. There is not much to be said for this last interpretation, since the Contracts and Commercial Law Reform Committee was anxious to get rid of all the technicalities and inconclusive case law which surround the present legal definitions of operative mistake.

We do not know why these alterations have been made. They do not seem to assist in operation of the legislation, and they sow the seeds of uncertainty where previously the definition was tolerably clear. Perhaps the previous definition will be restored before the Bill becomes law.

The previous clause also defined the respective ambits of the law of mistake and the law of frustration. Where a so-called "mistake" concerned an event which was to occur after the contract was made, the Bill would have no operation at all. The parties were left to the law of frustration and their remedies under the Frustrated Contracts Act 1944 (see Clause 2, "mistake" para. (c)).

4. Judicature Act 1908, s. 94A, as inserted by Judicature Amendment Act 1958, s.2.
5. See Cooper v Phibbs (1867) L.R. 2 H.L. 149, 170; Beauchamp v Winn (1873) L.R. 6 H.L. 223; Solle v Butcher (1960) 1 K.B. 671, 693.
This definition has been removed, and the Frustrated Contracts Act 1944 now appears as one of the legal doctrines which are to operate concurrently with the new legislation. Again, we do not know why this change was made. It could lead to considerable debate and confusion of legal doctrine.

All illustration is the recent case of *Amalgamated Investment and Property Co. Ltd v John Walker & Son Ltd.* The day after a property was sold, it was designated a historic place. Overnight its value was dramatically reduced. Was this a case of mistake or one of frustration? The Court held there was no mistake since the unexpected event occurred after the contract was entered into. When the matter was looked at from the point of view of the law of frustration, that principle was found to have no application because the purchaser took the risk of any changes in condition of the property after he bought it.

If the Bill in its present form becomes law, there may be argument that the parties made a mistake about a future event and are entitled to relief as for an ordinary mistake. Perhaps the argument would not succeed. But the earlier draft made the matter clear.

2. A "code" of mistake

How can a statutory reform be a "code", and at the same time an integral part of a much larger body of case and statute law? That is the question posed by the Clause 4. The law governing the setting aside of contracts generally is like a "seamless web". A number of different lines of doctrine converge on any particular case in which the defence of mistake is raised. Among the most important are the rules governing offer and acceptance, the doctrine of the "implied term" in contract law, and the law of innocent misrepresentation. A case of mistake may also be dealt with by these other doctrines. Indeed, according to some theorists "mistake" does not exist as an independent doctrine at all; cases which appear to be cases of mistake are dealt with entirely by these other doctrines, when the law is properly analysed. How then can the new law be a "code"? You cannot do away with these other doctrines altogether, since they are not confined in their operation to cases of mistake. On the other hand, you cannot ignore them since their unfettered application might cut right across what you are trying to do with the new law of mistake.

The method the draftsman has chosen is complex. First, Clause 4 declares the new legislation to take effect in place of the existing rules "governing the circumstances in which relief may be granted, on the ground of mistake". Note that is is confined to cases of *mistake*; where the related doctrines to which I have referred deal with cases which do not involve any mistake, their operation is entirely unfettered. Note also that the code deals only with what *relief* may be given for mistake. It does not purport to effect the underlying doctrinal basis of the law, though in many respects that basis will ultimately be irrelevant. So if, for example, a "contract" is no contract at all, Clause 4 does not turn it into a contract. The court in its discretion may do so, by validating it under Clause 6 (2) (a). Until that happens, it remains just as much a "non-contract" as it ever was. So the effect of the "codification" is strictly limited. Secondly, certain well recognised doctrines which may also come into operation in conjunction with the law of mistake are expressly preserved by Clause 4 (2). Among these are the

law of non est factum (I will mention an illustration presently), of rectification of contracts, of undue influence and breach of fiduciary duty. Since they are preserved, the intending plaintiff will still have a choice whether he relies on these older law, or the new law, or both. Similarly the intended defendant may content himself with his protection under the doctrine the plaintiff has chosen, or he himself may move out and seek some other or supplementary remedy under the new legislation.

The effect must be that the so-called “code” of mistake has to adapt itself to the underlying legal situation in which the parties find themselves. I take as an illustration of these observations, the recent case of United Dominions Trust Ltd v Western. A man bought a motor car on hire purchase. He signed the hire purchase form in blank, leaving the seller to fill in the agreed details. The seller filled them in wrongly, so that more was shown as owing by the buyer than he had agreed. The agreement was discounted to a financier. The buyer said this was a case of non est factum: this was not his document and he was not liable on it to the financier. But the Court did not agree. Applying well-established principles, it held that the financier could enforce the document as it was written. This, of course, was not a case of mistake at all and the new legislation would have no effect on the result. Suppose, however, we alter the facts slightly and assume that the buyer of the car signed a completed agreement in which the wrong amount had previously been inserted in error. This now becomes a case of mistake, and the legislation could apply. But to what state of affairs? This will depend upon whether the buyer can invoke the doctrine of non est factum. If he can, then he can avoid liability to the financier unless and until the financier obtains an order under Clause 6 (2) (a). If he cannot invoke the doctrine (which is more likely), then it is he who must seek relief under the new legislation. He cannot then seek it as against the financier because of Clause 7, which protects third parties where they have taken a disposition of property or an assignment of a chose in action under s. 130 of the Property Law Act 1952. But he can seek it as against the original seller, with a view no doubt to making him restore any benefit he has received as a result of discounting the agreement at the higher figure. In this example, the Court’s powers take shape according to the underlying legal structure of the situation.

The Statutes Revision Committee has added a new Clause 3A which might be thought to alter the Bill’s original purpose. But on closer inspection the new clause does not change the basic conception. Subclause (1) (which might have been better as a preamble) speaks broadly about the “arbitrary effects of mistakes on contracts”, which are to be cured by the new powers. Subclause (2) confirms that the powers are in addition to, and not in substitution for, powers to grant relief in respect of matters other than mistakes. These statements seem to endorse the view I have put forward about the “code” of mistake. There is, of course, the admonitory statement about the “general security of contract relationships” in the last line, but the import of that is obscure. A court, indeed, may make contract relationships more secure if it interferes freely in cases of mistake, since the parties are then secure against the risk of having the words of their contract turned against them in situations to which the parties never

thought they would apply. Naturally the courts will want to take into account any acts that the other party has honestly taken relying on the contract, and they are given broad powers under the new legislation to conform their remedies to that end, so he too will be “secure” in his transaction.

3. **Mistake which qualifies for relief**

Before a mistake can be a grounds for relief, the requirements of Clause 5 must be fulfilled. The Clause has been slightly re-drafted from its original form, but without any substantial change in meaning. The Clause now speaks in various places about the parties having to be “influenced in their decision” to enter the contract by the mistake. Previously they were said to be “relying on” the mistake. Neither phrase is an entirely happy one. Often people who are mistaken never turn their minds to the fact about which they are mistaken. If they do not think of it, how can it be said they “rely on it” or are “influenced by it”? Nevertheless they would never have entered into the contract had they known the truth. It is more accurate to say that they enter the contract “under” their mistaken belief, but for some reason the draftsman has not used this natural terminology.

The requirements of Clause 5 may seem rather loose and flexible. But any attempt categorically to define what is and what is not operative mistake is doomed to failure. Too much turns on the facts of each case, and the importance the mistaken fact has to the contract as a whole. Nevertheless the problem of definition cannot be ignored. At the very least, the mind of the judge or magistrate should be encouraged to run along lines which are generally helpful in determining the merits of the particular case. It is especially important, in cases of mistake, to steer clear of artificial distinctions which might appear attractive as a means of resolving the particular case, yet cannot provide a real basis for reaching a just result nor stand up as a guide for decision in later cases. Perhaps our definition can achieve no more than that. The concepts traditionally used in cases of mistake are very elastic, and past experience would suggest that they are not likely to deter a judge if he thinks that the claim to relief is meritorious. Moreover, it must be borne in mind that even if he finds that the mistake comes within the terms of Clause 5, he is not compelled to give relief. So the definition of operative of “available” mistake in Clause 5 serves a much more restricted role than did its counterpart under the common law doctrines of mistake.

There are three basic requirements which must be fulfilled before a Court may give relief for a mistake.

(i) **The parties state of mind.**

To what extent is the mistake a shared mistake, as compared with an error which only one party entertains? Present legal doctrines pay considerable attention to that question. So too does Clause 5 (1) (a), which makes reference to three possible situations:

1. Both parties share the same mistake (“common” mistake);
2. Both parties make a different mistake about the same fact (“distributed mistake”);^9^
3. One party is in error while the other knows the truth.

^9^ I have adopted the terminology used by Bronaugh, “Agreement, Mistake and Objectivity in the Bargain Theory of Contract” (1976) 18 William & Mary L.R. 213.

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To take an example, suppose A sells a Commer truck to B. A mistake about the make of the truck could take one of three possible forms:

1. A and B both think it is a Datson truck (common mistake)
2. A thinks it is a Datsun truck while B thinks it is a Leyland truck (distributed mistake)
3. A thinks it is a Datsun truck while B knows it is a Commer truck (unilateral mistake).

Under Clause 5 (1) (a), all three types of error are recognised as giving rise to the courts' jurisdiction in mistake. In the case of unilateral mistake, however, a further requirement is added. The party who was mistaken must show that the other party actually knew of his mistake when the contract was entered into. This reservation is probably wise. It is true that an ideal system of justice might make provision for the case where a vendor knows of some hidden defect in the goods or the house he sells, but trusts to luck that the purchaser has not found out. Under existing law the purchaser's rights would depend upon whether there was an implied warranty or fraud by concealment. The new legislation would not change matters, unless the vendor knows that the purchaser believes that there is no such defect. The vendor could probably avoid obtaining such knowledge simply by not raising the question, and by meeting any enquiries on the point by the response "Find out for yourself". But to attempt any reform here would go beyond what is reasonable to expect of legislation whose primary purpose is to clear up the law of mistake.

In dealing with unilateral mistake, the Bill therefore does not extend the law very much, if at all. In a recent decision, Mahon J. accepted that relief could be given in equity for a unilateral mistake, as long as the person who knew the truth took "studied advantage" of the other party's error, seeking to profit from it. Under the Bill, the Court would have a discretion in all cases where he knows of the other's mistake. Mahon J.'s "studied advantage" test may or may not commend itself as a general guideline for the exercise of the discretion.

(ii) The effect of the mistake.

The Contracts and Commercial Law Reform Committee said in its report, "...We see the law of mistake as essentially pragmatic, concerned with the maintenance of substantial justice in contracts rather than the perpetuation of an idealistic concept of 'consent'". Clause 5 (1) (b) therefore requires the court to look at the effect of the mistake to see whether it has resulted in an unequal exchange of values. This may occur either because the contract as a whole becomes unequal when the true facts are known, or because a particular term imposes a disproportionate obligation on one of the parties. Thus, the mistake may result in a car worth $4,000 being sold for $2,000. Or it may mean that the seller, having sold the car at a reasonable price, finds he has to provide further maintenance for $10 per week when the cost of providing it is $20 per week. Perhaps the Committee has oversimplified matters by seeing the adverse effect of mistake only as disproportion in value. I am inclined to agree with Dr Harrison who, in his comment on the report, made reference to a different but equally unfortunate type of effect. He instances Raffles v Wichelhaus, where there

were two ships called the "Peerless", each leaving Bombay but at different times of the year. Goods were sold "ex Peerless", the seller having in mind the one ship and the buyer the other. The contract was held void for mistake. Presumably, goods shipped on the one Peerless would be no more valuable than goods shipped on the other. But the consequences of upholding the contract might be very inconvenient. If the buyer had to accept goods on the ship which arrived later, he could find them useless to meet onward commitments to third parties. If the seller had to provide goods on the earlier ship and had made no arrangements to have goods shipped on it, he too would be in an awkward position. It is not easy to see how, under the new legislation, any relief could be given to the parties in *Raffles v Wichelhaus*.

(iii) **The terms of the contract.**

No case of mistake in contract can be properly decided without a very careful study of the particular contract in question. There may be provisions in it which expressly or by implication impose the risk of error on one or other of the parties. Such provisions, indeed, may not actually be written in to the contract, but instead be imported from the general custom which prevails in contracts of that kind. It is well established, for instance, that where land is sold defects in title must be raised and dealt with prior to settlement. Clause 5 (1) (c) makes it clear that the court cannot, through the exercise of its jurisdiction in mistake, override the provisions of the contract itself. The matter is not as simple as it may appear, however. Situations can arise where a clause which purports to allocate risk may not cover some highly unusual or unexpected event, notwithstanding that at first blush the words seem extensive enough to include it. Take for example the case of a car sold "as is, where is". Obviously this clause envisages mechanical breakdowns, warrant of fitness problems and the like. But arguably it does not include the situation where unknown to both parties the car has been destroyed by fire, or stolen by thieves. Using established principles of construction, the court in such cases may step around the contractual provision by giving it a more restricted meaning, in view of the unreasonable consequences which might follow if the wording of the provision is applied literally. Similarly, a clause which purported to place the risk of all mistakes on one of the parties and thereby ousts the jurisdiction of the court under the new legislation, would no doubt likewise receive a restricted construction. So you cannot put too much reliance on the express terms of a contract, when by hypothesis they relate to some event that the parties did not expect to happen.

These then are the essentials of operative mistake. But Clause 5 (2) (a) goes on to exclude one particular type of mistake from its operation. This is mistake about the interpretation of the contract one is entering into. It is not clear why it should be necessary to place such an absolute embargo on this form of mistake. Indeed, one or two cases may be cited in which even under existing law, such a mistake has been accepted as operative mistake.¹² Usually, of course, the error is unilateral and not known to the other party. Alternatively, the parties may recognise the ambiguity in their contract and decide to leave it to a court to decide in the event that the matter should ever be disputed; in this latter case

¹². *Hickman v Berens* [1895] 2 Ch. 638; *Wilding v Sanderson* [1897] 2 Ch. 534, 550.
there is probably no element of mistake at all. Possibly the legislature has in mind that kind of “jockeying for position”, and is anxious to ensure that the loser in the race is not able to turn the tables by invoking the law of mistake. There may, however, be other very deserving cases where it is entirely appropriate to grant relief for mistake. Take, for example, the situation where one party inserts into a contract some provision which has an established legal meaning, which is not apparent to the other party on a layman’s reading of the contract. If the knowledgeable party realises that the matter is important to the person with whom he is dealing, and that he has genuinely mistaken the meaning of the provision, should he be entitled to enforce the contract in its strict legal sense? As often happens in cases of mistake, the type of mistake involved is no indication at all of the merits of the mistaken party’s claim. Perhaps it would have been better to say nothing at all about such mistakes, leaving it to the courts to deal with each case on its own merits.

4. Remedies

The remedies provided for in the new legislation are all discretionary. They are listed in Clause 6. As I have said, this part of the reform is probably the most significant and far-reaching. I hope that I will not seem to minimise their importance by giving them only a passing reference today, I have already set out elsewhere how I think these remedies ought to be exercised. To say more than that, or to indicate views about how these powers will be exercised, would be to indulge in crystal-ball gazing. So I content myself with drawing to your particular attention two new remedies of fundamental importance.

The first is the remedy of validation, given by Clause 6 (2) (a). I have already pointed out how, under existing law, a mistaken contract may be no contract at all, as for example where A addresses an offer to B, believing him to be C, and B purports to accept the offer. Until we get to Clause 6, there is nothing in the Bill which would convert that “non-contract” into a contract. Yet the parties may have acted upon what they think is a contract over a period of time, so that the most sensible remedy will often be to treat the transaction as a valid contract. It can, of course, be varied (Clause 6 (2) (c)) and other supplementary relief can also be given. The effect is that, in determining the substance of the relief to be given, the pre-existing legal doctrine which declares the transaction not to be a contract at all becomes largely irrelevant.

The second is the remedy of “restitution or compensation”. Often, under existing law, a contract which is affected by mistake will have to stand because it is too late to rescind it. Since the only remedy is rescission, nothing more can be done. Yet one party may be clearly enriched as a result of the mistake, He may have sold property for twice its value, for example. Why does present law allow him to keep the profit? Not in order to enforce his expectations under the original contract, because he did not have any. If the other party had moved in time, the contract would have been set aside. Present law is apparently slow to act because of the fear that no remedy can be given which will not upset an arrangement which has been relied upon over a period of time. As long as the only available remedy is rescission, this view is justified. But by the remedy of restitution or compensation, the court can make the party who has profited

disgorge at least a part of that profit, without unduly disturbing the parties' basic legal relationship. The remedy is discretionary, so that if one party really has altered his position to his detriment on the faith of the transaction, this can be taken into account in determining what relief should be given against him. The court is looking for an unjust enrichment in a very broad sense; this may be found even though it is far too late to restore the parties precisely to the position they occupied before the mistaken transaction.

Such a view of "restitution" may seem strange and novel to some people, who view the concept of "restitutio in integrum" in a very literal sense. But in the modern economy, very few assets are of such significance that a money award is not an adequate reflection of their original worth. A man's total wealth is much more important to him that the individual assets which go to make up that worth, and which may be exchanged and replaced many times over during his lifetime. In recognising unjust enrichment in cases of mistake and giving remedies for it, the courts should be encouraged to move with the times, taking a wide view of the mistaken transaction as an accretion to the defendant's general wealth. On this view, an award of compensation arising out of a mistaken contract, or any other mistaken transaction for that matter, is not strange at all.

5. Third parties

The rights of third parties are generally protected by Clause 7 of the Bill. No order of the Court will invalidate dispositions made to those who are not parties to the mistaken contract itself. Thus, if A and B make a mistaken contract under which B is sold goods which he subsequently transfers to C, then no order the Court can make will affect C's title.

It is not quite as simple as that, however. There are some cases where Courts have in the past regarded an error as being so fundamental that no contract at all comes into existence. For instance, in the example I have just given A may believe that B is in fact X, a reputable person, B is really a rogue who, having obtained credit on the pretence that he is X, re-sells the goods to C and decamps with the proceeds. In some cases though not all, courts have held that there is no contract of sale as between A and B, so that title remains with A. B's sale to C does not confer title on C, who must restore the goods to A or be liable in conversion or detinue. The justification for this ruling must be that a supposed contract between A and the purported X cannot be turned into a contract between A and the real B; the security of A's transaction demands no less.

The new Bill would not change that result, because if the Court makes no order at all C will still be left without title. No order the court does make, therefore, "invalidates" B's disposition to C because it is ineffective anyway. The Contracts and Commercial Law Reform Committee recommended (para. 30) that C should have the right to seek the Court's assistance (in its discretion) to validate the transaction between A, B and C to the extent of giving C a good title. This recommendation is worked out in a rather elaborate manner in my own article.\(^{15}\) The Bill does not seem to achieve that result, however, at least in


the case of rogues who misrepresent their identity. Under Clause 5, relief may only be sought by a party who enters a contract under a *mistake*, which does not apply to the rogue. It is true that Clause 6 gives certain rights to third parties, but Clause 6 (1) requires that the person through whom the third party claims (that is, the rogue) must have had a right to relief. So the innocent third party would seem unable to institute proceedings with a view to obtaining an order in his favour. If the original seller A were to institute proceedings under the new legislation the Court might allow him relief only on condition that C’s title is validated. (See Clause 6 (4)). But A can circumvent this by taking proceedings against C based solely on his own right of title, and there would not seem much that C can do about it.

In conclusion I might say that there are obvious drafting difficulties with legislation of this kind. I have taken up quite a lot of time exploring them because, if the Bill becomes law, these matters will have to be sorted out before the full beneficial effects of the reform are realised. You might say, why have such complex legislation in the first place? The answer to this question lies, I think, in the way in which the Contracts and Commercial Law Reform Committee has had to go about reforming the law of contract. If it had been practical to codify the whole of the law of contract in one single reform, many of these complications would have been avoided. As the experience of the Law Reform Commission in England has shown, however, this is not a realistic way of tackling the problem of reform. Instead, our Committee has grappled with particular problems where it is clear that the law is not working satisfactorily. Having formulated a future policy for dealing with these problems, the Committee still has to fit the resulting reform in with the existing body of case law which is changed only to the extent necessary to give effect to the reform. It is this process which is complex, and requires the exercise of imagination both by the Law Draftsman and by lawyers who are called upon to put the new legislation into effect.
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