

Kendall knew the ground nut meal was to be resold in smaller lots to compounders, an important consideration for s. 14 (1), was ignored for the purposes of s. 14 (2).

This would seem illogical if it is considered that Lord Wright's test of merchantable quality—the test adopted by Havers J. at first instance, by the Court of Appeal, and in the House of Lords by Lord Morris of Borth-y-Gest and Lord Reid—is defined in terms of purpose. This test is: "If goods are sold under a description which they fulfil and if goods under that description are reasonably capable in ordinary use of several purposes they are of merchantable quality within s. 14 (2) of the Act if they are reasonably capable of being used for any one or more of such purposes even if unfit for use for that one of those purposes which the particular buyer intended": *Canada Atlantic Grain Export Co. Inc. v. Eilers* (1929) 35 Lloyds L.R. 206 at 213.

However the other three members of the House of Lords considered that Havers J. had applied the wrong test. Lord Pearce observed that the suggestion that goods are merchantable unless they are of no use for any purpose for which they would normally be used and hence would be unsaleable under that description may be misleading. His Lordship used the examples of a new carpet which happened to have a hole in it and a car which had its wing buckled. They would no doubt if their price was reduced sufficiently find a ready market but it would be wrong to say that they would necessarily be merchantable.

Lord Guest was of the same opinion and for this reason followed the test of Dixon J. in the High Court of Australia decision in *Grant v. Australian Knitting Mills Ltd.* (1933) 50 C.L.R. 387 at 408 where it was stated that goods are of merchantable quality if a buyer with knowledge of any defects would buy the goods "without abatement of the price obtainable for such goods if in reasonably sound order and condition and without special terms".

In New Zealand a similar view had been taken by Salmond J. in *Taylor v. Combined Buyers* [1924] N.Z.L.R. 627 at 644:

It is clear . . . that "merchantable" does not mean merely "saleable". Goods may be saleable yet not of merchantable quality. Few goods are so defective in quality that they cannot be disposed of at any price or for any purpose.

For there to be a breach of s. 16 (2) two conditions must exist. Firstly the goods must be bought by description from a seller who deals in goods of that description. Secondly there must be a breach of merchantable quality and according to the writer's interpretation of the majority in *Kendall v. Lillico* (*supra*) there is no breach of merchantable quality if the goods bought are of use for *any* purpose for which goods sold at *that* price are normally used.

R. N. Macassey.

## COMPANY LAW

In the objects clause of the modern memorandum of association of a limited liability company the inclusion of two particular types of sub-clause has produced what has been called ". . . the progressive attenuation of the doctrine of *ultra vires* . . ." (D. V. Barker (1966) 82 L.Q.R. 463) and led to speculation as to whether the doctrine has actually ceased to have effect. The clauses in point are firstly, the type of

clause examined by the House of Lords in *Cotman v. Brougham* [1918] A.C. 564, in which all objects are expressly stated to be primary objects and not merely incidental or ancillary to the "main objects"; and secondly, the "subjective formula" type of clause which authorises the company to carry on any business which in its opinion may be carried on advantageously in connection with its existing business. The validity of such a clause was accepted in New Zealand in *C. H. Mitchell Ltd. v. Wellington Meat Export Co. Ltd.* [1962] N.Z.L.R. 768, and more recently by the English Court of Appeal in *Bell Houses Ltd. v. City Wall Properties Ltd.* [1966] 2 Q.B. 256. A similar clause is implied into the memoranda of New Zealand companies incorporated under the 1955 Companies Act, by virtue of section 16 of that Act and clause 1 of the 2nd Schedule thereto.

The recent decision of the English High Court in *Re Introductions Ltd., Introductions Ltd. v. National Provincial Bank Ltd* [1968] 2 All E.R. 1221 shows that the operation of these sub-clauses, although having a limiting effect, by no means extinguishes the doctrine.

The facts were as follows: the plaintiff company was incorporated in 1951, its main objects as set out in the memorandum being to provide services and information to visitors attending the Festival of Britain. The memorandum contained the usual multifarious list of objects and powers, including a subjective type clause (sub-clause D); sub-clause N was a borrowing clause, similar to that contained in clause 13 of the 2nd Schedule to the Companies Act 1955, and a *Cotman v. Brougham* clause was also included.

In 1958, 398 of the 400 shares in the company changed hands and a new board of directors was constituted. In November 1960, the company abandoned its earlier activities and it commenced to operate the sole business of pig-breeding. In December 1960, finance was raised by the issue of a debenture to the defendant bank, a copy of the memorandum having been forwarded to the bank. The venture was not successful, and the company eventually went into compulsory liquidation; the bank sought to enforce its debenture, and was met by the contention that its issue was *ultra vires* the company. The company filed an application by originating summons to determine whether this was so.

Buckley J. considered firstly whether the business of pig-breeding was *ultra vires* the company, or if it was validated by the operation of the subjective clause, sub-clause D, which provided for the carrying on of any activity that the directors considered could be advantageously carried on in connection with any of the specified objects or the general business of the company. None of the specified objects or the general business of the company were being carried on, hence the business of pig-breeding could not be said to have been carried on in connection with any authorised activity; accordingly the business was held to be *ultra vires* the company.

The point then arose whether the debenture issued to the bank was part of the business of pig-breeding and thus void, or if the effect of the *Cotman v. Brougham* clause was to constitute the power to borrow conferred by sub-clause N an independent object of the company capable of being an isolated, *intra vires* transaction.

In *Anglo-Overseas Agencies v. Green* [1961] 1 Q.B. 1, an exporting and importing company had operated as property developers; sub-clause E of the objects authorised the company to "... acquire any concessions, contracts ... undertakings or businesses ... and to carry

the same into effect [and] operate thereunder . . . .” Salmon J. held that the subsequent *Cotman v. Brougham* clause enabled the company to operate under sub-clause E without regard to the “main objects” specified—any activity authorised by any sub-clause was to stand as a legitimate object independently of the others.

In the *Introductions* case, however, Buckley J. stated that it is necessary to read the whole of the objects clause as one in order to discover how the *Cotman v. Brougham* clause should be interpreted. The clause did not, as is sometimes the case, contain an exception as the context should so require, but the learned Judge found that this was a necessary inference, for, as he pointed out, at 1224:

. . . some of the sub-clauses are in terms which make it clear that what is referred to in the sub-clause could not, taken in isolation, authorise the company to embark on any kind of activity.

As an example of such a sub-clause, sub-clause J was cited, which read as follows:

To manufacture, sell, treat and deal in all kinds of commodities substances materials articles and things necessary or useful for carrying on any of the businesses of the company or in or for the operations of the company.

From an examination of the language of this sub-clause it was clear that before the company could embark on any activity under the sub-clause there would have to be in existence some legitimate business or operation of the company. The sub-clause was necessarily ancillary to some other object specified in the memorandum.

Turning to examine in this light the borrowing clause, Buckley J. stated, at 1227:

Now to borrow money by itself, without intending to use the money for any purposes, would be a senseless operation . . . Borrowing is only a sensible activity if it is associated with some use to which the borrowed money is to be put . . . the very nature of the transaction contemplated by sub-clause N infers that the company must have in view purposes to which the money shall be applied.

The learned judge was reinforced in this view by the language of the sub-clause, which provided in particular for the securing of loan finance by the creation of a charge over the company’s undertaking, thus implying that any borrowing was to be for the purposes of the company’s business.

It was held, that sub-clause N was one of that class of sub-clause which was necessarily ancillary to the business of the company. As the only business carried on by the company was *ultra vires*, the debenture issued over that business was also *ultra vires* and could not be enforced.

It is submitted that the case is fully compatible with earlier decisions, as in these (notably *Anglo-Overseas Agencies v. Green (supra)* and *Christchurch City Corporation v. Flamingo Coffee Lounge Ltd.* [1959] N.Z.L.R. 986) the sub-clause in point was clearly capable of establishing an independent object of the company.

In effect, the decision has expressly stated what was at least implicit in the earlier decisions, namely:

(a) the subjective formula will not validate the performance of activities not provided for in the memorandum unless they are carried on in connection with some object so provided for; and

(b) objects and powers which, by their very nature, are necessarily ancillary to some legitimate object of the company will not achieve the status of independent objects by virtue of the operation of a *Cotman v. Brougham* clause. Such a clause must be read as subject to an exception where the context so requires it.

C. S. Withnall.

[N.B. The decision of Buckley J. reviewed above has since been affirmed by the Court of Appeal: *Introductions Ltd. v. National Provincial Bank Ltd.* [1969] 2 W.L.R. 791. Ed.]

## CONTRACT LAW

### 1. Offer and Acceptance

In *Partridge v. Crittenden* [1968] 1 W.L.R. 1204, the appellant had been convicted of "offering for sale" Bramblefinch birds which could be sold, by virtue of s. 6 (1) of Schedule 4 of the Protection of Birds Act 1964, only if the birds were bred in captivity and had closed rings on their legs.

The appellant inserted an advertisement in the classified advertisement section of a periodical stating inter alia:

Bramblefinch cocks,  
Bramblefinch hens, 25s. each.

Such phrases as "for sale", "offered for sale" etc. appeared nowhere in the advertisement. On appeal against conviction it was held the advertisement was an invitation to treat. *Fisher v. Bell* [1961] 1 Q.B. 394 was applied despite the advertisement appearing in the classified advertisements. Some importance was attached by the Court to the fact that no such phrases as "for sale" appeared in the advertisement.

*Willets v. Ryan* [1968] N.Z.L.R. 863. The respondent gave the appellant an option to purchase a property. The price and deposit were expressed in the option, but the terms of payment of the balance was left open to be mutually agreed upon in the future. The appellant purported to accept the offer contained in the option and, also specified the manner in which he would pay the balance. The respondent refused to continue with the sale.

The question put to the Court of Appeal was whether or not the option contained an offer capable of acceptance. Turner J., in the course of delivering the judgment of the Court said, at 868, with reference to contracts for the sale and purchase of land:

But, although it is not necessary that the parties should express their agreement as to the time and manner of payment and although if they do not do so the Court will take them to have agreed to abide by such terms as the Court may think reasonable in this regard, it is otherwise where they have expressly reserved such a matter as one for later negotiation and agreement.

It was further felt by the Court that in such cases it was clear the parties meant to negotiate further before their pactum was to be given legal force.

There being no agreement on this point, there was consequently no concluded offer capable of acceptance and the appellant's purported acceptance amounted to no more than a counter-offer.

### 2. Implied Terms

*Charnock v. Liverpool Corporation and Another* [1968] 1 W.L.R. 1498. The plaintiff's car was damaged in a collision with the first defend-