

THE CONSUMER AND FAIR EXCHANGE: A THEORETICAL APPRAISAL

OF

THE MALAWI HIRE-PURCHASE ACT

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Abstract

Unfair exchange is a problem which the consumer who acquires goods under credit agreement may face. The goods may be misdescribed by the supplier or he may charge an excessive rate of interest for the credit allowance made to the consumer or the supplier may insert into the credit agreement provisions which protect him at the expense of the consumer or the supplier may over-secure his interest under the agreement.

The principal law which governs credit agreements in Malawi is the Hire-Purchase Act. This Act provides the basic content and form of a credit agreement and prohibits the supplier to insert certain clauses in the agreement and to engage in certain forms of conduct in relation to the agreement.

This thesis analyses the Act and argues that although it seeks to ensure that the consumer gets a fair exchange from the agreement, it has a number of weaknesses which undermine achievement of that objective. First, statements made about goods and credit supplied under the agreement, the quality of those goods and some types of security agreement which may be made in respect of the credit agreement are left to be regulated by other sources of law which are not primarily concerned with consumer protection. Second, the form of control created by the Act does not seem to be based on a clear and consistent policy. And third, enforcement of the Act is left to the parties to the credit agreement.

The thesis is divided into nine chapters. Chapter 1 is the

introduction which outlines issues dealt with in the thesis. The second chapter examines bases upon which common law controls unfair contracts and unfair contract provisions. Chapter three discusses the law which governs the quality of goods supplied under a credit agreement. Chapter 4 looks at provisions of the Hire-Purchase Act which govern credit. The fifth chapter deals with the law relating to security agreements which may be made in respect of credit agreements. Chapter 6 analyses all the regulatory provisions of the Hire-Purchase Act. Chapters seven and eight explore the possibility of public control of unfair exchange in these agreements. The former discusses how criminal sanctions could be used to re-enforce compliance with standards created by the Act while the latter shows that the whole regime could be made more effective by the introduction of a system of registration of traders who supply goods on credit. Chapter nine sums up all the findings of the thesis.

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TABLE OF STATUTES

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TABLE OF CASES

Abbot v Sworder De Gex & SM 448

Ailsa Craig v Malvern Fishing [1983] 1 All ER 101

Akerhielm v De Mare [1959] AC 789

Alec Lobb Ltd v Total Oil GB Ltd [1983] 1 All ER 941

Amade v Khoury (1958) 2 West African LR 32

Amoco Australia v Rocca Bros (1973) ALJR 681

Andrew v Singer [1934] 1 KB 17

Angel v Jay [1911] 1 KB 666

Anglo Auto Finance Ltd v James [1963] 3 All ER 566

Ankrah v Aryee (1957) 2 West African LR 251

Arcos v Ronaasen [1933] AC 470

Armstrong v Jackson [1917] 2 KB 822

Armstrong v Strain [1951] 1 TLR 856

Arrale v Costain Civil Engineering [1976] 1 Lloyds Rep 98

Ashington Piggeries v Christopher Hill [1972] AC 441

Associated Distributors v Hall [1938] 1 All ER 511

Astley Industrial Trust v Grimley [1963] 2 All ER 33

Australia Knitting Mills v Grant [1930] 50 CLR 387

Atchinson v Reith Anderson Ltd [1974] SLT 284

Baldry v Marshall [1925] 1 KB 260

Bannerman v White (1861) 140 ER 685

Barret v Corona, The Times, 16th June, 1902

Barton Thomas v Stapling Machines [1966] Ch 499

Beer v Walker (1877) 46 LJQB 677

Berger v Gill & Dufus [1984] 2 WLR 260

Bettini v Gye (1876) 1 QBD 183

Biggie v Parkin (1862) 158 ER 758
Birkenhead Co-operative v Roberts [1970] 3 All ER 391
Bisset v Wilkinson [1927] AC 177
Blundell-Leigh v Attenborough [1921] 3 KB 235
Borrowman, Phillips v Free & Hollis (1878) 4 QBD 500
Boyd & Forrest v Glasgow & SW Rly (1915) SC (HL) 20
Brady v St Margaret's Trust [1963] 2 QB 494
Brian Smith v Whitsheaf Mills [1939] 2 KB 202
Bridge v Campbell Discount Co Ltd [1962] AC 600
Bristol Tramways v Fiat Motors Ltd [1910] 2 KB 831
Brown v Sheen & Richmond Car Sales [1950] 1 All ER 1102
Buckley v Lever Bros Ltd (1953) 4 DLR 16
Bunge v Tradax [1981] 2 All ER 513
Butler v Miller IR 1 Eq 195

Cammel Laird v Manganese Bronze [1934] AC 402
Campbell Discount Co Ltd v Bridge [1961] 1 QB 445
Capital Motors v Beecham [1975] 1 NZLR 576
Carlill v *Carbolic* Smoke Ball Co [1893] 1 QB 256
Carringtons Ltd v Smith [1906] 1 KB 79
Cehave v Bremer [1976] QB 44
Chandelor v Lopus (1603) 79 ER 3
Chanter v Hopkins (1834) 150 ER 1484
Chapleton v Barry UDC [1940] 1 KB 532
Charterhouse Credit Co Ltd v Tolly [1963] 2 QB 683
Chatata Paint & Lacquer v Autocraft Panel Beaters Civil Cause No. 875 of
1980 (unreported)
Clarke v Dixon (1858) 120 ER 463

Clough v London & NW Rly Co (1871) LR 7 Exch 26
Combe v Combe [1951] 2 KB 215
Compagnie de Chemin Fer (1919) I Lloyds LR 235
Cooden Engineering Co Ltd v Stanford [1952] 2 All ER 915
Copperfield Cold Storage Co v R (1953) Law Reports of Northern Rhodesia

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Corfield v Starr [1981] RTR 380
Curtis v Chemical Cleaning & Dyeing Co Ltd [1951] 1 All ER 637

Davies v Directloans Ltd [1986] 2 All ER 783
Daniels v White and Tarbard [1938] 4 All ER 258
De Lassalle v Guilford [1901] 2 KB 215
Department of Commerce v Elliot [1981] NILR 10
Derry v Peek [1886-90] All ER Rep 1
Dick Bentley v Harold Smith (Motors) Ltd [1965] 2 All ER 65
Dies v British International Mining [1939] 1 KB 724
Donald v Suckling (1866) LR 1 QB 586
Donoghue v Stevenson [1932] **AC** 562
Drummond v Van Ingen (1887) 12 App Cas 284
Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Ltd [1915] AC 79
Edgington v Fitzmaurice (1885) 29 Ch D 459
Erlanger v New Sombrero (1878) 3 App Cas 1218
Esso Petroleum Co Ltd v Harper's Garage [1968] AC 269
Esso Petroleum Co Ltd v Mardon [1976] 2 WLR 586
Ex Parte Hubbard (1888) 17 QBD 690

Farnworth Finance Facilities v Attryde [1970] 1 WLR 1053
Farr v Butter Bros & Co Ltd [1932] 2 KB 606
Finance Co Ltd v Dooley [1964] 1 All ER 527

Flory v Denny (1852) 7 Exch 581

Frost v The Aylesbury Dairy [1905] 1 KB 608

Fry v Lane (188) 15 LR Ch D 679

Galbraith v Mitchenall [1964] 3 WLR 63

Garret v Boots the Chemist (1980) 88 The Monthly Review 238

Geier v Kujawa [1970] 1 Lloyds Rep 364

George Mitchell Ltd v Finney Lock [1983] 1 All ER 108 (CA) and [1983] 3
WLR 163 (HL)

Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd [1973] QB 400

Godley v Perry [1960] 1 WLR 9

Goldthorpe v Logan (1943) 2 DLR 519

Goulston Discount Co Ltd v Clark [1967] 2 QB 493

Graham v Johnson (1878) LR 8 Eq 36

Grand Trunk Rly of Canada v Robinson [1915] AC 740

Grant v Australia Knitting Mills [1936] AC 85

Grenfell v EB Meyrowitz ~~Co~~ [1936] 2 All 1313

Griffiths v Arch Engineering Co Ltd [1968] 3 All ER 217

Harbutt 'Plasticine' Ltd v Wayne Tank & Pump Co Ltd [1970] 1 QB 447

Harling v Eddy [1951] 2 All ER 212

Harper v Webster (1956) Rhodesia and Nyasaland LR 10

Harris v Knowles [1917] 2 KB 606

Heathcote v Paignon 2 Broc CC 175

Head v Tattersal (1871) 7 LR Exch 7

Hedley Byrne & Co Ltd v Heller Partners Ltd [1964] AC 465

Heilbut v Buckleton [1913] AC 30

Henry Kendall v William Lillico & Son Ltd [1969] 2 AC 31

Heyworth v Hutchinson (1876) LR 2 QB 447

Hollingworth v Souther Ferries Ltd [1977] Lloyds Rep 70

Hong Kong Fir Shipping v Kawasaki Kisen Kaisha [1962] 1 All ER 471

Hood v Anchor Line Ltd [1918] AC 837

Horsfall v Thomas (1862) 158 ER 813

Howard Marine & Dredging Co Ltd v Ogden [1978] 2 All ER 1134

Howe v Smith (1884) 27 Ch D 89

Imperial Clothing Co Ltd v Shankar Exports Ltd, Civil Cause No. 1109 of
1980 (unreported)

JA Booth & Co Pty Ltd v Fraser (1953) 52 AR (NSW) 566

Jenkins v Lombard Centre Plc [1984] 1 All ER 828

John Lee & Son (Grantham) Ltd v Rly Executive [1949] 2 All ER 581

Jones v Bright (1829) 130 ER 1167

Karsales (Harrow) Ltd v Wallis [1956] 1 WLR 936

Kempson v Ashbee (1873) LR 10 Ch 115

Kharaj v Khan (1923-60) African LR (Malawi series) 381

Kilmer v BC Orchard Lands Ltd [1913] AC 319

Knight v Hemming (1938) Rhodesia and Nyasaland LR 555

Krupp v Bell (1966) 58 DLR 466

Kruse v Sealy [1924] 1 Ch 136

Kunyamula v Brown Clapperton, Civil Cause No. 8 of 1982 (unreported)

Lamare v Dixon (1837) LR 6 HL 414

Lambert v Lewis [1982] **AC 225**

Landon Trust v Hurrell [1955] 1 All ER 839

Langridge v Levy (1837) 150 ER 1456

LBC Richmond-Upon-Thames v Motor Sales (Hounslow) Ltd [1971] RTR 116

LBC Sutton v Perry Sanger & Co Ltd [1971] 135 JP 239

LBC Wandsworth v Bentley [1980] RTR 429

Leaf v International Galleries [1950] 2 KB 86

Leason Pty Ltd v Prince Farm Pty Ltd [1983] 2 NSW 381

Leelasana v Tarmahomed, Civil Cause No. 1103 Of 1980 (unreported)

L'Estrange v Graucob [1934] 2 KB 394

Lever Bros v Bell [1931] 1 KB 557

Levison v Patent Steam Carpet Cleaning [1977] 3 WLR 90

Lewis v Maloney [1977] Crim LR 436

Lill Holdings v White [1979] 1 All ER 839

Lloyds Bank v Bundy [1975] 1 All ER 326

Lombank Ltd v Cook [1962] 3 All ER 491

Lombank Ltd v Excell [1963] 3 All ER 486

Long v Lloyd [1958] 2 All ER 402

Luditt v Ginger Coote Airways Ltd [1947] AC 233

Macaulay v A Schroeder Music Publishing Co Ltd [1974] 1 WLR 108

Makwakwa v Oil Company of Malawi, Civil Cause No. 77 of 1981
(unreported)

McEntire v Crosseley Bros Ltd [1895] AC 457

McGuire v Sittingbourne Co-operative Society Ltd, The Times, 3rd Feb,
1976

McKenzie v Bank of Montreal (1975) 55 DLR 641

McKinnon v Brockington (1921) 60 DLR 303

Millars v Turpie (1976) SLT (Notes) 66

Mills Conduit Investments v Tattersal (1939) 56 TLR 209

Modern Light Cars Ltd v Seals [1934] 1 KB 32

Muhammad Raza Nathan v Leyland (1948) Zanzibar LR 20

Multiservice Binding v Marden [1978] 2 All ER 489

Mundinger v Mundinger (1969) 3 DLR 338

Murray v Sperry Rand Corpn (1979) 96 DLR 113

Mussen v Van Dieman's Land [1938] Ch 253

Mutual Life & Citizen's Insurance Co Ltd v Evatt [1957] AC 793

National Westminster Bank v Morgan [1985] 1 All ER 821

Nattrass v Timson Shops Ltd [1973] Crim LR 197

Newtons of Wembley v Williams [1964] 3 WLR 888

Neville v Snelling (1888) 15 LR Ch D 679

Niblett v Confectioners' Materials Co Ltd [1921] 3 KB 387

Nordenfelt v Maxim Nordenfelt [1894] AC 535

Norman v Bennet [1974] 3 All ER 351

O'dea v Allstate Licensing System [1982-3] 152 CLR 359

Olett v Jordan [1918] 2 KB 41

Olley v Marlborough Court [1949] 1 KB 532

Ollivant v Bailey (1843) 114 ER 1257

Oscar Chess Ltd v Williams [1957] 1 All ER 352

Overstone v Shipway [1962] 1 All ER 52

Paris v Machniek (1973) 32 DLR 723

Parker v SE Rly (1877) 5 CPD 416

Parkfield Trust v Dent [1931] 2 KB 5790

Parkfield Trust v Portman (1937) Sol J 687

Pasley v Freeman (1789) 100 ER 450

Paul Newman & Measureworth Ltd v LBC Hackney (1982) 90 The Monthly Review 74

Pearson v Dublin Corporation [1907] AC 35

Pennsylvania Shipping v Compagnie Nationale de Navigation [1936] 2 All ER 1167

Phonographic Equipment Ltd v Muslu [1961] 3 All ER 626

Photo Production Ltd v Securicor Transport Ltd [1980] AC 827
Pomehuichuk v Gale [1950] 2 WWR 66
Poncione v Higgins (1904) 21 TLR 11
Priest v Last [1907] 2 KB 148
Pridmore v Calvert (1957) 54 DLR 13
Printing & Numerical Registering Co Ltd v Sampson (1875) LR 19 Eq 462
Randall v Newsome (1877) 2 QBD 102
R v Assistant Commissioner of Police of the Metropolis [1986] RTR 52
R v Hammerton [1976] 3 All ER 758
R v King [1979] Crim LR 122
R v Secretary of State for Transport [1983] RTR 88
Re Dagenham (1873) LR 8 Ch App 1022
Reeves v Capper (1838) 5 Bing. NC 136
Re Lawford [1902] 2 KB 445
Re Moore v Landauer [1921] 2 KB 519
Richardson, Spence & Co Ltd v Rowntree [1894] AC 217
Roche v Tyler [1917] VLR 665
Roscorla v Thomas (1842) 3 QB 234
Routledge v McKay [1954] 1 WLR 615

Salmond v Ward (1824) 172 ER 96
Samuel v Newbold [1906] AC 461
Scandinavia Trading Ltd v Flota Ecuatoria [1983] 1 Qb 529
Schneider v Heath (1813) 170 ER 1462
Sealand of the Pacific v Ocean Cement (1973) 33 DLR 625
Seddon v NE Salt [1905] 1 Ch 326
Shanklin Pier v Detel Products [1951] 2 All ER 471
Sherras v De Rutzen [1895] 1 QB 918
Sherrat v Gerald, the American Jeweller [1970] 68 LGR 256

Simmons v Potter [1975] 347

Shiloh Spinners Ltd v Harding [1973] AC 275

Slator v Nolan (1876) IR 11 Eq 367

Smeaton Hanscombe & Co v Sassoon I Setty & Co [1953] 1 WLR 1468

Smith v Chadwick (1882) 20 Ch D 27

Smith v Spurling Motor Bodies, The Times, November, 10, 1961

Sperry Rand Canada Ltd v Thomas Equipment (1982) 135 DLR 197

Sport International v Inter-Foot Ltd [1984] 1 WLR 776

Sprite v Tawurai (1961) Rhodesia and Nyasaland LR 290

Spurling v Bradshaw [1956] 1 WLR 461

Starside Properties Ltd v Mustapha [1974] 2 All ER 567

Steadman v Drinkle [1916] AC 275

Stockloser v Johnson [1954] 1 QB 476

Suisse Atlantique Societe d'Armement Maritime v Rotterdamsche Kolen
Centrale [1967] AC 361

Tarleton Engineering Co v Natrass [1973] 1 WLR 1216

Terence Gorge Edwin Cook v Howells Garage Ltd (1981) The Monthly Review

49

Tesco Supermarkets Ltd v Natrass [1971] 2 All ER 127

Tildent Rent-A-Car Co v Chaudra (1984) 150 DLR 685

Tildent Rent-A-Car Co v Clendenning (1978) 83 DLR 400

The Afvos [1980] 2 Lloyds Rep 469

The Debtor [1903] 1 KB 705

The Earl of Aylesford v Janssen (1750) 2 Ves Sen 126

The Earl of Aylesford v Morris (1873) LR 8 Ch App Cas 484

The Mihalis [1971] 1 QB 164

The Rasbora [1972] 1 Lloyds Rep 645

Thompson v LM & S Rly Co [1930] 1 KB 41

Thornett & Fehr v Beers & Sons [1919] 1 KB 486

Thornton v Shoe Lane Parking [1971] 2 QB 163

Tottenham v Emmet 14 WR 3

UGS Finance v National Mortgage Bank of Greece [1964] 1 Lloyds Rep 446

Umco v Owen 232 A. 2d 405 (1967)

Urau v Modern Finance Ltd (1970) 12 DLR 366

Van Toll v The SE Rly Co (1862) 12 CB (NS) 75

Watkins v Rymil (1883) 10 QBD 17

Webster v Cook (1867) LR 2 Ch App Cas 542

Webster v Higgin [1948] 2 All ER 127

Wells (Merstham) Ltd v Buckland Sand & Silica [1965] 2 QB 170

Western Credit v Alberry [1964] 1 WLR 945

White v Blackmore [1972] 3 All ER 158

Whiteleys Ltd v Hilt [1918] 2 KB 808

Whittington v Seale-Hayne (1900) 82 LT 49

Wiebe v Butchart's Motor Ltd (1949) 4 DLR 838

Wilde v Gibson [1843-60] All ER Rep 494

William & Wilson v OK Parkin Stations Ltd (1971) 17 DLR 243

Williams v Walker-Thomas Furniture 350 F. 2d 445 (1965)

Wilson v Rickett Cockerell [1954] 1 QB 598

Wilton v Osborne [1901] 2 KB 110

Wood v Abrey 3 Madd 417

Wren v Holt [1903] 1 KB 610

Yeoman Credit Ltd v Apps [1962] 2 QB 508

Yeoman Credit Ltd v McLean [1962] 1 WLR 131

Yeoman Credit Ltd v Odgers [1962] 1 WLR 215

Yeoman Credit Ltd v Waragowski [1961] 3 All ER 145

Zawadski v Sleigh [1975] RTR 113

ABBREVIATIONS

AC	Appeal Cases
ALJ	Australian Law Journal
All ER	All England Reports
Can. BR	Canadian Bar Review
Ch D	Chancery Division
CLJ	Cambridge Law Journal
CLR	Commonwealth Law Reports
Col. LR	Columbia Law Review
Crim. LR	Criminal Law Review
DLR	Dominion Law Reports
Eq	Equity
Exch	Exchequer
Harvard LR	Harvard Law Review
HL	House of Lords
ICLQ	International and Comparative Law Quarterly
JBL	Journal of Business Law
JEI	Journal of Economic Issues
JP	Justice of the Peace
KB	Kings Bench
LGR	Local Government Reports
LQR	Law Quarterly Review
Mich. LR	Michigan Law Review
MLR	Modern Law Review
NILR	Northern Ireland Law Reports
NLJ	New Law Journal
NSWR	New South Wales Reports

NYULR	New York University Law Review
NZLR	New Zealand Law Reports
QBD	Queens Bench Division
RTR	Road Traffic Reports
SLT	Scots Law Times
Sol J	Solicitors' Journal
TLR	Times Law Report
Univ of Pitts. LR	University of Pittsburg Law Report
VLR	Victoria Law Reports
WLR	Weekly Law Reports
Yale LJ	Yale Law Journal

CHAPTER ONE

INTRODUCTION

A number of articles appeared in the Malawi daily, Daily Times, between the second half of 1982 and the early months of 1983 under the title of 'Consumer Protection'. The articles highlighted some of the problems facing the consumer of goods and services in Malawi. To quote one of them:

"The individual consumer is faced with several problems of which the major ones are:

- a) he is faced with a wide range of similar goods and is unable to make an informed choice;
- b) he is always presented with inferior quality goods by unscrupulous traders or manufacturers;
- c) he shops under extreme inflationary pressure;
- d) he is faced in some cases ~~with~~ unfavourable business practices".(1)

The suggestion in these articles was that the solution to these problems lies, if not exclusively then largely, with the Bureau of Standards created by section 3 of the Malawi Bureau of Standards Act. It was not realised that as its name shows, this body can not solve the enumerated problems although, as will be shown later, some of its activities are of benefit to consumers. Besides, either by design or through oversight, the articles never mentioned that there exist in Malawi a body of principles of law and statutes which grant consumers

some measure of protection. It was out of the desire to investigate this fact that the idea of this thesis was conceived.

As indicated by the article quoted above, consumer problems may take many forms. However in general, the problems may relate either to the safety of consumer goods and services or to the fairness of the contract under which those goods or services are obtained. In this thesis it is intended to deal with fair exchange in consumer contracts regulated by the Hire-Purchase Act (referred to hereinafter as 'credit agreements').

As used in relation to contracts, the expression 'unfair exchange' may mean a number of things. It may suggest absence of mutual consent in the sense that one party to the contract has misled the other as to the character and nature of any aspect of the contract. Secondly, the expression may also mean that the transaction involves an element of surprise in that one party to it learns about some of the terms of the contract for the first time after the deal has been concluded. Thirdly, it may imply that one or more terms of the contract are unfavourable to one of the parties to an unjustifiable degree. Fourthly, the expression may also mean that although no term of the contract is unfavourable to the plaintiff, taken as a whole, the balance of the contract is heavily tilted in favour of the other party.

Now although, as will be shown later, the Hire-Purchase Act deals with the second and third meanings only, the expression is used in this thesis to cover all the four meanings. Thus it can be said that this work discusses measures taken by the Malawi law to 'equate' values exchanged in credit agreements. Briefly, these measures are

- a) fixing the price and terms upon which the agreements should be concluded and
- b) ensuring that the supplier (2) does not insert certain clauses in a credit agreement or engage in certain forms of conduct in the conclusion or performance of the agreement.

The decision to study the issue of fair exchange in relation to credit agreements has been influenced by three major reasons. First, these agreements are normally standardised, with the supplier fixing all the terms of the agreement in advance and the purchaser having to 'adhere' to terms so fixed. Although the fact that an agreement is one of adhesion does not necessarily mean that it will be unfair to the party with unequal bargain power, in practice the fact that he can not co-determine the terms gives the other party a chance to over-reach him. Second, because these transactions require elaborate formality to conclude and are executory in nature, they easily lend themselves to analysis. Third, and perhaps more important, experience in both Britain and the United States shows that economic development brings with it increased use of credit by consumers.(3) That in turn gives rise to the need not only for proper regulation of the conduct of consumer credit suppliers but also the protection of consumers from risks associated with the use of credit. No statistics are available to show how wide is the use of credit agreements by consumers in Malawi. But there is no doubt that these agreements are used and that their use has not been static over the years.(4)

The Anatomy of Credit Agreements

A person who wishes to purchase consumer goods has two options- to pay immediate cash or to obtain allowance from the supplier of the goods to pay for them subsequent to taking delivery of the goods. But even where he pays immediate cash, he has the options of paying from his own earnings or from borrowed money. From this it will be clear that where goods are supplied under a credit agreement, in fact two contracts are wrapped up together. There is a contract for the supply of goods coupled with a contract for the provision of credit. The transaction is essentially the same as where a loan is obtained from a money-lender and is used to purchase goods from a retailer seller. In both cases, two commodities change hands: credit and goods.(5) However in Malawi not only do these two types of agreements continue to be regarded as being irreconcilably different but they are also governed by two different statutes. Pure money loans are governed by the Loans Recovery Act while credit agreements are regulated by the Hire-Purchase Act. Although it is not the object of this thesis to canvass for the integration of these two legal regimes, it should be observed that the differentiation is difficult to justify.

The Hire-Purchase Act recognises four different types of credit agreements. First, there is the 'credit sale' which can be described as an unconditional contract for the supply of goods under which the whole or part of the purchase price is payable in instalments. It is 'unconditional' because the property or ownership in the goods supplied is transferred to the purchaser either before or upon the delivery of the goods to him. Because the purchaser may be the owner of the goods as soon as the formalities are completed, the supplier can not re-possess the goods if the purchaser defaults in the payment of the

instalments of the purchase price. Not surprisingly therefore, the Hire-Purchase Act provides that the supplier is entitled to the return of the goods if the purchaser fails to comply with any provision of the agreement.(6)

The second type of credit agreement is the 'conditional sale' which is defined by the Act as a

"contract whereby goods are sold subject to the condition that notwithstanding delivery of the goods the ownership in such goods shall not pass except in terms of the contract and the purchase price is to be paid in two or more instalments".(7)

As this definition shows, a conditional sale agreement differs from a credit sale in that the ownership of the goods does not pass to the purchaser immediately but remains vested in the supplier during part of the life of the agreement. The idea here is clearly to give the supplier some measure of control over the goods which he can use as a leverage against the purchaser.

But this device may prove illusory because the purchaser could use section 26(2) of the Malawi Sale of Goods Act to defeat the supplier's title to the goods. That provision states that where a person 'having bought or agreed to buy goods' obtains with the consent of the seller, possession of goods, delivery or transfer of the goods by that person under any sale, pledge or other disposition, to another who receives the goods in good faith and without knowledge of the right of the original seller over the goods, will have the same effect as if the

person making the delivery or transfer were a mercantile agent in possession of the goods with the consent of the owner and with authority either to sell them or to consign them for the purpose of sale or to raise money on their security. Under a credit sale or conditional sale agreement, the purchaser 'has bought or agreed to buy' the goods and so he could avail himself of this provision.(8)

To avoid this, subsequent to the supply, the supplier could create a mortgage or charge over the goods supplied. The effect of that would be to grant the supplier power with or without notice, to seize the goods should the purchaser default in re-paying the debt under the credit agreement or break any term of the agreement. Of course a mortgage is more effective for this purpose than a charge since the latter has the weakness that should the goods be subsequently sold by the purchaser, under the Malawi Sale of Goods Act they would be taken by the sub-purchaser with an implied warranty that they are free from any charge in favour of any third party, not declared or known to the sub-purchaser before or at the time of the sub-purchase.(9) The effect of this provision is clearly to allow the purchaser under a credit agreement to pass title to goods over which there is a non-possessory charge to a bona fide sub-purchaser.

The third form of credit agreement is the simple hire agreement. This is a contract whereby a person is entitled to enjoy possession and use of goods in return for the payment of a hire rent or after two or more instalments have been paid in respect of the goods, to continue or renew the hiring from time to time at a nominal rent or to continue or

renew from time to time the right to be in possession of the goods, without any further payment or against payment of a nominal amount periodically or otherwise.(10) Because the hirer only gets possession of the goods, the supplier will find this a convenient way of selling credit without having to worry about the legal loss of his title to the goods. If the goods are durable and are kept in reasonable repair, he could use them over and over and thus get a good return on them.

Lastly, there is the hire-purchase agreement. This is defined by the Hire-Purchase Act as a contract which provides for the hiring of goods whereby the hirer has the right to purchase the goods after two or more instalments have been paid in respect of them.(11) In other words, a hire-purchase agreement involves a bailment of goods by the supplier to the purchaser and an option on the part of the latter either to return them and terminate the agreement or to buy them at the time fixed by the contract.(12) But until the option to purchase has been exercised, the purchaser is a mere bailee of the goods who has neither bought them nor agreed to buy them.(13)

Undoubtedly that constitutes a solid legal ground for the supplier to use the goods as a form of security for credit granted to the purchaser to acquire the goods. Since the purchaser is a mere bailee of the goods, he can not legally pass title to them to any one, however innocent and bona fide that other person is. Small wonder then that every hire-purchase agreement will give the supplier power to re-possess the goods if the purchaser defaults in discharging any of his obligations under the agreement. Similarly, it is for that reason that

the hire-purchase agreement is the form which is widely used by suppliers of goods on credit where the goods are durable and their price is high and payable in a number of instalments over a long period of time.

Financing Credit Agreements

For a retail seller, to supply goods on credit is like stock-piling in that he commits his own resources before he gets paid. Besides, additional sales mean locking up more resources and the availability of less working capital for the day to day running of the business as well as for the replenishment of stocks. For these reasons, he must find ways of building up a steady supply of fresh capital which can be regulated according to fluctuations in the instalment credit debts.

One way of doing that is to draw bills of exchange on customers for the amounts of their debts under the credit agreements. This is advantageous where the sums involved are substantial. Separate bills can be drawn to mature as each instalment of the debt falls due and be accepted by each customer when signing the credit agreement. The supplier could then discount the bills with his bank or any financial institution before they fall due and thus obtain immediate cash. Of course it is well to remember that the bills are drawn as collateral security for instalments of the debt and therefore the supplier will not be entitled to them unconditionally unless the customer defaults in re-paying instalments of his debt.

Another way open to the supplier is to obtain a loan from the bank.

This option will commend itself more readily to suppliers of goods on credit because it involves less technicality. A supplier will experience little difficulty to obtain a bank loan if he has valuable business premises or other good collateral. However this method of raising capital is not always sufficiently flexible since it is possible for the supplier's security to fall short of the finance which he requires. And here it must be noted that as a matter of business prudence, no bank will advance money to the full value of the security taken for the loan; it will always allow a margin for a possible depreciation in the value of the security while the loan remains unpaid.

To overcome that problem, the supplier could secure the loan on the credit agreements themselves. But in that case, the bank or finance institution which provides the loan may insert into the loan agreement a number of terms concerning the supplier's business, especially about the duration of the credit agreements and the class of goods for which credit should be available. It may also wish to be satisfied about the creditworthiness of the supplier's customer. Furthermore, it may appoint the supplier as its agent for the purpose of collecting instalments due under the credit agreements and sums so received will be applied in reduction of the supplier's debt. If it becomes necessary to enforce the security, the bank being in possession of the agreements, can revoke the supplier's authority to act as its agent and require payment of the instalments to be made directly to it.

Thirdly, the supplier can get his credit agreements financed by a finance company.(14) There are two major ways whereby this could be

done. The first is the 'direct collection' method. Here, upon receiving a request from a customer for goods on credit, the retailer will sell those goods to the company which will then supply them under a credit agreement to the customer. The credit agreement will have been prepared by the company although its conclusion by the customer will be supervised by the retailer. Normally there will be a standing agreement between the retailer and the finance company which provides that inter alia

- a) the retailer should join every credit agreement financed by the company as guarantor so that he should be responsible for any loss suffered by it by reason of default by any customer to discharge his debt under the credit agreement;
- b) bills be drawn on customers for the amount of each instalment due under a credit agreement and be endorsed by the retailer so that if any one of those bills is subsequently dishonoured, the retailer should be liable to the company as endorser and
- c) the retailer should undertake to re-purchase any goods returned by customers or re-possessed by the company.(15)

The finance company could also use the second method of 'block discounting'. Under this arrangement the retailer initially finances himself. However instead of waiting for instalments payable under the credit agreements to come to him, he will enter into an agreement with the company to sell to it the credit agreements. In legal terms, this is an assignment by the retailer to the company of his rights and interests under those agreements.

It is not uncommon in this sort of arrangement for the finance company not to pay the retailer a sum of money representing the full value of the balances outstanding under the credit agreements. The company will normally retain a certain percentage of that sum, the amount of the percentage depending on prevailing interest rates, the sizes of the transactions discounted and competition which the company faces from other traders in that area. And because the venture involves a considerable measure of risk to the company in that customers may default or terminate credit agreements prematurely or the goods supplied may depreciate very fast, the company may pay to the retailer immediately around 75% of the total value of the 'block'. The balance will be retained as security against any of these eventualities.(16)

The Legal Regime of Credit Agreements

Although the title of this thesis suggests that this work is concerned with discussion of the Hire-Purchase Act, it must be noted that credit agreements are governed by other sources of law other than this Act. The most important of these are the general law of contract, the Sale of Goods Act, the Bills of Sale Act, the Merchandise Marks Act and the Bills of Exchange Act. Thus the thesis is in fact a study of this whole body of law. But these other sources of the law of credit agreements are not studied sui generis; they are examined with a view to showing flaws in the conception of the Hire-Purchase Act. For that reason, it is considered appropriate that this thesis should be

described as a critique of the Hire-Purchase Act.

It is perhaps worthwhile to make another point here. Almost all the cases used in this thesis are English common or statutory law cases. But this should not be taken as suggesting that either judgements of English courts are binding on Malawi courts or that English law applies to Malawi. The fact is that Malawi is an independent legal jurisdiction with its own final courts of appeal. However there are two qualifications to that.

First, section 15 of the Republic of Malawi (Constitution) Act, 1966 provides that unless there is a contrary provision by the Malawi Parliament, the civil and criminal jurisdiction of all courts in Malawi must be exercised in conformity with inter alia, 'the substance of the common law and the doctrines of equity'. For that reason, although not bound by English common law cases, Malawi courts have often felt persuaded by these cases, especially if they are decided by either the Court of Appeal or the House of Lords.

Second, for historical reasons, a number of Malawi statutes are not only in pari materia with some English statutes but are also founded on similar assumptions and concepts. The Hire-Purchase Act is one example and the Malawi Sale of Goods Act is another. Now the accepted view is that to interpret such statutes, a Malawi court can refer to English cases decided under the corresponding English Acts. Thus for instance in Monteiro v Acme Construction Co Ltd Spencer-Wilkinson J said:

"It is true that some sections or parts of sections [in our statutes] are obviously taken from parts of ...

English [statutes], so that where our wording is the same as the wording of an English Act decided English cases interpreting that wording may be of assistance in asserting the meaning of the same words in the local [statute]".(16)

Lay-out of the Thesis

This thesis is divided into nine chapters. The first, which is this one, introduces the issues discussed in the succeeding chapters. Chapter two shows how courts of equity have got around the concept of freedom of contract to ensure fair exchange in contracts generally. The third chapter serves two purposes: it discusses the general law of contract which governs the quality of goods supplied under a credit agreement and at the same time demonstrates how that law ensures fair exchange in these agreements. Chapters four and five look at provisions of the Hire-Purchase Act which regulate credit supplied under credit agreements and security which may be furnished for that credit. The sixth chapter analyses all the regulatory provisions of the Hire-Purchase Act. Chapters seven and eight explore the possibility, which is raised by the Hire-Purchase Act itself, of ensuring fair exchange in credit agreements through criminal sanctions and administrative control of traders who supply goods on credit. The ninth chapter sums up the conclusions and findings of this thesis.

It will be apparent from the lay-out that it is not the object of

this thesis to question the desirability of what the Hire-Purchase Act seeks to achieve. Rather, the aim is to question whether the Legislature, having decided to prevent unfair exchange in credit agreements, should not have gone further than the Hire-Purchase Act goes. The thesis argues that it should have done so because contract law, whether in its classical form or as altered by the Hire-Purchase Act, is not capable of deterring unfairness in these agreements or in contracts generally. That this is so is demonstrated by statutes such as the Malawi Weights and Measures Act and the Automotive Trades Registration and Fair Practices Act. These statutes signify recognition by society in Malawi of the inadequacy of the law of civil obligations by creating supplementary machinery to assist in the enforcement of fair exchange in contracts. It is therefore suggested that such machinery should also be available to deal with the issue of fair exchange in credit agreements. In other words, this thesis seeks to assert that if the ideas embodied in the model created by the Hire-Purchase Act are properly formulated and enforced, they offer very useful protection to the private purchaser of goods on credit. However it argues that that alone is not enough to ensure that this purchaser gets fair exchange unless backed by a system of public control. As Karl Llewellyn once said:

"Legislation can ... cumulate with civil liability. This cumulation, instead of substitution, is one lesson that the 18th and 19th centuries ... suggest to the 20th... The 19th century does not show failure of the civil

obligation. It shows instead that civil obligation is magnificent, when rightly handled- but not enough, however rightly handled".(18)

FOOTNOTES

- 1 . Times, Monday, 11 October, 1982.
- 2 . The Hire-Purchase Act uses the word 'seller' to describe the person who supplies goods and credit under a credit agreement. However for the sake of clarity, he is described as 'supplier' throughout this thesis.
- 3 .It has recently been estimated that excluding credit for house purchase, consumer credit in Britain currently stands at £22 billion: G Borrie, The Credit Society: its Benefits and Burdens [1986] JBL 181.
- 4 . The Reserve Bank of Malawi, Financing and Economic Review, p. 73
- 5 . The Crowther Report, 1971, vol. 1, para. 4.2.3.
- 6 . The Hire-Purchase Act, section 2.
- 7 . Ibid.
- 8 . Cf Newtons of Wembley Ltd v Williams [1964] 3 WLR 888.
- 9 . The Malawi Sale of Goods Act, section 14(c).
10. The Hire-Purchase Act, section 2.
11. Ibid.
12. Warman v Southern Counties [1949] 1 All ER 711.
13. Helby v Matthews [1895] AC 471
14. The Crowther Report, vol. 2, para. 79. For a general discussion of finance companies financing of motor vehicle sales, see WA Grimes, Financing Automobile Sales, passim.
15. CW Aston, Hire-Purchase Accounts and Finance, p. 15.
16. AG Guest, The Law of Hire-Purchase, paras. 87-91.

17. (1923-60) ALR (Malawi series) 862, p. 869. See also Re Osman Bros
(1923-60) ALR (Malawi series) 336, p. 341.
18. On Warranty of Quality and Society (1937) 37 Col. LR 341, p. 408.

CHAPTER TWO

THE COMMON LAW AND FAIR EXCHANGE IN CONTRACTS

It was stated in the last chapter that the principal aim of the Malawi Hire-Purchase Act is to protect consumers against unfair exchange in credit agreements. For that reason, not only does it render unenforceable certain provisions which parties may insert in such an agreement but it also imposes terms upon which the agreement must be concluded. At common law too courts can refuse to enforce certain contractual provisions although the contract itself is not infected by any procedural handicap(1) on the ground that the terms are unfair on one of the parties to the contract. Provisions affected by this are exclusion clauses, forfeiture clauses and minimum payment clauses.(2) Besides, the contract itself can be set aside at common law if found to be 'unconscionable'. However these defences are not adequate to protect consumers against unfair and oppressive transactions. Consequently it is sought to demonstrate in this Chapter that although their existence is useful, it does not render the controls set up by the Hire-Purchase Act superfluous or useless. Of course as later chapters will show, even these controls have their own shortcomings which make them inadequate to prevent unfair exchange in credit agreements.

2.1 Minimum Payment Clauses(3)

A hire-purchase agreement or indeed any contract may contain a

clause which stipulates that if the purchaser breaks the contract and the seller terminates it as a result of that breach, the purchaser should pay a certain pre-calculated sum (hereinafter referred to as 'minimum payment'). To understand the utility of such a clause in hire-purchase agreements one feature of these contracts must be understood. The total purchase price in a hire-purchase agreement is generally a compound of two sums: the cash price of the goods involved and the finance charged exacted on that cash price.(4) The finance charge will normally be the product of a certain percentage of the cash price and the period for which the agreement is intended to run.

What this means is that should the agreement fail to live up to the end of that period (e.g. because it is terminated by the seller on the ground of breach by the purchaser), the finance charges which the seller would have earned will be reduced and so too, the total purchase price. And the seller's position is made worse by two more factors. First, he can not recover the cash price of the goods as a matter of course.(5) Second, assuming that the goods are resaleable when repossessed by the seller, the instalments of the purchase price paid up to the date of the termination of the agreement may not be enough to cover the depreciation in the value of the goods which the seller will not recover in the resale, and other expenses incurred to run and maintain the purchaser's account.

In view of that, the minimum payment clause is a very useful tool to the seller. It will enable him to meet the cost to him of an untimely termination of the agreement. However, not infrequently, the tool has

been used to take unfair advantage of the purchaser. Explaining the point, it was said in the House of Lords:

"The purpose of an owner entering into a hire-purchase transaction is to turn goods into cash; as a moneylender, which he is in all but form, his purpose is to recover with interest the amount of his advance. [The minimum payment] clause is designed to provide him with a guarantee at the expense of the hirer that, come what may, he will get out of the deal in money at any rate two-thirds of the total hire-purchase price... The guarantee thus becomes operative whenever the hiring determines before the purchase option is exercised, provided that something less than two-thirds of the whole sum has been paid over, and it makes no difference to the terms of the obligation whether the hiring is put an end to by the hirer under his option, or by the owner under his, or by the automatic operation of any one of the events specified in [the clause]".(6)

It can be seen from this that a minimum payment may be imposed not only to obviate the difficulty of calculating damages after breach (as may sometimes be thought) but also to serve as a form of security to the seller to ensure that the purchaser does not fail to perform his obligations under the agreement.

It is now settled that in the latter case courts may intervene to refuse enforcement of the clause.(7) Although it has sometimes been said

that for the relief to be granted the minimum payment must be shown to have been imposed in terrorem of the party in breach(8) and at other times, that the test is that the amount must not be a genuine pre-estimate of the loss that could be caused by that party's breach, it is clear that enforcement is refused because it is felt that the sum demanded is not fair. That is made clear by the rules of construction formulated by Lord Dunedin in the locus classicus Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Ltd.(9) His lordship laid down that a minimum payment clause will be held to be unenforceable if, inter alia

- a) the amount which it stipulates is extravagant and unconscionable as compared to the greatest loss that could conceivably be proved to have followed from the breach;
- b) the breach upon which that amount is payable consists in not paying a sum of money and the minimum payment is greater than that sum of money and
- c) a single lump sum is payable on the occurrence of one or more or several events, some of which may occasion serious loss and others trifling damage.(10)

These rules have been applied in many contract cases.(11) However those cases will not be discussed here. Similarly, it is not intended to consider the question whether relief should be available where the minimum payment is payable upon the occurrence of an event which is not a breach as, for instance, where the purchaser exercises his option to terminate the hire-purchase agreement. Rather the task here will be to show how courts have dealt with minimum payment clauses which were

stipulated to come into operation upon breach of the hire-purchase agreements into which the clauses were inserted.(12)

The first thing to be said about these clauses is there is absence of uniformity in their formulation. And that perhaps partly explains why clarity has proved difficult in this area. Roughly, the clauses can be divided into three categories.(13) First, clauses which stipulate for a 'fixed' percentage of the purchase price as the minimum payment. For example, in Cooden Engineering Co Ltd v Stanford (14) the clause provided that inter alia, if the purchaser defaulted in his payment of the instalments of the purchase price and the seller terminated the agreement and recovered possession of the goods, the seller would be entitled to recover the full balance of the future unpaid instalments together with his costs and a expenses.(15) Other cases while retaining the same principle demand lesser percentage. In Associated Distributors Ltd v Hall (16) it was 50%; in Bridge v Campbell Discount Co Ltd(17), 66% whereas it was 75% in Landon Trust Ltd v Murrell.(18)

Second, clauses which require payment of a 'fluid' percentage of the purchase price. That is illustrated by Finance Co Ltd v Dooley(19) where the clause required payment of 50% of the purchase price plus a further 5% of that price for each month between the conclusion of the agreement and receipt of the goods by the seller up to 75% of the price. This type of clause was used in two further cases.(20)

And finally, the clause which seeks to correspond the minimum payment to the measure of damages for breach of a hire-purchase agreement.(21) That clause was used in Anglo Auto Finance Ltd v

James(22) where the purchaser was required to pay the difference between (a) the total sum received by the seller by way of deposit, instalments of the purchase price and proceeds of the sale of the repossessed goods and (b) the total purchase price.

Both the first and the third types of minimum payment clause were held to be unenforceable in the cases cited. Of course as will be shown below, it is less clear as to what circumstances will render such clauses unenforceable. The attitude of the courts towards the second type of minimum payment clauses has been mixed. In Phonographic Equipment Ltd v Muslu (23) it was held by the Court of Appeal that the clause was not penal and therefore would be enforced. The court was impressed by the fact that the amount of the minimum payment payable began to decline after the sixth month and completely disappeared after the eighteenth month. In the words of Donovan LJ:

"To my mind this looks more like an attempt to pre-estimate the loss from depreciation than the fixing of a penalty to operate in terrorem of the hirer. I do not lose sight of the undoubted fact that a breach in the early months of the hiring may produce more to the owner than if the agreement ran its course, but this depends on the value of the machine when retaken and put in order, and it may well be that although the second-hand market in juke boxes seems in the present case to have been comparatively stable, nevertheless as at the date of the

contract the owners may well have thought that tastes in this particular field can easily alter for no discernible reason". (24)

Counsel for the purchaser contended that the clause could not be said to stipulate a genuine pre-estimate of damage because it imposed one amount of minimum payment for a number of breaches some of which could produce only trivial damage.(25) The court recognised the legitimacy of that argument but refused to be swayed by it on the ground that it was valid only insofar as the first six months of the agreement were concerned but had no validity to the period from eighteen months onwards.(26)

The matter subsequently came up for consideration by the House of Lords in Bridge v Campbell Discount.(27) The clause in that case was of a different type but the amount of the minimum payment payable under it tended to decline as the hiring continued and their lordships were all agreed that that made the clause unenforceable. In the words of Lord Radcliffe:

"Since the obligation under [the] clause ... may mature at any time from the beginning to the end of the hiring, a week after the beginning or a week before the end, it seems to me impossible to take a single formula for measuring the damage as any true pre-estimate. It produces the result, absurd in its own terms, that the estimated amount of depreciation becomes progressively less the longer the vehicle is used under the hire. This is because the sum agreed on diminishes as the total of

the cash payments increases. It is a sliding scale of compensation, but a scale that slides in the wrong direction, if the measure of anticipated depreciation is to be supposed to be the basis for the compensation agreed on. The fact that this anomalous result is deliberately produced by the formula employed suggests ... that the real purpose of this clause is not to provide compensation for depreciation at all but to afford the owners a substantial guarantee against the loss of their hiring contract".(28)

In the case of Lombard Ltd v Excell (29) the Court of Appeal rejected the argument that this case had overruled Phonographic Equipment or shown it to be wrong in law in every situation or that the clause used in Phonographic Equipment will as a matter of law be valid in every case.(30) And Veale J took an even more extreme attitude in Finance Co Ltd v Dooley where refusing to follow Phonographic Equipment he said:

The judgements in Muslu's case were delivered in July, 1961. In November, 1961, Bridge v Campbell Discount Co Ltd ... was argued before the House of Lords, and their lordships delivered judgement on January 25, 1962. ... Muslu's case was referred to in argument, and was expressly relied on by Counsel, but none of their lordships referred to it in their speeches".(31)

There is not much to commend the view of the Court of Appeal in Phonographic Equipment Ltd v Muslu and it is possible that in future the

type of clause used in that case will not be treated as liberally as was done here. However what is important for the present purposes is that the position with respect to that type of minimum payment clause is rather unclear.

But although the other two types of minimum payment clause have consistently been refused enforcement by the courts, the cases in which the clauses came up for determination do not lay down clear guidelines on how the rules formulated by Lord Dunedin in Dunlop Pneumatic's case will be applied to hire-purchase agreements. In some of the cases it seems to be suggested that to decide whether the clause should be enforced one has to construe it first and then apply Lord Dunedin's rules thereafter. On the other hand, there are cases where the matter was decided by not only construing the clause and applying these rules but also by considering the subject-matter of the agreement as well as other facts in and outside the agreement itself.

For instance, in Landon Trust Ltd v Hurrell whose facts have already been given on p. 22 above, the actual amount payable as minimum payment was £425. The Queens Bench Division held the clause to be unenforceable against the purchaser, contending that that sum was not a genuine pre-estimate of the damage which the seller had suffered as a result of the purchaser's breach of the hire-purchase agreement. The court came to this conclusion after examining the whole agreement and some surrounding circumstances. Said Lord Denning:

"The £425 is three-quarters of the total price. It is inserted by the hire-purchase companies by rule of thumb

without regard to the make of the car, its age, the market conditions or anything of the kind. It is the same for all. The £425 payment for compensation for depreciation is payable on the footing that the car, when it is re-taken, is in good order, repair and condition. If it is in bad condition, the owners can recover damages for breach of agreement ... and the damages are payable in addition to the £425. Assume that the car is kept in good condition, and at the end of the first month the hirer makes default and the owners re-take the car. Can anyone suppose that in that time the value of it will have dropped by three-quarters so that it will be worth only one quarter of what it was worth a month before? It is an altogether extravagant thing to imagine".(32)

The same view was advocated in Lombard Ltd v Excell where it was said:

"Now counsel for the finance company argues that in every case it is purely a question of construction and that evidence of the surrounding circumstances, such as the subject-matter of the hire-purchase, is not admissible. We are quite unable to accept this argument. It is directly contrary to what Lord Dunedin said where he recognised that the circumstances of each case must be highly relevant".(33)

By contrast, the House of Lords held the clause in Bridge v Campbell Discount Ltd to be unenforceable by applying the canon of construction

only. It was clear on construction, said their lordships, that the minimum payment demanded was not a genuine pre-estimate of the seller's loss. Since the vehicle which was the subject-matter of the agreement was second-hand, the depreciation in its value should have become greater the longer the vehicle remained in the purchaser's hands. Yet the minimum payment demanded was largest when the car was returned after it had been in the purchaser's hands for a short time and got progressively smaller as time went by. Besides, the clause allowed the seller to be paid 66% of the purchase price without taking into consideration that:

- a) the purchase price included an interest element which the seller would not forgo and
- b) the vehicle came back to the seller with a resaleable value which could exceed the 33% balance of the purchase price which the owner had not received by reason of the termination of the agreement.(34)

Similarly, upon construction it was found that the clause in the more recent Australian case of O'dea v Allstate Licencing System (35) was not a genuine pre-estimate of the loss suffered by the owner as a result of the hirer's default. In that case the total hire rent was \$39,550.32 and upon breach of the agreement by the hirer, the owner was entitled to recover the vehicle which was the subject of the agreement and all future instalments of the hire rent which were unpaid. The hirer paid seven instalments and part of the eighth instalment, the whole payment amounting to \$8,114.28, and thereafter paid nothing. Consequently the owner repossessed the vehicle, resold it for \$20,000

and then brought an action for \$31,436.04 which was the difference between the total hire rent and the \$8,114.28 already paid by the hirer. The High Court of Australia held that the sum claimed was a penalty and therefore could not be recovered. It was pointed out that on its true construction the minimum payment clause could not be said to impose a genuine pre-estimate of loss suffered by the owner because the sum of money which it stipulated was payable for breach of a large number of terms and conditions in the agreement- ranging from the trivial to the serious- so that where the breach was minor, there could be an unreasonable windfall to the owner and an unconscionable burden on the hirer.(36) Moreover, observed Wilson J, although the clause could be brought into operation at any time during the subsistence of the hiring, there was no provision in it or indeed in the whole agreement for a rebate of finance charges on future instalments which would become immediately payable by the hirer or for crediting him with any capital gain represented by the amount by which the value of the vehicle on repossession exceeded its appraisal value.(37)

Of course it may well be that on the facts of these cases whichever approach one adopts the result will be the same. However it should be recognised that if the real reason for the relief against minimum payment clauses is that in some cases they impose an unfair burden on the parties against whom they are intended to apply, then as a general rule, the canon of construction is not the ideal tool for achieving that objective. Construction will be applied to ascertain the meaning of the language used in the clause. Now to the extent that whether the clause

is enforceable depends on the view which the court takes of the meaning so ascertained (i.e. whether as construed, the clause falls under any one of the rules formulated by Lord Dunedin in Dunlop Pneumatic's case), there will be cases where the clause is enforceable although the agreement as a whole is oppressive and unfair to the party against whom the clause is enforced. Consequently there is a good reason for saying that the clause must be looked at in the light of the whole agreement and circumstances surrounding its conclusion.

No doubt courts have adopted that approach in some of the cases examined above. It was shown, for example, that absence of a provision in the agreement for rebating to the party in breach part of the unearned finance charges or for crediting him with capital gain from resale of goods which are the subject-matter of the agreement will weigh heavily against enforcement of the clause.(38) As for the clause itself, the cases have shown that:(39)

- a) the minimum payment payable must increase, and not decline as the term of the agreement progresses;
- b) the minimum payment must not be calculated as a percentage of the purchase price;
- c) the clause must reflect the nature and condition of the subject-matter of the agreement and
- d) where the minimum payment is expressed as compensation for breach of the agreement, it should not be based on the loss of future instalments of the purchase price where the breach does not amount to a repudiation of the agreement by the party in breach.

However in spite of all that, there is no definitive indication of whether these are the only ingredients- and if not, what other ingredients- which must be present in the clause or the agreement as a whole for relief to be granted. Similarly, it is not clear as to how many of these ingredients must be present for the clause to be regarded as unenforceable. Recently one court has held that the conclusion that a clause imposes a penalty can not be foreclosed by a statement in the agreement of the parties' intention for stipulating the minimum payment. It said:

"The parties ... may have intended subjectively to make a pre-estimate of damages in the event of breach. If, however, that pre-estimate is either extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach or, judged as at the time of making the contract, is unreasonable in the burden which it imposes in the circumstances which have arisen, it is a penalty regardless of the intention of the parties in making it".(40)

But when can it be said that a minimum payment is 'extravagant and unconscionable' or that a minimum payment clause imposes an unreasonable burden on the party against whom it applies? As will be shown below, there exists at common law a jurisdiction whereby a contract may be set aside if it is proved to be either unconscionable or (arguably) unreasonable. Now if these two words were used by the court above in the

sense which they bear under that jurisdiction (41), that not only renders unnecessary much of the lore on minimum payment clauses but also raises new problems. Those problems will be discussed under the sub-title 'Jurisdiction Against Unconscionable Bargains'. Meanwhile the discussion will turn to forfeiture clauses.

2.2 Forfeiture Clauses(42)

Instead of a minimum payment clause, the contract may contain a clause which stipulates that if any one of the parties commits certain breaches he will forfeit certain proprietary or possessory rights usually relating to the subject-matter of the contract. Such a provision is called a 'forfeiture clause' and the commonest breach upon which it is made to become operational is failure to pay an instalment of the purchase price by a stated date. Since in hire-purchase contexts the party in breach is usually the purchaser, the effect of the clause is that he loses the title to keep possession of the subject-matter of the agreement or to recover any money which he may have paid to the seller before the breach. Here too courts have intervened to prevent the innocent party from insisting on his rights where it is clear that that would occasion unfairness to the party in breach. One form of relief which has been given is a grant of further time to perform the breached obligation.(43)

In Re Dagenham (44) a company agreed with a landowner to purchase a piece of land for £4000 of which £2000 was to be paid at once and the remainder on a future date named in the agreement. The agreement

contained a clause which provided that if the whole of the unpaid £2000 together with any interest payable on it was not paid by the stipulated date, the vendor would re-possess the land without any obligation to repay any part of the money already paid by the purchaser. It was held that the clause was in the nature of a penalty from which the purchaser was entitled to be relieved on payment of the balance of the purchase-money still owing with interest.

The basis for the relief is the feeling that it is not fair that a person should use his legal rights to take advantage of another's misfortune, and still less, that he should scheme to get legal rights with this object in mind.(45) Consequently, the relief may not be available where the parties act at arm's length and the party against whom the forfeiture applies is under no bargaining handicap.

In Scandinavian Trading Ltd v Flota Ecuatoria the issue was whether the relief should be granted to charterers of a ship under a charter agreement who were required to forfeit use of the ship for failure to make prompt payment of the hire rent. Declining to relieve the charterers in the Court of Appeal, Robert Goff LJ said:

"[W]hen we come to consider the nature of a contract such as a time charter, and the circumstances in which it is likely to be made, we see the most formidable arguments against the proposed extension of the equitable jurisdiction. In the first place, a time charter is a commercial transaction in the sense that it is generally entered into for the purposes of trade, between

commercial organisations acting at arm's length.(46) It is for the parties to bargain the terms of the contract. They can bargain not only about the form of the charter to be used; they can also bargain about the amendment to the standard form ... Parties to such contracts should be capable of looking after themselves; at the very least, they are capable of taking advice ... The possibility that shipowners may snatch at the opportunity to withdraw ships from the service of time charterers for non-payment of hire must be well known in the world of shipping... [I]t must also be very well known that anti-technicality clauses are available which are effective to prevent any such occurrence. If a prospective time charterer wishes to have any such clause included in its charter, he can bargain for it".(47)

This judgement would bring together the law governing the grant of relief against forfeiture clauses and the law relating to unconscionable bargains. As will be shown below, one ground for relief against such bargains is that the party seeking to enforce the bargain was in a more superior bargaining position than the other when the transaction was concluded and took advantage of that to obtain the unfair transaction. However the general view seems to be against such an interpretation of Scandinavia Trading. The House of Lords affirmed the decision of Court of Appeal but on different grounds. In giving their judgement Lord Diplock made it clear that the denial of relief was based on the fact

that this was a contract for services for which courts of equity never granted specific performance. Now if an injunction was granted restraining the shipowners from exercising their right under the charterparty to withdraw the vessel, though negative in form, that would be pregnant with an affirmative order to the shipowners to perform the agreement and juristically would be indistinguishable from a decree for specific performance of a contract to render services.(48)

In Sport International v Inter-Footwear Ltd (49) the Court of Appeal thought that Scandinavia Trading laid down two principles of law, one narrow and the other general. The narrow rule is that the equitable jurisdiction to relieve against forfeiture clauses does not extend to a time charter which is not a charter by demise whereas the general rule is that the jurisdiction does not extend to contracts which do not involve the transfer or creation of proprietary or possessory rights. And in the case of BICC Plc v Burnly Corpn where the contract involved was commercial and the parties to it were companies, Dillon LJ commenting on Scandinavia Trading has said:

"The fact that the right to forfeiture arises under a commercial agreement is highly relevant to the question whether relief against forfeiture should be granted, but I do not see that it can preclude the existence of the jurisdiction to grant relief, if forfeiture of proprietary or possessory rights, as opposed to merely contractual rights, is in question".(50)

In view of this judgement and the fact that the House of Lords'

judgement affirming Scandinavia Trading accepted the practical objections to the grant of relief in that case which were 'convincingly expressed by Robert Goff LJ' (51), it can validly be said that the fact that the party against whom a forfeiture clause was intended to apply was not under a bargaining handicap when the contract was concluded will be relevant to the question whether relief against the clause should be granted. More crucial, however, will be the fact that specific performance is not possible because either the contract is one for services or time is made of the essence (52) or the party seeking relief is not ready and willing to perform the broken obligation or the breach itself is wilful or serious.(53) In Barton Thomas v Stapling Machine the defendant leased to the plaintiffs under a hire agreement machines for making wire-bound boxes. The contract provided that in case of breach of any term of the agreement the defendant would be entitled to serve notice requiring the plaintiffs to remedy the breach within thirty days and in default to terminate the agreement. The plaintiffs failed to make payments due under the agreement and did not comply within thirty days with a notice requiring immediate payment. Consequently the defendants sent them notice of immediate termination of the agreement. On the same day the plaintiffs took out summons seeking relief against forfeiture together with further time in which to pay the arrears. It was contended for the defendants that relief should not be granted because inter alia the parties had prescribed a period within which any breach of the contract was to be remedied and that on the facts, that period had elapsed and the plaintiffs had not shown that they were ready to pay the

amount in arrear. The judge did not think that the presence of the thirty-day period in the agreement was conclusive so as to make it clear beyond argument that relief from forfeiture should not be granted because had specific performance been asked for it could not have been granted. However he did accept that lack of evidence to show that the plaintiffs were ready to pay the sum owing was fatal to the success of the plaintiffs' case. In his view:

"It is an invariable condition of relief from forfeiture for non-payment of rent that the arrears, if not already available to the lessor, shall be paid within a time specified by the court. The precise length of time is a matter of discretion... but the imposition of the condition is not a matter of discretion; it is a requirement of law rooted in the principle upon which relief is granted. It follows that readiness to pay arrears within such time as the Court shall think fit is a necessary condition of the tenant's claim for relief".(54)

This judgement shows two points. First, as already said, relief against a forfeiture clause may take the form of grant of further time to the party in breach to perform the broken obligation. Second, the court has discretion as to the duration of that time and can extend it on subsequent application by the party seeking relief. As Edmund Davies LJ indicated in the more recent case of Starside Properties v Mustapha, courts grant relief against forfeiture clauses in such circumstances as

justice requires and on terms which are equitable in those circumstances. For that reason, said his lordship, if it should later appear that the relief by way of an extension of time first granted ought to be extended and that in fairness to the other party that can be done, a court should grant a new extension of time.(55)

Now if it is accepted that it is what is just and equitable in the circumstances of each case which should guide the court, it seems to follow that in deciding whether relief should be granted, whether the breach is non-payment of money or not, the court ought to have regard to all the circumstances of the case. Where the breach is non-payment of money due, it is only natural that the guilty party's readiness to pay that money should be a crucial factor in the court's decision. Yet even then the court should not close its eyes to other factors which might militate for or against enforcement of the forfeiture clause. And that seems to have been the view of Lord Wilberforce in Shiloh Spinners v Harding. According to his lordship, equity expects people to carry out their bargains and will not let them buy their way out of them by uncovenanted payment. However, he said, it is consistent with this principle, that in appropriate cases courts of equity should relieve against forfeiture for breach of covenant or condition where the primary object of the bargain is to secure a stated result which can effectively be attained when the matter comes before the court, and where the forfeiture clause is put in the contract by way of security for the product of that result. As to what he implied by the word 'appropriate', he said:

"The word 'appropriate' involves consideration of the conduct of the applicant for relief, in particular whether his default was wilful, of the gravity of the breaches, and of the disparity between the value of the property of which forfeiture is claimed as compared with the damage caused by the breach".(56)

This judgement was supported by Lord Dilhorne, Lord Pearson and Lord Kilbrandon. But the contract there involved breach of covenants to keep premises in good repair so that it is not clear whether their lordships intended the judgement to apply also to cases where the breach involved non-payment of money due. Of course it would be curious that where the breach was failure to pay money relief should depend on the guilty party's readiness to pay that money whereas in any other kind of breach, the more comprehensive approach suggested by Lord Wilberforce should apply. Yet that seems to be what is suggested by the balance of authority on the question whether money already paid can be recovered by the payer as a form of relief against forfeiture, if he fails to complete payments under the contract as a form of relief against forfeiture.

Once the breach has been committed and the innocent party seeks to enforce the forfeiture clause, one course of action open to the guilty party, as has been seen, is to seek an extension of time within which to remedy the breach. However in some cases he may choose to let the innocent party terminate the contract and then ask the court to grant him relief against forfeiture of any money he may have paid under the

contract before the breach. One reason why he may choose this course of action is the fear that it might not be possible to work well with the other party to the contract after the breach. Consequently he will want to recover any money paid by him before the breach rather than seek an extension of time to remedy the breach.

There is yet no case in which that form of relief has been granted. However it is well established that so long as that is the intention of the parties, the money can be recovered by the guilty party despite his breach of the contract. In Dies v British & International Mining (57) it was held by Stable J that the general rule is that the law confers on the payer the right to recover his money unless the seller can point to some language in the contract from which the inference to be drawn is that the parties intended and agreed that he should keep the money. Goff and Jones have described that holding to be consistent with the general view of the common law that a person can not be denied restitution merely because he is in breach of contract.(58) But as it shows, the party in breach will forfeit the money already paid under the contract if that is the express or implied agreement between him and the other party. And courts have taken the view that where the money is paid as a deposit, the parties thereby imply that should the payer subsequently fail to comply with the contract, he should forfeit the money so paid.(59) However there are authorities which suggest that despite the express or implied agreement that the money should be forfeited, in appropriate cases the court may grant the party in breach relief against the forfeiture.

Mussen v Van Dieman's Land seems to be the first case in which the relief was sought. The facts of the case were that the defendants agreed to sell to the plaintiff land for £321,000. The money was to be paid by instalments and time was made of the essence. A clause in the agreement stipulated that if the plaintiff made default in paying any of the instalments the defendants could rescind the contract and retain all monies already paid by the purchaser. It was also agreed that on payment of a certain sum the defendants would convey to the plaintiff two blocks of land. The blocks whose value was £99,300 were duly conveyed to the purchaser who had by that time paid £139,500 under the contract. Subsequently when he failed to pay one instalment which had fallen due, the defendants gave him notice that they were rescinding the contract. By two letters written two years and three years later, respectively, the purchaser demanded repayment to him of £40,200 which was the difference between the total amount of money he had paid to the defendants and the value of the two pieces of land which had been conveyed to him. When the defendants refused to comply with the letters, he brought an action against them for recovery of the money. In his judgement, Farwell J was of the view that for relief to be granted in such cases, it had to be shown that the forfeiture clause was penal and that it would be unconscionable for the payee to retain the money claimed by the payer. The judge did not say what he meant by the word 'penal' nor did he show whether or not the clause under discussion was penal. However he thought the purchaser had failed to show that it would be unconscionable for the defendants to insist on their legal rights

and retain the disputed £40,200. In his words:

"In order to entitle a plaintiff to relief from a penalty, it is necessary in my judgement for him to show that there is some ground upon which it would be unconscionable in the defendants to retain the money or the whole of the money. I find it difficult to see why, in a case of this kind, it should be unconscionable on the part of the vendor, who has contracted to part with his land on agreed terms, to enforce the contract if he so desires. There may be special circumstances in some cases in which the Court would take the view that it was unconscionable, and that the plaintiff was accordingly entitled to relief, but unless I can be satisfied that in this case there is something unconscionable in what the defendants seek to do, in my judgement I have no jurisdiction to grant any relief whatsoever".(60) (My emphasis)

It is clear that although the judge uses the word 'unconscionable' four times in this passage, he does not define it. However reading the whole judgement, it is possible to say that his conclusion that there was nothing unconscionable in what the defendants sought was influenced by the following facts:

- a) that the plaintiff could not and had not offered to complete performance of his obligation under the agreement which he had broken;

b) that the plaintiff had taken almost five years to bring the action so that specific performance could not be decreed even if he had asked for it and

c) that the plaintiff had at least got part of what he bargained for.

Of course it should be noted that the plaintiff's claim related only to £40,200 and not to the £99,300 for which land had been conveyed to him. For that reason fact (c) was irrelevant to the matter in issue. In fact it is probable that Farwell J mentioned it in his judgement merely for the sake of completeness.

Now if in fact the decision turned on facts (a) and (b), it can be said that the judge was merely endorsing the view of the authorities cited earlier. As argued, those authorities support the proposition that it is a condition for the grant of relief against forfeiture that the party in breach should be ready and willing to perform the contract so that where specific performance can not be ordered, then the other party should be allowed to go ahead with the forfeiture. According to this view the party seeking to enforce the forfeiture clause acts 'unconscionably' if the other party having broken the contract is thereafter willing to carry it out but the former not only refuses to let him do so but also seeks to retain the money already paid by the party in breach under the contract.⁽⁶¹⁾ Thus such issues as the gravity of the breach, the relation between the damage caused by the breach and the money sought to be retained and whether or not the breach was deliberate, are not taken into consideration in deciding whether the innocent party is acting unconscionably in insisting on his

rights.(62)

By contrast, in the second case where recovery of money already paid was attempted, the majority of the Court of Appeal thought that these factors should be considered in determining the issue. The case is Stockloser v Johnson. In that case the plaintiff agreed to buy plant and machinery from the defendant. The contract provided that the purchase price was to be paid in instalments and that if the plaintiff failed to pay any of those instalments for a period of more than 28 days, the defendant could rescind the contract, retain the instalments already paid by the plaintiff under the contract and retake possession of the plant and machinery. Later the plaintiff having defaulted in the payment of one instalment the vendor rescinded the contract and sought to retain the instalments already paid by him. Although not financially able to complete the contract, the plaintiff brought an action to recover the instalments on the ground that the effect of the forfeiture clause was penal and unconscionable and that in equity he was entitled to relief. It was held by the majority of the Court of Appeal (Denning and Somerville LJJ) that it was possible at equity to allow recovery of the money but that on the facts of this case, that relief could not be granted. They took up the view expressed by Farwell J in Mussen v Van Dieman's Land that for relief against forfeiture to be granted, the forfeiture clause must be penal and secondly, that it must be unconscionable for the innocent party to retain the money already paid by the guilty party under the contract.(63) However unlike Farwell J they did not think that 'unconscionable' should be interpreted to cover

simply the situation where the innocent party refuses to allow the party in breach to complete performance of the contract and seeks to retain the money already paid by the latter under the contract. Rather they thought that the court should also consider the disparity between the sum of money of which forfeiture is sought as compared with the damage caused by the plaintiff's breach and other relevant factors at the time relief is sought.(64) In the words of Lord Denning:

"[T]here is an equity of restitution which a party in default does not lose simply because he is not able and willing to perform the contract. Nay, that is the very reason why he needs the equity. The equity operates, not because of the plaintiff's default, but because it is in the particular case unconscionable for the seller to retain the money. In short, he ought not unjustly to enrich himself at the plaintiff's expense. This equity of restitution is to be tested ... not at the time of the contract, but by the conditions when it is invoked. Suppose ... that in the instance of the necklace, the first instalment was only 5 per cent of the price; and the buyer made default on the second instalment. There would be no equity by which he could ask for the first instalment ... any more than he could claim payment of a deposit".(65)

On the facts before them, the two Lord Justices held that the plaintiff had no equity whereby he could ask for the money claimed because during

the subsistence of the agreement, he had received substantial amounts of money under the contract in royalties from the plant and machinery which the defendant was not asking back.

This approach sounds sensible and consistent with what has already been said that it is not a rule of the common law that a party to a contract is to be denied restitution merely because he is in breach of that contract. Indeed it accords with the general principle upon which damages are awarded in contract cases.(66) However from what has been said earlier, it is possible to see that the approach was novel at the time (67) and unsupported by the balance of authority.(68) Small wonder then that the third member of the court, Romer LJ, thought that the plaintiff's case should fail because the only form of relief against forfeiture clauses which courts of equity could grant was an extension of time to the party in breach to remedy his breach. He said:

"[T]here is no sufficient ground for interfering with the contractual rights of a vendor under forfeiture clauses of the nature which are now under consideration, while the contract is still subsisting, beyond giving a purchaser who is in default, but who is able and willing to proceed with the contract, a further opportunity of doing so; and no relief of any other nature can properly be given, in the absence of some special circumstances such as fraud, sharp practice or other unconscionable conduct of the vendor, to a purchaser after the vendor

has rescinded the contract".(69)

His lordship gives two views of the law which ought to be noted here. The last part of his judgement refers to the general jurisdiction whereby equity relieves against unfair bargains. He says that that relief is based on the finding that the party seeking to enforce the bargain is guilty of some procedural unfairness such as fraud or sharp practice. This jurisdiction is discussed below but it will only be mentioned here that his lordship's observation on this matter is not, with due respect, entirely correct. But more important for the present purposes is his statement that relief against forfeiture clauses can only be given where the party seeking it is able and willing to proceed with the contract and that the relief will be in the form of a grant of further time to complete the contract. Undoubtedly, this is supported by the cases discussed above. But as argued there, the requirement that the guilty party must be willing to complete his performance of the contract is natural and makes sense where the relief he is seeking is a grant of further time to remedy his breach. For as the judge said in Barton Thomas v Stapling Machine, it is an inevitable condition of this sort of relief that if the party seeking the relief is not able to perform the contract when the matter comes to court, at least he will be able to do so within the time which the court may specify. For that reason, willingness to proceed with the contract must be shown before relief in this form can be granted. However where the plaintiff is seeking recovery of money already paid before his breach, that requirement does not make any sense at all. Indeed one could say that in

such a case the requirement is irrelevant and the court ought not to insist on it. On the other hand, the court should enquire whether it would be fair for the innocent party to insist on his rights as embodied in the forfeiture clause. And to answer that question it ought to consider whether or not the default was wilful and grave and examine the disparity between the money sought to be retained and the damage caused by the default.

But be that as it may, the harshness of the view advocated by Romer LJ has been demonstrated by the case of Galbraith v Mitchenall. The plaintiff in that case hired a caravan from the defendants for five years and made an initial payment of £550 10s. The cash price of the caravan at that time was £1050. The hire agreement provided that if owing to any reason the plaintiff determined the agreement even in the last month or if, due to some default on his part, the defendants elected to re-possess the caravan, the defendants would inter alia retain the initial payment. The plaintiff lived in the caravan for four months but paid no monthly rental as agreed. Consequently, the defendants determined the agreement and re-possessed the caravan which was then worth £800 only. The plaintiff then brought an action to recover the initial payment on the ground that the defendants had effected a forfeiture under which he had been penalised by their retention of that money. Sachs J was in no doubt that the effect of the forfeiture clause was harsh:

"It is always a matter of degree, but taking into account the evidence put before me, any set of terms which

entitled the vendor in such circumstances ... to retain a sum in excess of something between 25 per cent and 40 per cent of the retail price so attracts the stigma of undue harshness that if the finance company had to sue for the £550 10s upon some slightly different contract, that sum would also have been held a penalty".(70)

But in spite of that he declined to grant relief to the plaintiff against the clause on the ground that there was no proper authority for it. His view was that the majority judgement in Stockloser v Johnson quoted above was obiter (71) and that in the case of Campbell Discount v Bridge (72) the Court of Appeal had refused to follow it in favour of the minority judgement of Romer LJ.

Sachs J's judgement has been widely criticised.(73) It is no doubt correct that of the two judgements delivered in Stockloser's case which have been quoted above Romer LJ's judgement was more relevant to the decision reached in that case than that of Denning and Somerville LJJ. However it should also be recognised that what these two Lord Justices were concerned with was not simply to give a reason for their decision but also to break new ground.(74) Consequently it is not very helpful to simply dismiss their judgement as being obiter without examining the merit of the view they were advocating. But more than that, contrary to what Sachs J thought(75), the case of Campbell Discount v Bridge did not involve a claim for relief against forfeiture of money already paid under a contract. The action in that case arose from a minimum payment clause and the issue for determination was whether the hirer should pay

the amount imposed by that clause because he had exercised the option granted to him by the agreement to terminate the contract of hire. Clearly, on those facts, any reference which the Court of Appeal may have made to Stockloser v Johnson must be obiter.(76)

To conclude, it can be said that the cases discussed under this section show that relief which can be sought against the operation of a forfeiture clause may be of two kinds. The party against whom the clause is intended to apply may want a further chance to comply with the contract or he may wish to recover what he has paid under the contract. The first implies and requires that the contract must be subsisting whereas the second does not. The dominant judicial view is that relief in the form of a further opportunity to remedy the breach can only be granted if it is shown that the party seeking it is able and willing to perform his obligations under the contract. Although that view has been criticised here, that it is sensible is not doubted. What has been doubted, however, is the deduction from that of a rule of law denying a party recovery of money already paid unless he can show that in spite of his readiness to proceed with the contract, the party not in breach is not prepared to let him do so. Dicta opposed to that suggest that if a forfeiture clause is penal and it is proved that it would be unconscionable for the innocent party to retain the money, the party in breach should be allowed to recover it irrespective of whether he is able and willing to proceed with the contract. Of course it is less clear as to what is meant by the words 'penal' and 'unconscionable'.

2.3 Exclusion Clause(77)

The contract may also contain an exclusion clause. Such a clause will be intended either to excuse liability for certain breaches altogether or to define circumstances in which the party relying on the clause undertakes liability for those breaches or to restrict the exercise of any right or the availability of any remedy arising out of the breach of any obligation in the contract by the party relying on the clause or to limit the time within which an action for any breach of the contract is to be brought. However for present purposes the last function will be ignored.

Courts have generally viewed exclusion clauses which perform any one of the first two functions as depriving the party against whom they apply of his right. Consequently, they have striven to make such clauses unenforceable wherever possible. One tool which has been used for that purpose has been the requirement that the clause be brought to the notice of the party against whom it applies if it is to bind him.(79) On the face of it, this is no more than an affirmation of the basic rule of contract law that for a contract to bind the offeree, it must have been accepted by him. Thus where the plaintiff entered into a contract for hotel accommodation and only knew of the exclusion clause thereafter when she went to her room where the clause was exhibited, it was held that the clause was not part of the contract and that therefore it did not protect the hotel from liability for the theft of the plaintiff's property from the room.(80) But this should not be understood to mean that the party adversely affected by the clause should actually have known about it or its contents at the time the contract was concluded or

before that time. It is possible for the clause to be legally part of the contract even though he did not see the clause or could not have read it if he had seen it.

Firstly, where there has been a previous course of dealings between the parties (81) during which the clause was used and in the contract in question it was reasonably believed by the parties that their rights and obligations under it would be governed by the terms which had applied on the earlier occasions, the clause may be implied into the contract.(82) Of course it is possible that where the bargaining power of the parties is not equal, as for instance where the parties are merchant and consumer and the clause is intended to apply against the latter, courts may be reluctant to incorporate the clause into the contract through the canon of 'previous course of dealings'.(83)

Secondly, although one party is subjectively ignorant of the clause and its contents, the clause may nevertheless be held to be part of the contract if at the time when the contract was concluded or before that time, the proferens did what was reasonably sufficient to give notice of its existence to the other party.(84) Now once that has been done, it is immaterial that the latter did not read the clause, was illiterate or could not understand the language in which the clause was written.(85) But whether notice given is reasonably sufficient will be a question of fact to be determined by reference to the nature of the clause, its subject-matter and all relevant circumstances before or at the time the contract was concluded. Thus, for instance, if the clause is on a document (e.g. a voucher or receipt) which the recipient could not be

expected to know that it contained a contractual term (86) or if he knew that there was some writing on the document but the document itself was handed to him folded up and the relevant part of the writing was partly obliterated by a stamp (87), it will be difficult to say that the notice given was reasonably sufficient in the circumstances. Similarly, where the clause is displayed on a sign-post which is not well lit and the sign is not designed to meet the eyes of any person entering on the premises on which it is fixed, that has been held not to constitute reasonably sufficient notice to a person coming onto the premises on a dark night.(88)

Thirdly, where the clause is contained in a contractual document which the party adversely affected by the clause signs, that will suffice to incorporate the clause into the contract between him and the proferens. This is normally referred to as the rule in L'Estrange v Graucob (89) although there is reference to it in an earlier case.(90). It is possible that this rule is a result of policy considerations. In the first place, it can be seen as a reflection of the anxiety by the common law to uphold contracts wherever possible.(91) The second consideration can be gleaned from the following judgement of Maugham LJ:

"If the document signed by the plaintiff was a part of a contract in writing, it is impossible to pick out certain clauses from it and ignore them as not binding on the plaintiff".(92)

Because of that, in the absence of fraud (93), misrepresentation (94) or

mistake (95), the clause will be deemed to have been incorporated into the contract by virtue of the signature.

But if these are the bases of the rule in L'Estrange v Graucob (and there is nothing to suggest that that is not the case), it is difficult to see why the rule should be absolute. It is doubted that the sanctity of contract would be less served if signature of a document containing a contractual term were to be regarded as raising the (rebuttable) presumption of knowledge of the term by the party making the signature and the burden was thrown on that party to prove absence of notice on his part of the clause. Even more indefensible is the fact that it is never asked whether or not the presentation of the signed document gave the party against whom the clause is sought to be applied reasonably sufficient notice of its existence. Such a question is pertinent considering that in some cases because of the speed at which the contract is concluded, it is clear to the proferens that the other party has not read the clause and therefore can not reasonably be expected to have agreed to exchange his performance on the basis of the clause. Indeed it has often been shown that most of these clauses are written in such a way that it must be taken to be common knowledge on those seeking to rely on these clauses that the other parties do not read the clauses before signing documents in which they may be contained.

Canadian courts have addressed their minds to this issue. In Tildent Rent-A-Car Co v Clendenning on renting a car from the plaintiffs the defendant elected to pay an additional premium which he understood to give him full indemnity against damage to the vehicle, having been told

on previous occasions that the payment provided 'full non-deductible coverage'. A contract was submitted to him which he signed before the plaintiff's clerk without, to the latter's knowledge, reading its terms. In fact on the face of the document it was provided that the 'collision damage waiver' would not apply if the vehicle were driven in contravention of any provision of the agreement and, at the back, it was stipulated that the car was not to be operated by any person who had drunk any intoxicating liquor of whatever quantity. The car was damaged while being driven by the defendant who had at the time of the accident taken some alcohol which the court accepted as not having intoxicated him. Relying on the exclusionary provisions, the plaintiffs brought an action against the defendant to recover damages for the damage to the car. The crux of their case was that as the defendant had signed the contract, L'Estrange v Graucob applied so that it was immaterial that he had not read the provisions before signing the contract. It was held by the Ontario Court of Appeal (Lacourcier JA dissenting) that despite the signature, the defendant was not bound by the provisions. It was their view that the provisions were stringent and onerous and as such the plaintiffs should have taken specific steps to alert the defendant of their existence. Since no such steps were taken and it was clear that had he known of the clauses, the defendant would not have entered into the contract, it was not open to the plaintiffs to rely on the clauses and fasten liability for damage to the car on the defendant. In the words of Dubin JA:

"In modern commercial practice, many standard form printed

documents are signed without being read or understood. In many cases the parties seeking to rely on the terms of the contract know or ought to know that the signature of a party to a contract does not represent the true intention of the signer, and that the party signing is unaware of the stringent and onerous provisions which the standard form contains. Under such circumstances, I am of the opinion that the party seeking to rely on such terms should not be able to do so in the absence of first having taken reasonable measures to draw such terms to the attention of the other party, and in the absence of such measures, it is not necessary for the party denying knowledge of such terms to prove either fraud, misrepresentation or non est factum".(96)

Of course one can say that the approach being advocated in this case should be available to exclusion clauses generally and not be confined to those which happen to have more stringent terms than others. Nevertheless the approach itself should be lauded because clearly

"[I]t retains the role of signed documents as a means of protecting reasonable expectations [but] it does not allow ... that a party should rely on a printed document to contradict what he knows, or ought to know, is the understanding of the other party".(97)

What has been said so far relates to the procedure of making the clause part of the contract. As regards the clause itself, there are

suggestions that to be enforceable, it must be reasonable. For instance, in Gillespie Bros & Co Ltd v Roy Bowles Transport Denning MR said:

"[The clause] should be given its ordinary meaning, that is, the meaning which the parties understood by the clause and must be presumed to have intended. The courts should give effect to the clause according to that meaning—provided always ... that it is reasonable as between the parties and is applied reasonably in the circumstances of that contract".(98)

According to him, if the exclusion clause is unreasonable or is sought to be applied unreasonably by the proferens courts are justified in refusing to enforce it according to its ordinary meaning. However his lordship does not indicate when the clause is to be regarded as being 'unreasonable' nor does he define the factors to be considered when applying the test. Indeed it can be said that although the test of reasonableness is adopted in the United Kingdom by a number of statutes which deal with unfair contract terms (99), at common law the test has not been applied with enthusiasm. With the exception of a few cases involving restraint of trade (100) reference to it in other cases is by way of obiter statements only.(101) Thus on the whole it is probably correct to say that at common law courts have no general power to strike down a contract term merely because it is unreasonable.(102)

A more substantive tool which courts have used to combat abuse of exclusion clauses is the doctrine of fundamental breach or breach of a fundamental term. At the root of this doctrine was the desire to ensure

that the proferens did not unfairly limit the performance which the other party was to receive from him under the contract. Accordingly, it was said that there was a substantive rule of law which did not allow the proferens to rely on an exclusion to escape liability for fundamental breach of the contract or breach of a fundamental term of the contract.(103)

Although the doctrine was of undoubted utility, it was beset with a number of problems. First, there was no agreement as to what constituted a fundamental breach or a fundamental term.(104) Second, the parentage of the doctrine itself was dubious.(105) And thirdly, according to Professor Coote, the doctrine engendered an artificial interpretation of exclusion clauses.(106) But in judicial circles doubt was first cast on the doctrine by Pearson LJ in UGS Finance v National Mortgage Bank of Greece where he said:

"This is not an independent rule of law imposed by the court on the parties willy-nilly in disregard of their contractual intention. On the contrary it is a rule of construction based on the presumed intention of the contracting parties".(107)

This was strengthened three years later by the House of Lords which unanimously held in Suisse Atlantique Societe d'Armenet Maritime v NV Rotterdamsche Kolen Centrale (108) that there was no substantive rule of law which disallowed the proferens from relying on a clause excluding liability for fundamental breach or breach of a fundamental term of contract. In each case, said their lordships, the matter is one of

construction. The court has to look at the clause together with the whole contract to determine whether liability for the events which have occurred is excluded or limited by the clause.

Two attempts were made thereafter by the Court of Appeal to revive the substantive doctrine.(109) This second rise was thwarted by the House of Lords decision of Photo Productions Ltd v Securicor Transport Ltd (110) which not only affirmed Suisse Atlantique but also held that an exclusion clause can modify or limit the primary obligation of the contract in which it is inserted. Thus in Photo Production itself where Securicor was under a duty to provide personnel to patrol the plaintiffs' factory, the implied obligation to operate the patrol service with due regard to the safety and security of the factory was held by Lord Wilberforce to have been excluded by a clause in the agreement between the parties which stated that 'under no circumstances [was Securicor] to be responsible for any injurious act or default by any employee ... unless such act or default could have been foreseen and avoided by the exercise of due diligence [by Securicor]'. As a result Securicor was found not liable for damage caused to the plaintiffs' factory by fire started by one of Securicor's patrolmen. This view has been consolidated by two more recent House of Lords cases of George Mitchell Ltd v Finney Lock and Ailsa Craig v Malvern Fishing.(111)

Now once it had been unanimously held in Suisse Atlantique that there was no substantive rule of law which forbade reliance on an exclusion clause by a party who had committed a serious breach of contract, one would have expected that all the trappings of the

doctrine of fundamental breach would be abandoned and that the task of the courts now would be simply to construe exclusion clauses in the light of the whole contract and then enforce the clause according to the meaning so ascertained. In fact the position is far from that. A limitation has been placed on the application of the rule of construction and that limitation involves much of the discussion which surrounded the rise and application of the doctrine of fundamental breach. In Suisse Atlantique itself Lord Reid said:

"There is no reason why a contract should not make provision for events which the parties do not have in contemplation or even which are unforeseeable, if sufficiently clear words are used. But if some limitation has to be read in it seems reasonable to suppose that neither party had in contemplation a breach which goes to the root of the contract".(112)

And further on Lord Wilberforce added:

"[T]he question remains open in any case whether there is a limit to the type of breach which [the parties] have in mind. One may safely say that the parties can not, in contract, have contemplated that the clause should have so wide an ambit as in effect to deprive one party's stipulation of all contract force: to do so would be to reduce the contract to a mere declaration of intent".(113)

The suggestion from these judgements seems to be that an exclusion

clause should be applied restrictively 'for a total exclusion of liability, if widely construed, might lead to conclusion that there was no primary obligation at all and thus no contract'.(114) But by imposing such a qualification the House of Lords were re-enforcing the argument which underlay the doctrine of fundamental breach. It will be recalled that the idea behind the doctrine was the belief that a contract had a core obligation liability for which one party could not exclude without depriving the other party of the benefit which it was intended that the latter should get from the contract. Consequently, whenever a party sought to rely on an exclusion clause it had to be determined as to what the core obligation of the contract was and whether or not the clause applied to it. If it did, the clause could not be enforced.

A similar approach seems to have been adopted in construing exclusion clauses subject to the limitation espoused by the House of Lords in the judgements quoted above. In the case of George Mitchell Ltd v Finney Lock (115) the defendants agreed to supply to the plaintiffs 'Late Dutch Special' cabbage seed and purported to limit their liability if the seed should prove to be defective, to replacing the defective seed or refunding the purchase price which was £201.60. Furthermore, they excluded 'all liability for any loss or damage arising from the use of any seed ... supplied by us and for any consequential loss or damage arising out of such use ... or for any other loss or damage whatsoever'. The contract also stated that the price of the seeds was based on these terms. Owing to error on the part of the defendants the seed turned out not to be 'Late Dutch Special' cabbage seed and was wholly

unmerchantable. As a result the plaintiffs lost as much as £61,000. The issue then was whether the defendants could rely on the exclusion clause given above to escape liability for the loss. In the Court of Appeal it was held that the defendants were not entitled to rely on the clause. The agreement was subject to section 55(4) of the English Sale of Goods Act 1979 and applying that provision, it was found that it would not be fair or reasonable for the defendants to rely on the clause because it had been imposed without negotiation, the defendants could and should have known that they were delivering the wrong seed and it was possible for them to insure against the risk of the loss that had been caused to the plaintiffs. It was also the view of Kerr and Oliver LJ that as the delivery of the wrong seed was caused by the defendants' own negligence, they could not rely on the clause to escape liability for the loss because on its true construction, the clause did not protect them from the consequences of their own negligence or the delivery of something different from what the plaintiffs had ordered. Reiterating the words of Lord Reid and Lord Wilberforce quoted earlier, Kerr LJ said:

"Provided that the words used do not go so far as, in effect, to absolve one party from contractual obligation whatever, so as to reduce a so-called contract to a mere declaration of intent without imposing any binding obligation, all provisions of a contract, including all exemption clauses however wide, fall to be construed and applied if, on the true construction, it is clear that the parties intended them to apply to the situation in

question."(116)

Oliver LJ's argument was that the clause was to be taken to assume that the defendants would fulfil the primary obligation of supplying 'Late Dutch Special' cabbage seed. Since that obligation had not been fulfilled, to enforce the clause and thus allow the defendants to escape liability for the loss which they had caused would be in effect to say that the defendants had not bound themselves to do anything in exchange for the plaintiffs' performance. In other words, as far as he was concerned, if the clause was enforced in the circumstances, that would reduce the defendants' undertaking to a mere declaration of intent and thus contradict the very existence of a contract between the parties.

In the House of Lords the decision of the Court of Appeal was affirmed. For reasons almost identical to those given by the Court of Appeal, Lord Bridge who delivered the leading judgement agreed that it would not be fair or reasonable under section 55(4) of the English Sale of Goods Act 1979 to allow the defendants to rely on the disputed clause. But his lordship was critical of the other ground upon which reliance on the clause was refused by the Court of Appeal. In particular, he accused Oliver LJ of coming 'dangerously near to re-introducing by the back door the doctrine of fundamental breach which this House in Securicor I [1980] AC 827, had so forcibly evicted by the front'.(117) He was of the view that the contract between the parties was for the supply of 'seed' simpliciter and that since that was what the defendants had supplied and the plaintiffs accepted, it was difficult to accept that enforcing the exclusion clause would deprive

the transaction of the element of exchange. In his words:

"In my opinion, this is not a 'peas and beans' case at all. The relevant condition applies to seeds.... The defective seeds in this case were seeds sold and delivered, just as clearly as they were seeds supplied by the appellants to the respondents. The relevant condition, read as a whole, unambiguously limits the appellants' liability to replacement of the seeds or refund of the price".(118)

The point to note here is that both courts were agreed on the basic idea that an exclusion clause should not be construed so as to reduce the proferens' undertaking to a mere declaration of intent. Their difference, however, was on what was to be regarded as the proferens' undertaking in this case. For while Oliver LJ thought that he had undertaken to supply 'Late Dutch Special' cabbage seed, Lord Bridge was of the view that his obligation was merely to supply seeds. As a result to the latter, so long as the clause contemplated the sale and delivery of seed, it did not contradict the existence of a contract between the parties by excluding liability for the supply of seed which was not 'Late Dutch Special' cabbage seed. On the other hand, according to Oliver LJ, to the extent that the clause in effect allowed the proferens to supply any seed and get away with it, it could hardly be said that it did not deprive his undertaking of contractual force. Lord Bridge disapproved of this view and there may be grounds for siding with him in that respect. However it must be recognised that Oliver LJ's view has

its germ in the very rule of construction which the House of Lords enunciated in Suisse Atlantique and the subsequent cases given above.(119) And as far back as the time when Photo Production was decided at least one learned commentator did foresee this divergence of opinion on the import of the rule. He said:

"[T]here is little in Securicor to prevent lawyers, so minded, concluding that a rule of 'construction' remains, to the effect that exception clause do not apply to fundamental breach. On past experience, that will almost certainly mean that the enquiry will be directed, not to the words used, but the presence or absence of fundamental breach, as the determinant".(120)

But more than that, to the extent that the task of the court now is merely to construe the clause and determine whether the language used in it covers the events which have occurred, the post-fundamental breach legal regime can not be said to make any substantial attempt to stem abuse of exclusion clauses. One of the criticisms levelled against the doctrine of fundamental breach was that its application excluded consideration of the fairness of the clause. As Lord Reid once observed:

"There is no indication ... that the courts are to consider whether the exemption clause is fair in all the circumstances or is harsh and unconscionable or whether it was freely agreed by the customer".(121)

But in spite of that it does not appear that the new rule of

construction has room for that consideration either. In England development of the rule along this vein may be said to have been foreclosed by the passing of legislation, such as the Unfair Contract Terms Act, which adopts the test of reasonableness of the clause. However in Photo Production Ltd v Securicor Transport, for instance, which was decided according to the common law, no attempt was made by the House of Lords to concoct a formula for the prevention of unfair exchange through these clauses. Of the judges who delivered leading judgements, Lord Wilberforce devoted a major part of his judgement going through the turbulent history of the doctrine of fundamental breach. Only in the very last paragraph of the judgement did he address himself to the issue of the fairness of the clause used in that case. His view was that since Securicor demanded only the modest charge of 26 pence per visit by their patrolmen to the plaintiffs' factory and they had no knowledge of the value of the factory, 'nobody could consider it unreasonable that as between these two equal parties the risk assumed by Securicor should be a modest one, and that the respondents should carry the substantial risk of damage or destruction'.(122) The late Lord Diplock also thought that the apportionment of risk which the clause introduced into the contract was one which reasonable businessmen in the position of the parties would think most economical.(123)

Thus the suggestion here seems to be that even if the clause as construed covers the event which has occurred and does not reduce the proferens' stipulation to a mere declaration of intent, the clause may nevertheless not be enforced if it is considered to be

unreasonable. Of course the case does not put it beyond doubt that the test of fairness in all cases will be one of reasonableness. Besides, although it is clear as to why the court concluded that in this case the clause was not unreasonable, there is no definitive indication of what factors in general would have to be present for a clause to be considered unreasonable. Indeed it has been argued that as the test is objective, to be determined in accordance with the conduct, thoughts and responses of the reasonable man, it is not appropriate as a means of preventing unfairness in this area of contract because it does not cater for the susceptibility of the party to a contract who may be illiterate or whose bargaining position may otherwise be inferior to that of the other party to the contract.(124) Thus it has been suggested that the subjective test of unconscionability should be adopted instead. It is to that test that this discussion will now turn.

2.4 The Jurisdiction Against Unconscionable Bargains

It has been noted in the preceding pages that there is an opinion that whether minimum payment clauses, forfeiture clauses and exclusion clauses are to be enforced should depend on whether or not they are shown to be unconscionable. This section examines the historical background to the jurisdiction against unconscionable bargains, explores resuscitation of the jurisdiction in modern time by courts and shows how it has been adopted in recent legislation on both sides of the Atlantic. The conclusion arrived at is that although the concept of unconscionability is suggested as the test to be applied

in the enforcement of these clauses, the concept itself is surrounded by a penumbra which makes it difficult to define as well as to formulate guidelines for its application. As a result it is submitted that the concept will not help very much in controlling unfair exchange through the use of these clauses in contracts.

Relief against unconscionable bargains is of antiquity. Writing in his book published in 1790, Powell observes that the mere fact that a bargain was unreasonable (125) or that the price furnished for it was inadequate (126) was of itself no ground for setting aside an agreement or otherwise relieving one party to it. However if there was fraud in the transaction, then the unreasonableness could be a basis for relief. Similarly, if there was 'inequality and imposed burden or hardship on one of the parties', the agreement could also be set aside on that ground. For example, says Powell

"If a covenant be inserted in a mortgage that, if the interest be not paid punctually at the day, it shall from that time, and so from time to time, be turned into principal, and bear interest. This covenant will be relieved against as fraudulent, because unjust and oppressive in an extreme degree".(127)

By the same token, where the plaintiff received an inadequate price for his property or as a purchaser, paid an exorbitant price, and this inequality of exchange was caused by ignorance or the impulse of distress on the part of the plaintiff and the other party knew and took advantage of that, that would furnish adequate grounds for a court to

set aside the contract. He also states that although inadequate price (or excessiveness of it) per se was not a ground for invalidating a contract, yet if the inequality of exchange furnished

'self-evident demonstration, from the intrinsic nature and subject of the bargain itself, of fraud; evincing that the party who suffers the loss must have been imposed upon', relief could be granted to the disadvantaged party.(128)

The explanation given by Powell for these instances of judicial intervention seems to suggest that relief would be granted because it was felt that the plaintiff had not really consented to the transaction. For example, he says that inadequacy of price per se could be a ground for relief if the enormity of the inequality of exchange showed

"... that the party who suffers the loss must have been imposed upon, and can not be considered as having been in possession of an understanding adequate to render him capable of contracting; in which case no obligation could be incurred by him".(129)

He offers almost a similar explanation for the grant of relief in cases where advantage was taken of one party's ignorance or distress to drive a hard bargain against him.(130)

It is submitted that this is not wholly correct. The relief was not based on the presence of any defect in the plaintiff's consent. The courts did accept that in formal terms, there was a binding agreement between the parties. However they felt that in spite of that

consensus, the agreement as concluded was unfair and it was that unfairness, rather than the absence of real consent on the part of the disadvantaged party, which was the reason for refusal to order specific performance of such agreements or for relieving that party from his obligation under the agreement. Indeed as one judge has recently observed, in these cases courts rarely, if ever, concern themselves with the reality of the weaker party's consent; their concern is with the conduct of the stronger party.(137)

Sometimes courts have used the concept of fraud as a vehicle for this intervention. But as Professor Sheridan shows, this concept embraced not only cases of deceit symptomatic of absence of real consent but also disparate situations where

"... one party has taken advantage of the weakness or necessity of the other to an extent which strikes the judge as being a greater advantage than the current morality of the ordinary run of businessman allows".(132)

And it must be added here that it was not always necessary to prove affirmatively that advantage had been taken of the weaker party's disadvantage. As it was held in Fry v Lane where the vendor who was a poor and ignorant man sold his reversionary interest at a considerable undervalue without professional advice other than that of the purchaser's solicitor,

"[W]here a purchase is made from a poor and ignorant man

at a considerable undervalue, the vendor having no independent advice, a court of equity will set aside the transaction.... The circumstances of poverty and ignorance of the vendor and absence of independent advice throw upon the purchaser, when the transaction is impeached, the onus of proving... that the purchase was fair, just and reasonable".(133)

Transactions in which the intervention was made were usually sales of property, mortgages or simple money loans and are sometimes described as 'harsh and unconscionable' transactions.(134) In a letter to Lord Kames, Lord Hardwicke is on record as having said that the root principle underlying the old equitable doctrine of 'harsh and unconscionable bargains' is that one of the parties to the transaction has taken an unfair advantage of the other party.(135) The expression 'harsh and unconscionable' was incorporated into the Money-Lenders Act at the beginning of this century. The Act was adopted in Malawi as the Loans Recovery Act. In what is section 3 of the Malawi Act, it was provided that where the interest charged in a money loan contract is excessive and the contract is 'harsh and unconscionable', courts could re-open the transaction to do justice between the parties. The Act did not define the expression but it is clear from cases decided under this provision that relief was granted in cases of unfair exchange arising from one party to the transaction taking advantage of the other party's weak bargaining power.(136)

Expectant Heirs

A special class of contracts which deserves to be mentioned here is transactions involving heirs dealing in their expectancy. These transactions are normally referred to in text books as 'catching bargains' and represent an area where courts have set aside a contract even where the party seeking relief entered into the agreement with his eyes open and no fraud was involved to procure his consent. Mere inadequacy of price has been regarded as sufficient ground for upsetting the agreement, the onus being on the party seeking to enforce the transaction to show that he had given fair market value. The relief was initially confined to transactions involving heirs properly so called. However in the course of time it was extended to cover everyone dealing in his reversionary interest.(137) In its pristine form the relief seems to have been based on policy aimed at protecting family property against prodigal heirs who could easily dissipate it by giving it away on outrageously improvident terms. Besides, there was always a feeling that such transactions were not completely bereft of the element of deceit. In the words of Powell:

"[I]n most of these cases, deceit and illusion on other persons, not privy to the fraudulent agreement, has occurred; the father, ancestor, or relation, from where the expectation of the estate has sprung, have been kept in the dark; the heir or expectant has been prevented from disclosing his circumstances, and resorting to them

for advice, which might have tended to his relief and reformation; by this the ancestor has been misled, and induced to leave his estate, not to his heir or family, but to a set of artful persons who have divided the spoil before hand".(138)

However on analysis it is clear that in most of the transactions falling in this class the grant of relief was also influenced, albeit in a way not usually apparent at first sight, by the wider doctrine of disparity of the bargaining power of the parties. Usually the expectant would go into the transaction under pressure of financial distress and without proper advice. In other cases he would be under age and largely inexperienced in business matters. Now although to get relief he did not need to prove all this, it is undeniable that the other party always seized on these weaknesses as well as the knowledge that the plaintiff would certainly come into some property, in fixing the terms of the transaction.(139)

That this was so is demonstrated by the case of Neville v Snelling. In that case the money-lender claimed £1368 2s 6d for sums amounting to £900 advanced to the borrower. Although the latter was not an heir nor expected any property, his father was a wealthy man and it is him, rather than the borrower, whom the money-lender expected to re-pay the loan. Denman J rejected the claim on the ground that it would be inequitable for the money-lender to recover the £1368 2s 6d. Having reviewed instances in which courts had previously interfered with transactions, and denied the existence of a case which

restricted the intervention only to cases where the aggrieved party was an heir or reversioner, the judge said:

"The real question in every case seems to be the same as that which arose in the case of expectant heirs and reversioners before the special doctrine in their favour was established—that is to say, whether the dealings have been fair, and whether undue advantage has been taken by the money lender of the weakness or necessities of the person raising the money. Sometimes extreme old age has been unduly taken advantage of, and the transaction set aside. Sometimes distress. Sometimes infancy has been imposed upon,..... But in others, taking the whole history together, it may represent so many features of unconscientiousness, extortion, and unfair dealing on the one side and weakness on the other, as to compel the Court to exercise its equitable jurisdiction, at all events so far as to restrain the profits of the money lender within fair and reasonable bounds".(140)

The Modern Trend

Relief against unfair transactions has featured prominently in a number of recent Canadian and English law reports. The cases do not involve any of the clauses discussed earlier and although the expression 'harsh and unconscionable' does appear in their head-notes, the cases have been decided on the basis of what has been described as the doctrine of 'inequality of bargaining power'.(141)

But as will be shown, this doctrine has been distilled from cases decided under the jurisdiction against harsh and unconscionable bargains. Consequently the doctrine can justifiably be called a 'resuscitation of the olden equitable jurisdiction whereby relief was given against unfair contracts'.(142)

In Krupp v Bell (143) the doctrine was used to refuse specific performance of a contract under which a senile woman who was easily led and had no business experience sold her land to a neighbour at the grossly inadequate price of \$35 per acre without taking independent advice.(144) Three years later, the Ontario Court of Appeal also used it to grant relief in Mundinger v Mundinger (145) against a separation agreement under which in consideration of \$10,000 a woman was required to relinquish all rights to support and maintenance from her husband and to convey to him half of her interest in two pieces of property whose value was \$20,000 and \$40,000, respectively. It was shown that the woman signed the agreement at a time when she was just recovering from mental depression caused by the husband's cruelty. The Court described the agreement as being 'unconscionable and improvident' on its face and that the position of the wife at the time when it was concluded was such that her husband was in a position of dominance and control over her, of which he took full advantage to procure the agreement.(146)

This doctrine has also been used by other Canadian courts to grant relief against a mortgage (147) and an agreement releasing an insurance company from meeting claims brought by its insured.(148)

In England the doctrine has been canvassed for in many cases.(149)

Its inapplicability in undue influence cases has now been put beyond doubt by the House of Lords in National Westminster Bank v Morgan (150). But as was pointed out by Denning MR in Lloyds Bank v Bundy, an undue influence case,

"By virtue of it, English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by his own needs or desires, or by his own ignorance or infirmity".(151)

Thus in Arrale v Costain Civil Engineering (152) his lordship thought that the doctrine could be used to come to the aid of an injured workman who had been compensated under a workman's compensation statute outside England and then made to sign a receipt which in effect took away his right to claim further compensation under the common law.

Then there is Macaulay v A Schroeder Music Publishing Co Ltd which arose out of an agreement between music publishers and a song writer. Because the agreement was too favourable to the former, it was set aside on the ground that it was unreasonably in restraint of trade.(153) In their judgement the House of Lords endorsed the idea that the reason for judicial intervention in cases of this nature is inequality of bargaining power between the parties. In particular, Lord Diplock said that when a court refuses to enforce a contract which is in restraint of trade, the court is implementing not some 19th century economic theory about the benefit to the general public of freedom of trade, but 'the

protection of those whose bargaining power is weak against being forced by those whose bargaining power is stronger to enter into bargains that are unconscionable'.(154) In his opinion, although courts do seem to base their decisions on current economic theories, in fact they strike down a bargain if they think that it was unfair as between the parties to it and uphold it if they think that it was not. In other words, said his lordship, in each case the question is whether the bargain was fair, the test of fairness being the necessity of the restrictions for the protection of the legitimate interests of the promisee and commensurate with the benefit secured to the promisor under the contract.(155)

Underlying Factors

When the cases in which the existence of this doctrine has been recognised are examined what emerges is that three elements must be present before the relief under discussion will be granted:

- a) one party to the contract must have been at a serious disadvantage through poverty, ignorance or other infirmity;
- b) that weakness must have been exploited by the other party to the transaction and
- c) the transaction so procured must be more favourable to the stronger party than to the party at a disadvantage with respect to price and/or non-price terms.(156)

Of course as already indicated, in olden times courts at equity never insisted that (b) should be affirmatively proved. Where there was a sale at undervalue or at an exorbitant price, that was accepted as indicating

that advantage had been taken of the disadvantaged party's weak bargaining power so that in the absence of proof by the other party to show that the transaction was otherwise fair (e.g. because the weak party had been independently advised), relief was granted to the former against the transaction.

This last point is sparkingly demonstrated by Multiservice Binding v Marden in which the defendant lent the plaintiffs, a small company, £36,000 on the basis that the latter's liability to re-pay the principal and interest should be linked to the value of the Swiss Franc. Clause 6 of the loan agreement provided that any sum paid on account of interest or in re-payment of the principal should be increased proportionately or decreased proportionately if at the close of business on the day preceding the day on which payment was to be made the rate of exchange between the Swiss Franc and the pound sterling should vary by more than 3% from the rate prevailing on the date on which the deal was sealed. The loan was secured by a mortgage which was not redeemable during the first 10 years of its life. The mortgage deed also stipulated that the plaintiffs were to pay interest at the rate of 2% quarterly above the bank rate and that arrears of interest would be capitalised after 21 days. Because during the term of the loan agreement the pound greatly depreciated in value against the Swiss Franc, the principal re-payable rose from £36,000 to £87,588.22 and the interest spiralled to an average 16.01% over the whole period. Consequently the plaintiffs applied to court, claiming that clause 6 taken together with the other terms of the mortgage deed was unenforceable in that it was unreasonable. Their claim

was rejected on the ground that they had failed to show that the clause and the terms referred to were unfair and unconscionable.

Browne-Wilkinson J said:

"[I]n order to be freed from the necessity to comply with all the terms of the mortgage, the plaintiffs must show that the bargain, or some of its terms, was unfair and unconscionable; it is not enough to show that, in the eyes of the court, it was unreasonable.

In my judgement a bargain can not be unfair and unconscionable unless one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say, in a way which affects his conscience.

The classic example of an unconscionable bargain is where advantage has been taken of a young, inexperienced and ignorant person to introduce a term which no sensible well-advised person or party would have accepted. But I do not think the categories of unconscionable bargains are limited..." (157)

The learned judge thought that the case should be dismissed because the plaintiffs, who were businessmen, went into the bargain with their eyes open, with the benefit of independent advice, without any compelling necessity to accept a loan on these terms and without any sharp practice by the defendant. On those grounds, he said, there was nothing unfair or oppressive or morally reprehensible about the bargain. (158)

It should perhaps be mentioned here that a contract which is harsh and unconscionable, and therefore impeachable, can be rendered valid by the party of whose weak bargaining power advantage was taken, if he subsequently confirms the transaction or acquiesces in it. He will be deemed to confirm the transaction if after it is concluded, he decides to go on with it after taking independent legal advice or (arguably) after his condition has improved. Acquiescence on the other hand, describes the situation where the plaintiff expressly or impliedly indicates to the other party that he will go on with the transaction despite its unfairness, and the latter in reliance on that indication changes his position in such a way that refusal to enforce the transaction would occasion hardship to him.(159) But the point to note is that

"[Both] confirmation [and] acquiescence must be founded on full knowledge of the facts [of the case] ... and it will be of no avail whilst the plaintiff continues in the same situation as when he entered into the contract..."(160)

In other words, if the plaintiff's position does not improve and he takes a long time to have the transaction set aside, the presumption will be that the same distress which pressed him to enter into the contract prevented him to come forward and assert his right.(161) Thus for instance in Addis v Campbell (162) where a person bought a reversion at a gross undervalue from an heir in distressed circumstances and resold it at a large profit to a sub-purchaser who had full notice of

the original fraud, and the heir being still in distress was induced by the original purchaser to join in and confirm the re-sale, the transaction was set aside as against the sub-purchaser on the re-payment of the price paid on the first purchase.

However what the cases have not clarified is the standard or enormity of the weakness and of the imbalance of the contract, which will need to be proved before the relief can be granted. For instance, where the weakness stems from ignorance, does the plaintiff have to show absolute lack of knowledge or will it suffice if he merely shows that the other party knew more than he did about the subject-matter of the transaction? Similarly, where financial distress is the weakness, what should be the standard of disparity between the parties? Is it enough if the plaintiff shows that he is not a businessman or will he have to go further and show that he was generally not a man of means? In some, if not most, of the cases given above there was a combination of infirmities—senility coupled with lack of business experience or desperate financial distress combined with ignorance and poverty. For example in Slator v Nolan (163) the plaintiff was a reckless and improvident man in what was described by the judge as 'the most miserable state of poverty and destitution' whereas the defendant was 'a shrewd, intelligent man, well versed in legal matters and business'. Relief was granted to the plaintiff against the bargain which was the subject of the case. But there have also been cases where relief was granted although the plaintiff had one handicap.(164) Yet the authorities do not say in clear terms whether one of these is the

general rule and the other, the exception, or indeed whether one handicap will suffice as long as it significantly impairs the bargaining power of the party affected.

Furthermore, it is not clear whether it would have made any difference as regards the result of these cases if it was shown that the plaintiff could have got what he wanted elsewhere at less onerous price and non-price terms. It is possible to argue that since the real issue here is whether or not taking into account the position of the parties and all the terms of the contract, the bargain as struck is fair, it should not matter that the plaintiff knew of alternative sources of what he wanted. On the other hand, it might be asked whether as a matter of policy, an individual who fails to shop around for cheaper sources of credit, for example, and falls into the jaws of a 'loan-shark' should be rescued by the law under the pretext of preventing unfair exchange, even if he suffers from any of the handicaps enumerated in the cases discussed above. Of course the answer must be given in the affirmative because that is clearly the policy of modern consumer statutes, including the Malawi Hire-Purchase Act itself. But the point is that it is not clear whether or not this policy also applies to the application of the doctrine against harsh and unconscionable bargains.

A similar problem surrounds the issue of whether or not the contract itself is unfairly balanced in favour of the party in a strong bargain position. Generally, the position is that granted that one of the parties has weak bargaining power, the contract will be

regarded as being unfair to him if either the price demanded is excessive or inadequate or the non-price terms imposed are unduly onerous on him. In Macaulay v A Schroeder Publishing Co Ltd, for example, the unfairness consisted in the fact that the parties did not obtain mutual advantage from the contract. The agreement was supposed to last for 5 years and be renewable for a similar period if the royalties earned by the plaintiff during the first five-year term exceeded £5,000. Meanwhile the defendants held the exclusive copyright for the whole world in all the plaintiff's compositions during the duration of the agreement; they could terminate the agreement at any time and could assign both the agreement and the copyright without the consent of the plaintiff. On the other hand, the plaintiff had no right to terminate the agreement and could assign it only with the defendants' approval. As already seen, the House of Lords considered these non-price terms unfair and granted the plaintiff relief against the whole agreement.

But to judge fair exchange of a contract on the basis of non-price terms alone as was done here involves gross artificialisation. Ideally price and non-price terms tend to complement each other. Here the plaintiff's remuneration was by way of royalties and he received £50 against the royalties on signing the agreement. But supposing that the sum which he received had been £1,000, for the sake of argument, would it have been defensible to hold the terms of the contract unfair? That point was never considered by Lord Diplock who discussed the doctrine of inequality of bargaining power. But although one can only speculate as to what his lordship's reaction would have been had that been the case,

it is a trite observation that in contracts of this nature a rise in the price offered tends to mitigate the harshness of the other terms of the contract.

Of course it should be observed here that although price has been considered aside from non-price terms in deciding the issue of substantive fairness of the contract, and it has actually been suggested that excessiveness or inadequacy of price per se can be a ground for relief against a harsh and unconscionable bargain (165), common law has no rule as to what constitutes a fair price.(166) Judges decide each case on its facts, having regard in particular to all the circumstances existing at the time the contract was concluded.(167) The test is that, to use the words of Lord Thurlow (168), the price must be so unequal as to produce an exclamation or to put it in the words of Lord St Leonard (169), it must be such as to shock the conscience of the court.(170) Obviously all this does not offer much to the development of consistency in the prevention of unfair exchange through this doctrine.(171)

From this discussion it is clear that the doctrine is surrounded by many uncertainties. In recent years the doctrine has been incorporated into a number of statutes. Now it is intended to examine these statutes to see how they resolve the uncertainties.

a) The Position in the United States

Section 2-302 of the Uniform Commercial Code provides that if a court finds a contract or a clause in the contract to have been 'unconscionable' at the time the contract was made, the court may

refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. This provision represents a jump from the position at common law. Here courts can re-make the contract or refuse to enforce it altogether whereas at common law generally the relief they could give was in the form of refusal to enforce the contract.(172) Besides, it seems that here relief could be granted just on the basis of the unfairness of a clause in the contract. But the Code gives no guidance as to the application of this provision apart from stating that the policy behind it

"... is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power."(173)

Of course at least it is clear from this that mere inequality of bargaining power between the parties is not a ground for relief. But again, it is not clear as to what is to be understood by the words 'oppression and unfair surprise'.

The doctrine of unconscionability is also adopted by the Restatement of the Law (2nd) Contract.(174) But unlike the Uniform Commercial Code, the Restatement makes an attempt to shed some light on the scope of the doctrine. It states that the determination that a contract or contractual term is or is not unconscionable will be made in the light of the setting, purpose and effect of the contract and that factors to be considered

"include weaknesses in the contracting process like those

involved in more specific rules as to contractual capacity, fraud, and other invalidating causes; the policy also overlaps with rules which render particular bargains or terms unenforceable on grounds of public policy".(175)

But by incorporating 'invalidating causes' such as lack of capacity or fraud, here the doctrine seems to cover more ground than was the case under common law.

The Restatement also shows that overall imbalance of the contract as evidenced by 'gross disparity in the values exchanged may indicate that the contract is unconscionable'.(176) Furthermore, inequality of bargaining power can make a contract unconscionable.(177) Of course merely because the parties are unequal in their bargaining positions and/or the inequality results in an allocation of more risks to the weaker party does not render the bargain unconscionable. However where the inequality is gross (178) and the terms of the contract as concluded are unreasonably (179) favourable to the stronger party, that

"... may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms".(180)

This comment seems to suggest that in deciding whether or not the party in a weak bargaining position had alternative sources for the subject-matter of the contract, courts should also find out if

those alternatives would have presented him with a meaningful choice. But more important than that, by including instances where the real issue is absence of agreement between the parties, the comment indicates once again that here the doctrine of unconscionability has got a wider scope than under common law.(181)

However, like the Uniform Commercial Code, the Restatement does not shed light on matters of real darkness. It gives factors whose presence may indicate unconscionability in the bargaining process (182) without actually showing the combination of those factors which will amount to the gross inequality of bargaining power which may justify judicial intervention. Similarly, although it provides that overall imbalance may be a factor in finding that a contract is unconscionable, it does not say what amount of disparity in the exchange would amount to 'overall imbalance'. Finally, it has already been seen that gross inequality of bargaining power coupled with terms which are unreasonably favourable to the party in a stronger bargaining position may be a basis for relief to the weaker party against the transaction. However the Restatement does not make it clear whether that is intended to be the standard combination so that if, for instance, one term of the contract is unreasonably favourable to the stronger party but the inequality of bargaining power between the parties is less than 'gross', no relief will be granted to the weaker party against the contract.(183)

These problems are never solved even by proposed alternatives to the Uniform Commercial Code and Restatement formulations of the doctrine. For instance, section 5.108 of the Uniform Consumer Credit

Code (hereinafter referred to as the 'U3C') adopts the wording of section 2-302 of the Uniform Commercial Code with the difference that the former applies to consumer credit sales, consumer leases and consumer loans.(184) Thus under the U3C the standard of conduct is what might be acceptable not as between knowledgeable merchants (which is the case under the Uniform Commercial Code) but as between a merchant and a consumer.(185)

Section 6.111(3) of the U3C gives a number of factors (186) to be considered when applying section 5.108. Some of those factors are:

- a) gross disparity between the price of the property or services sold or leased and the value of the property or services measured by the price at which similar property or services are readily obtainable in credit transactions by like buyers or lessees;
- b) the fact that the creditor contracted for or received separate charges for insurance which make the sale or loan as a whole unconscionable;
- c) the fact that the respondent has knowingly taken advantage of the inability of the debtor reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement.

The first of these factors is an innovation by the drafters of the U3C and therefore deserves some discussion. Clearly, if inadequacy or excessiveness of the price is to be an important element in the granting of this relief, the bench-mark of what is a fair price must be the ordinary market price of the product or service involved. But the drafters of the Code recognised that in the field of consumer

credit, there is normally no uniform market price for all classes of consumers. The practice is to fix the price of credit according to whether the purchaser is or is not a good risk. Hence the statement that the standard must be 'the price at which similar property or services are readily obtainable in credit transactions by like buyers or lessees'. But the problem is that this assumes that the market is competitive. For although traders may demand higher finance charges the more uncreditworthy a purchaser is, that may not give a good indication of the price at which such purchases would readily obtain credit if to fix the charges actually demanded, traders in fact take advantage of the distress and ignorance of such purchasers. In other words, although the test of disparity of prices introduced by the U3C represents a significant step forward in the development of the doctrine of unconscionability, in fact the test is of limited practical utility.

The National Consumer Act also adopts the doctrine but with the substantive provision worded differently from that of the Uniform Commercial Code, the U3C and the Restatement. This difference arises from the fact that the National Consumer Act was drafted because it was felt that these other formulations of the doctrine do not adequately protect the consumer and lack clarity. Section 5.107(1) of the Act provides that:

"If it is found as a matter of fact that a consumer credit transaction, any aspect of the transaction, any conduct directed against the consumer by a party to the transaction, or any result of the transaction is

unconscionable",

the court shall, inter alia, refuse to enforce the transaction against the consumer or so limit the application of any unconscionable aspect or conduct to avoid any unconscionable result. Then it gives nine factors which the trier of fact must take into account when deciding the matter. Most of the factors are scooped from the Uniform Commercial Code and the UCC except the following:

- a) the degree to which terms of the transaction require consumers to waive legal rights;
- b) the degree to which terms of the transaction require consumers to jeopardise money or property beyond the money or property immediately at issue and
- c) the degree to which the natural effect of the practice is to cause or aid in causing consumers to misunderstand the true nature of the transaction or their rights and duties thereunder.

Again, these factors contribute to proper understanding of the scope of the doctrine. However the real question remains unresolved: is one of these factors enough for relief to be granted, and if not, how many more would be required and in what combination?

Sinai Deutch who has studied the doctrine under the United States law concludes that neither these proposals nor the case-law applying the doctrine offers any meaningful answer to these questions.(187) He therefore suggests as a guideline, that in determining the issue of unconscionability the court should consider the procedural and substantive unfairness of the contract in the light of its

background, setting, purpose and effect.(188) He defines procedural unfairness as meaning 'unfair methods and circumstances created by any one of these elements:

- a) unfair surprise arising from the form of the contract itself or circumstances surrounding it;
- b) high-pressure sales tactics or deception;
- c) absence of meaningful choice;
- d) superiority of bargaining power arising from lack of knowledge, ability, experience or capacity of one of the parties or from special knowledge possessed by the supplier not available to the purchaser and
- e) incorporation of the agreement into an adhesion contract'.(189)

On the other hand, substantive unfairness relates to unfair terms of the contract or unfair results arising from the agreement, foreseeable at the time the contract was made.(190) Although he believes that it is impossible to describe all the instances relating to the terms which can render a contract substantially unfair, he gives five instances which according to him illustrate that type of unfairness:

- a) excessive one-sidedness of the terms of the contract, even though no single term is by itself unconscionable;
- b) gross disparity between the contract price and the value of the subject-matter of the contract, when measured by the price at which similar property or services are readily obtained under similar circumstances;
- c) unfair disclaimers of warranties and limitation of remedies;

- d) waiver of defences in consumer transactions and
- e) provisions which conflict with the dominant purpose of the transaction.

It is the view of Sinai Deutch that the general rule should be that both types of unfairness must be present for a contract or a clause in it to be held as being unconscionable. However a contract or a clause in it can be declared unconscionable where only one type of unfairness is present if that unfairness is extreme. Where both types of unfairness need to be present, he proposes that

"the greater the unfairness of one aspect, the less is required from the other aspect to render such a determination".(191)

But although Deutch believes that his suggestions will offer guidance on the application of the doctrine, in fact the guidelines which he proposes are of such a general nature that one commentator says about them:

"[I]t is surely a little optimistic to think ... that their enactment would make much difference to what he considers the dangerously vague nature of the court's power under the existing provisions".(192)

Firstly, he suggests that both types of unfairness must be present for a contract to be considered unconscionable. But it has been shown that under each type of unfairness he enumerates a number of elements or instances of unfairness. The question then which arises, but on which he sheds no light at all, is which elements from procedural unfairness should be present for any instance of substantive unfairness? For

example, if the seller employs high-pressure techniques and the contract as concluded has an unfair disclaimer (and he does not say as to what is to be understood by the expression 'unfair disclaimer'), will that be enough to make the contract so one-sided as to justify judicial intervention? Secondly, he says that one type of unfairness will suffice if it is in the extreme form. But he does not define the word 'extreme'. And thirdly, he uses such expressions as 'excessive one sidedness', 'gross disparity', 'unfair disclaimer' and 'the dominant purpose' of a contract, which in the absence of adequate explanation offer no real guidance at all.

The English Consumer Credit Act 1974 (193)

This Act also confers on courts power to grant relief against unfair consumer credit agreements. (194) Section 137(1) of the Act provides that if a court finds a credit bargain 'extortionate' it may re-open the agreement so as to do justice between the parties. Such relief may take the form of:

- a) taking account between the parties;
- b) setting aside the whole or part of any obligation imposed on the debtor;
- c) requiring the creditor to re-pay the whole or part of any sum paid under the credit bargain and
- d) altering terms of the agreement. (195)

Under section 138(1) a credit bargain is extortionate if it requires the debtor or his relative to make payments which are 'grossly exorbitant' or otherwise contravenes ordinary principles of fair

dealing. To determine that, the court may take into consideration ingredients including interest rates prevailing at the time the bargain was made and certain factors relating to the debtor and the creditor.(196) The factors relating to the debtor are his age, experience, business capacity and state of health and the degree to which, at the time of making the credit bargain, he was under financial pressure, and the nature of that pressure. As for the creditor, the factors which may be considered are the degree of risk accepted by him, having regard to the value of any security provided by the debtor; his relationship to the debtor and whether or not a colourable cash price was quoted for any goods or services included in the credit bargain.

The application of section 138 is illustrated by the recent case of Davies v Directloans Ltd.(196a) The defendants who were part of a group of companies which engaged in property investment and development, specialised in providing loans to finance purchases of houses from other companies in the group. Rates of interest which they charged were usually higher than those charged by building societies and councils because their source of finance were bank loans at 3% above the bank base rate. Consequently they always persuaded would-be borrowers to get an outside mortgage and made it a term of their agreement that the borrower must satisfy them that he was unable to obtain a loan sufficient to complete the purchase from any other source.

The plaintiffs who were self-employed and had irregular incomes entered into a contract with a company in the group for the purchase

of a house at the price of £20,950, of which £2,500 was paid as a deposit. They had a year in which to find the balance of the purchase price and interest payable on it at the rate of 12% per annum and in the meantime they were entitled to occupation of the house. When it became clear that they could not obtain a mortgage from anywhere else, they executed a legal charge for the loan of £17,450 from the defendants to complete the purchase. The loan was payable with interest at the rate of 21.6% in 120 equal monthly instalments of £334.45. The plaintiffs consulted their solicitor before executing the charge and were aware that the defendants would charge them a higher than usual rate of interest for the loan. When they fell into arrear with repayment of the loan, the defendants began proceedings for possession of the house. However before the hearing the plaintiffs successfully sold the house and discharged their liabilities to the defendants. Thereafter the plaintiffs brought this action against the defendants seeking to have the legal charge reopened on the ground that the loan and its terms of repayment amounted to an extortionate credit bargain within the meaning of section 138 of the Consumer Credit Act 1974 in that the rate of interest was grossly exorbitant and circumstances surrounding the loan contravened ordinary principles of fair dealing. It was held by the High Court that the action should be dismissed because there was nothing in the facts of the case which made the credit bargain extortionate as claimed by the plaintiffs since

a) the plaintiffs had received independent legal advice before executing

- the loan agreement;
- b) they were not under any greater financial pressure than was to be expected for house purchasers;
 - c) the degree of risk accepted by the defendants justified a significantly higher rate of interest than a building society would have charged a borrower with a good repayment record and a steady income;
 - d) although the true rate of interest charged was higher than usual, it was not grossly exorbitant;
 - e) the defendants treated the plaintiffs with forbearance and consideration throughout the duration of their agreement and never took advantage of the plaintiffs' lack of business experience and
 - f) the terms of the loan agreement were reasonable and generous.

The factors mentioned in section 138 are not dissimilar from those which were material to the determination of whether or not a money-loan agreement was harsh and unconscionable under the Money-Lenders Act 1900. (197) Consequently it has been said that the word 'extortionate' here signifies not only that terms of the bargain are unreasonably one-sided, but also that they are so unfair as to be oppressive. (198) However it is not clear how the factors, including any relevant ones which the court may wish to take into account, are to combine for the bargain to be reopened. In Davies v Directloans Ltd it was accepted that the appropriate rate of interest should have been 18% and not 21.6% which the defendant charged. But it was view of the judge that the 3% difference did not amount to what under section 138 could be described

as a 'grossly exorbitant' rate of interest, and viewed in the light of all the circumstances of the case, it fell short of what would make the credit bargain extortionate. But this raises one question. Assuming all the elements of the case to be the same, would a substantial difference in the two rates, of say 30%, have made any difference in the outcome of the case? In other words, would excessiveness of interest on its own be enough for a bargain to be reopened? Under the Money-Lenders Acts an excessive rate of interest in itself could be a basis for relief(199) although there are cases where interest rates of 177%, 160% and 120% were held not to render the money-loan agreement harsh and unconscionable.(200)

Moreover, the factors provided by the Act are only 'to be taken into account' so that it will be for each court to decide in which direction to go once those factors have been established. For example, says Professor Goode, if the interest rate charged is higher than the prevailing rate and it is shown that the debtor was suffering from ill health or was in financial difficulties at the time that the bargain was made, that might influence the court to grant relief on the ground that the combination of these factors, in the absence of an adequate explanation, shows that the debtor must have been imposed upon.(201) On the other hand, depending on how high the rate of interest charged is, it could be said that because of the debtor's condition, he represents a high risk and that, therefore, justifies imposing a higher than usual rate of interest. As already shown above, this was the view of the court

in Davies v Directloans Ltd.

Lastly, it is clear from section 138 that the list of factors given there is not exhaustive and that the court can take into account 'any other relevant considerations'.(202) What these considerations will be will obviously depend on the facts of each case. Clearly, a provision drawn in these terms is necessary if courts are 'to do justice between the parties' without their hands being tied at their backs. But while that is so, the existence of an illimitable class of factors which the court is asked to take into consideration in each case serves to envelop the scope of the doctrine against extortionate bargains in more darkness. No doubt the specification of a number of relevant factors does throw some light on this umbra. But whether that can illuminate the concept well enough to help the establishment of consistency in its application without at the same time narrowing the scope of the jurisdiction itself will to a large extent depend on the number and clarity of the factors specifically mentioned by the Act. The reason for this is that there is always reluctance on the part of the courts to interpret these 'residuary categories' (203) liberally.

That is illustrated by the application of the expression 'harsh and unconscionable' under the Money-Lenders Act 1900. In the cases of Wilton v Osborn (204) and Barret v Corrona (205) decided almost immediately after the Act was passed, it was decided that a money loan agreement could not be re-opened under the Act on the ground that it was harsh and unconscionable unless there was an element of fraud on the part of the creditor. Now although these cases were later overruled (206), the desire to exercise sparingly the jurisdiction against unfair bargains

created by the Act never died completely.(207) As a result by the 1970's uncertainty still surrounded the expression 'harsh and unconscionable' so that although it was frequently referred to in judgements, its scope and application was a matter of controversy.(208) And it is no wonder that the draftsman of the Consumer Credit Act 1974 not only opted for the word 'extortionate' instead but also chose to give some guidelines on when relief was to be granted under this jurisdiction.

Sinai Deutch also makes a similar observation about the doctrine of unconscionability in the United States.(209) When the Uniform Commercial Code was drafted in the late 1940's, the doctrine was neither defined nor were guidelines provided for its application. The hope was that in the course of time, courts would fill in the lacunae. But contrary to that expectation, by mid-1970's the only thing which United States courts had successfully achieved was to state the types of contract to which the doctrine applied. No specific rules had been evolved to guide courts in its application.(210) And it has taken further initiative in the form of the Restatement, the U3C and the National Consumer Act to do that job. But as already seen these proposals have not done all that there is to be done. However as compared to the Consumer Credit Act, it is arguable that these proposals make a more significant attempt to illuminate the mist which surrounds this jurisdiction. By specifying up to nine factors, they help to narrow down the category of 'other illimitable relevant factors' which a court has to consider in deciding whether or not relief should be granted against the contract in issue.

Of course in many,if not most,cases courts will get things right and justice will be done between the parties. However that will be achieved

by following what the judge's instincts show to be just rather than through the guidance of any predetermined rules on how to decide whether or not a bargain is unconscionable. As one learned author observes:

"The criteria which must be employed in categorising a credit bargain as 'extortionate' are themselves difficult to quantify... and it is difficult to see how the courts will be able to give an impression of consistency and certainty".(211)

It has been shown in this chapter that at common law in an appropriate case a court may not give effect to a contract even if it is validly concluded and is binding. Apparently enforcement is refused on the ground that the contract itself or one of its terms is penal, unreasonable or unconscionable. But beneath that terminology it is clear that the real reason for refusing enforcement is that the court considers the contract to involve unfair exchange as between the parties to it. No doubt this jurisdiction is important. However as demonstrated, the rules governing it are riddled with so much uncertainty that its capability to prevent unfair exchange particularly in consumer contracts is limited.

FOOTNOTES

1. 'Procedural handicaps' here refers to elements such as fraud, misrepresentation, duress, etc which negative the existence of mutual consent.
2. For a full discussion of these clauses, see GH Treitel, The Law of Contract; Anson's Law of Contract and Cheshire and Fifoot, The Law of Contract.
3. For a discussion of minimum payment clauses, see: AL Diamond, Introduction to the Law of Hire-Purchase, pp 35-42; AG Guest, The Law of Hire-Purchase, paras 625-641; RM Goode, Hire-Purchase Law and Practice, pp 154-161; JS Zeigel, The Minimum Payment Clause Muddle [1964] CLJ 108; RM Goode, Some Problems of Hire-Purchase Law (1962) Law Journal 216 and JWA Thornely, Hire-Purchase: Minimum Payment and Damages [1968] CLJ 185.
4. Deposit and the sum payable to exercise the option to purchase have been deliberately left out of this equation for the sake of clarity.
5. See Yeoman Credit Ltd v Waragowski [1961] 3 All ER 145 and Financings Ltd v Baldock [1963] 1 All ER 443.
6. Bridge v Campbell Discount Co Ltd [1962] All ER 358.
7. Cooden Engineering Co Ltd v Stanford [1952] 2 All ER 915.
8. See the judgement of Denning LJ in Landon Trust Ltd v Hurrell [1955] 1 All ER 839.
9. [1915] AC 79, pp 87-88.
10. This last rule was stated in the form of a presumption so that if the minimum payment is expressly proportioned to the seriousness of

the breach, it will be difficult to contend that the clause is penal and therefore unenforceable- see: Cooden Engineering Co Ltd v Stanford, supra note 7, p. 928. Per Jenkins LJ

11. GH Treitel, The Law of Contract, 4th ed., pp 663-6
12. Of course it is recognised here that there is still some controversy as to whether the purchaser broke the agreement in Bridge v Campbell Discount supra note 6.
13. This classification is taken from AL Diamond, op. cit.
14. Supra note 7
15. That was also the case in the most recent Australian case of O'dea v Allstate Licensing infra note 35
16. [1938] 1 All ER 511
17. Supra note 6
18. Supra note 8
19. [1964] 1 All ER 527
20. See Phonographic Equipment Ltd v Muslu and Lombank Ltd v Excell infra notes 23 and 29, respectively
21. For that measure of damages, see Yeoman Credit Ltd v Waragowski supra note 5 as modified by Overstone Ltd v Shipway [1962] 1 All ER 52
22. [1963] 3 All ER 566
23. [1961] 3 All ER 626
24. Ibid., p.631
25. It will be recalled that this was one of the rules which were formulated by Lord Dunedin in Dunlop Pneumatic's case supra note 9.

26. Supra note 23, pp 631-2
27. Supra note 6
28. Ibid., pp 396-7. See also the judgement of Lord Morton at p.391
29. [1963] 3 All ER 486
30. The view that Phonographic Equipment v Muslu had decided as a matter of law that a clause imposing a 'mobile' percentage of the purchase price as a minimum payment will be valid in every case was advanced by Winn J in Lombank v Cook [1962] 3 All ER 491. This case was overruled by the Court of Appeal in Lombank v Excell supra note 29.
31. Supra note 19, p.532
32. Supra note 8
33. Supra note 29, pp 489-90 Per Upjohn LJ
34. Supra note 6, pp 396-7 Per Lord Radcliffe
35. [1982-83] 152 CLR 359
36. Ibid., p.460 Per Dean J
37. Ibid., p.383
38. It will be recalled that these factors had a great influence in the cases of Bridge v Campbell Discount; O'dea v Allstate Licensing and Landon Trust Ltd v Hurrell.
39. This summary is made by AG Guest, op. cit., paras. 640-41
40. O'dea v Allstate Licensing System supra note 35, p.400
41. And there seems to be nothing to suggest that that is not the case.
42. For a discussion of forfeiture clauses, see GH Treitel, op. cit., pp 669-71; Geoff and Jones, The Law of Restitution, pp 380-6 and K Hodgkinson, Specific Performance and Deposits (1984) 4 Oxford

Journal of Legal Studies, pp 137-42.

43. Starside Properties Ltd v Mustapha [1974] 2 All ER 567
44. (1873) LR 8 Ch App 1022
45. Holdsworth, The History of English Law, Vol 5, p. 330
46. As will be shown below, this has not been universally accepted as the ratio of the case.
47. [1983] 1 QB 529 (CA)
48. [1983] 3 WLR 203, p. 207
49. [1984] 1 WLR 776, p. 786
50. [1985] 2 WLR 132, p. 146
51. Supra note 48
52. Steadman v Drinkle [1916] AC 275
53. This last point was made in Shiloh Spinners Ltd v Harding [1973] AC 691. See particularly the judgement of Lord Wilberforce at pp. 723-4.
54. [1966] Ch 499, p. 510
55. Starside Properties Ltd v Mustapha supra note 42
56. Supra note 53
57. [1939] 1 KB 724, p. 740
58. Supra note 42
59. Howe v Smith (1884) 27 Ch D 89
60. [1938] Ch 253, pp 262-3
61. Ibid., pp 262-4
62. It may be that in Mussen v Van Dieman's Land these issues were considered but that is not apparent in Farwell J's judgement.
63. [1984] 1 QB 476, p. 490

64. It will be recalled that one of the grounds upon which relief may be granted against a minimum payment clause is that the amount it imposes is more than the greatest loss that could probably arise from the breach upon which the clause is made to become operative.
65. Supra note 63, p. 492
66. For an analysis of this case, see H McGregor, The Law of Damages, 14th ed., paras. 389-396
67. But in view of Lord Wilberforce's judgement in Shiloh Spinners v Harding supra note 53, it is not as novel today.
68. As has already been shown, the earlier case of Mussen v Van Dieman's Land in which the issue was raised in effect established that where the party in breach can not complete the contract, relief against forfeiture will not be available to him. Denning and Somerville LJJ thought that the case of Steadman v Drinkle supra note 52 supported their view. The Privy Council in this case did say that the party in breach could claim relief against forfeiture of money already paid by him under the contract. However specific performance was possible in that case and the party in breach was ready to pay the amount due so that it could be said that the Privy Council felt that it was unconscionable for the other party on the one hand not to allow him to make the completion and on the other, to retain the money already paid by the party in breach under the contract. But more than that, the issue which the Privy Council had to settle in that case was not forfeiture of money already paid but whether specific performance could be decreed against the innocent party. As a result whatever the Privy Council said about forfeiture of money already paid was

clearly obiter dictum.

69. Supra note 63, p. 501
70. [1964] 3 WLR 454
71. Ibid.
72. [1961] 1 QB 445
73. See Goff and Jones, op. cit., p. 350; H McGregor, op. cit. para. 395 and The Afovos infra note 74, pp 478-9
74. Indeed more recently it has been conceded that Stockloser v Johnson "... is authority for the proposition that courts can, in suitable cases, intervene ... to prevent a party insisting on his strict legal rights by reference not only to the circumstances existing at the time the contract is made, as in the case of a penalty strictly so called, but also by reference to the circumstances existing at the time suit is brought". The Afovos [1980] 2 Lloyd Rep 469, p.479 Per Lloyd J
75. It is doubtful that the Court of Appeal in Campbell Discount v Bridge categorically followed Romer LJ's judgement in Stockloser v Johnson-- see Ogus, The Law of Damages, p. 56
76. And here it must be noted that the decision of the Court of Appeal in Campbell Discount v Bridge was later reversed by the House of Lords-- see [1962] AC 600.
77. See B Coote, Exception Clauses; Yates, Exclusion Clauses in Contracts and Lawson, Exclusion Clauses after the Unfair Contract Terms Act 1977

78. Yates, op. cit., pp 33-41
79. For how a party to a contract can acquire knowledge of the terms of that contract, see Clarke, Notice of Contractual Terms [1976] CLJ 51; Anson's Law of Contract, 25th ed., pp 152-8 and GH Treitel, op. cit. pp 137-41.
80. Olley v Marlborough Court [1949] 1 KB 532. See also Thornton v Shoe Lane Parking [1971] 2 QB 163 and Hollingworth v Southern Ferries Ltd [1977] Lloyds Rep 70
81. Of course there is no agreement as to what constitutes 'previous course of dealings'-- Yates, op. cit., pp 49-52
82. See Spurling v Bradshaw [1956] 1 WLR 461, p. 467; Henry Kendall v William Lillico & Sons Ltd [1969] 2 AC 31 and Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd [1973] QB 400
83. Yates, op. cit., p. 48
84. Parker v SE Rly (1877) 2 CPD 416 and Hood v Anchor Line Ltd [1918] AC 837, p.844
85. Thompson v LM & S Rly Co [1930] 1 KB 41. Cf Geier v Kujawa [1970] 1 Lloyds Rep 364, p. 368
86. Parker v SE Rly supra note 84, p. 422 and Chapelton v Barry UDC [1940] 1 KB 532
87. Richardson, Spence & Co Ltd v Rowntree [1894] AC 217
88. William & Wilson v OK Parking Stations Ltd (1971) 17 DLR 243. Cf Watkins v Rymill (1883) 10 QBD 17
89. [1934] 2 KB 394
90. Parker v SE Rly, supra note 84, p.421
91. Anson's Law of Contract, supra note 79, p.63

92. L'Estrange v Graucob, *supra* note 89, pp 405
93. Pearson v Dublin Corporation [1907] AC 35
94. Curtis v Chemical Cleaning & Dyeing Co Ltd [1951] 1 KB 805
95. This is suggested by JR Spencer in *Signature, Consent and the Rule in L'Estrange v Graucob* [1973] CLJ 104.
96. (1978) 83 DLR 400, p.409. This judgement has recently been followed in Tilden Rent-A-Car Co v Chaudra (1984) 150 DLR and the clause involved is the same in both cases.
97. Professor SM Waddams, 49 Canadian Bar Review pp 590-1
98. [1937] QB 400, p.416
99. See the Railway and Canals Act 1854; the Misrepresentation Act 1967 and the Unfair Contract Terms Act 1977
100. Nordenfelt v Maxim Nordenfelt [1894] AC 535; Esso Petroleum Co Ltd v Harper's Garage [1968] AC 269 and Amoco Australia v Rocca Bros (1973) 47 ALJR 681
101. See Van Toll v The SE Rly Co (1862) 12 CB (NS) 75, p.88; Parker v SE Rly Co, *supra* note 84, p.428; Levison v Patent Steam Carpet Cleaning [1977] 3 WLR 90; The Rasbora [1972] 1 Lloyds Rep 645 and John Lee & Son (Grantham) Ltd v Rly Executive [1949] 2 All ER 581, p.584
102. Anson's Law of Contract, *supra* note 79, p.185 which relies on Grand Trunk Rly of Canada v Robinson [1915] AC 740, p.747 and Luditt v Ginger Coote Airways Ltd [1947] AC 233, p.242
103. See Smeaton Hanscombe & Co v Sasson I Setty & Co [1953] 1 WLR 1468; Karsales (Harrow) Ltd v Wallis [1956] 1 WLR 936; Yeoman Credit v Apps [1962] 2 QB 508; Astley Industrial Trust v Grimley [1963] 1 WLR 584 and Charterhouse Credit Co Ltd v Tolly [1963] 2 QB 683

104. See for example, Melville, *The Core of A Contract* (1956) 19 MLR 26
105. In Photo Production Ltd v Securicor Transport Ltd *infra* note 110 Lord Wilberforce described the doctrine as having 'imperfections and of being of doubtful parentage'.
106. He first made that observation in his book Exclusion Clauses, *supra* note 77 and has maintained that view in his most recent writing on this subject: *Unfair Contract Terms Act 1977* (1978) 41 MLR 312.
107. [1964] 1 Lloyd's Rep 446, p.456
108. [1967] AC 361
109. Harbutt 'Plasticine' Ltd v Wayne Tank & Pump Co Ltd [1970] 1 QB 447 and Farnworth Finance Facilities v Attryde [1970] 1 WLR 1053
110. [1980] AC 827
111. *Infra* note 115
112. *Supra* note 108, pp 398-9
113. *Ibid.*, pp 431-2
114. George Mitchell Ltd v Finney Lock *infra* note 115 Per Oliver LJ
115. [1983] 1 All ER 108
116. *Ibid.*, p.119
117. [1983] 3 WLR 163, p.168
118. *Ibid.*, p.169
119. That is also illustrated by the Canadian case of Sperry Rand Canada Ltd v Thomas Equipment (1982) 135 DLR 197.
120. B Coote, *The Second Rise and Fall of Fundamental Breach* (1981) 55 ALJ 788, p.801
121. *Supra* note 108, p.406
122. *Supra* note 110, p.846

123. Ibid., p.851
124. Yates, op. cit., p.277
125. Essay Upon the Law of Contracts, Vol II, p.144
126. Ibid., p.152
127. Ibid., p.146
128. Ibid., p.158
129. Supra note 128
130. Essay Upon the Law of Contracts, Vol II, p.153
131. Alec Lobb Ltd v Total Oil GB Ltd infra note 156 Per Peter Millet
QC132. Fraud in Equity, p.73
133. (1888) LR 40 Ch D 312, p.322
134. Bellot, Bargains With Money-Lenders, p.114
135. Reproduced by Parkes, History of the Court of Chancery, p.501
136. See Poncione v Higgins (1904) 21 TLR 11; Samuel v Newbold [1906] AC 461; Carringtons Ltd v Smith [1906] 1 KB 79 and the more recent Canadian case of Urau v Modern Finance Ltd (1970) 12 DLR 366
137. Tottenham v Emmet 14 WR 3; The Earl of Aylesford v Morris LR 8 Ch 484 and Webster v Cook LR 2 Ch 542
138. Supra note 125, pp 182-3. Powell seems to have scooped this passage from the celebrated dictum on equitable fraud, of Lord Chancellor Hardwicke in The Earl of Aylesford v Janssen (1750) 2 Ves. Sen. 126 reproduced in White and Tudor, Leading Cases in Equity, 8th ed., Vol I, pp 302-21.
139. Sturge, Construction of the Money-Lenders Act 1900 (1906) 22 LQR 203, pp 218-9 and Fraud in Equity, supra note 132, pp 144-5
140. (1888) 15 LR Ch D 679, pp 702-3

141. Trebilcock, for one, uses that name in his article 'The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords', (1976) 26 University of Toronto LJ 359.
142. That is the view of Abraham Coetzee in his unpublished Ph D thesis 'Judicial Control of Unfair Contracts in English and Scots Law', (1980) University of Edinburgh.
143. (1966) 58 DLR 466
144. See also Paris v Machniek (1973) 32 DLR 723
145. (1969) 3 DLR 338
146. Ibid., p.341
147. McKenzie v Bank of Montreal (1975) 55 DLR 641
148. Pridmore v Calvert (1975) 54 DLR 13
149. Cf National Westminster Bank v Morgan [1985] 1 All ER 821, p.830
where Lord Scarman said:
"And even in the field of contract I question whether there is any need in the modern law to erect a general principle of relief against inequality of bargaining power. Parliament has undertaken the task (and it is essentially a legislative task) of enacting such restrictions on freedom of contract as are in its judgement necessary to relieve against the mischief. For example, the hire-purchase and consumer protection legislation ..."
150. Ibid.
151. [1975] 1 QB 326, p.339
152. [1976] 1 Lloyd's Rep 98, p.102

153. This case has been discussed in a great detail by Trebilcock, op. cit.
154. [1974] 1 WLR 1308, p.1315
155. Ibid., p.1316
156. For these elements, see the judgement of Peter Millet QC in Alec Lobb Ltd v Total Oil GB Ltd [1983] 1 All ER 944, p.961 and BE Crawford, [1966] 44 Canadian Bar Review 142.
157. [1978] 2 All ER 489, p.502
158. Ibid., p.503
159. Spry, The Principles of Equitable Remedies, 2nd ed., p.226
160. White and Tudor, op. cit., p.344
161. Kempson v Ashbee (1873) IR 10 Ch 115
162. White and Tudor, op. cit., p.345
163. (1876) IR 11 Eq 367
164. See for instance, Lloyds Bank v Bundy; Mundinger v Mundinger and Pridmore v Calvert supra notes 151,145 and 148, respectively.
165. Cf Wood v Abrey 3 Madd 417 where Vice-Chancellor Leech said:
 "Mere inadequacy of price is of no more weight in equity than at law. If a man who meets his purchaser on equal terms negligently sells his estate at an undervalue, he has no title to relief in equity".
166. White and Tudor, op. cit., p.331. Cf the English Money-Lenders Act 1927 where interest in excess of 48% was prima facie excessive and called for an explanation from the money-lender.
167. See for example, the cases reproduced in Bargains with Money-Lenders supra note 134, pp 185-263.

168. Heathcote v Paignon 2 Broc. CC 175
169. Abbot v Sworde 4 De Gex & Sm 448
170. Cf Butler v Miller (1867) IR 1 Eq 195, p.210 where Walsh MR thought that a ratio of 2:1 between the price demanded and the market price would be acceptable for relief to be granted. However that test has not been universally accepted by the common law.
171. Of course it must be noted here that in money loan cases where the interest demanded was excessive, courts could trim the interest to a reasonable rate, normally 5%-- Bargains With Money-Lenders, supra note 134.
172. Section 2-302 of the Uniform Commercial Code
173. Ibid., Official Comment 1
174. See section 208 of the Restatement of Law (2nd) Contract
175. Ibid., Official Comment (a)
176. Ibid., Official Comment (c)
177. Ibid., Official Comment (d)
178. The Restatement does not define the word 'gross' as used here.
179. Similarly, it does not define the word 'unreasonable' as used here.
180. Supra note 177
181. That observation is supported by B Clark and JR Fonseca, Handling Consumer Credit Cases, p.50. See also Leff, Unconscionability and the Code (1967) 15 U Pa LR 485 and Ellinghaus, In Defense of Unconscionability (1969) 78 Yale LJ 759.
182. Supra note 177
183. And here it is important to note that according to Official Comment

(e), particular terms may be unconscionable even though the contract as a whole is not unconscionable.

184. Section 5-108 of the Uniform Consumer Credit Code
185. Ibid., Official Comment 1
186. Three of these factors seem to have been taken from the Uniform Commercial Code.
187. Unfair Contracts, pp 123-6
188. It will be recalled that this is also the line of the Restatement except that it does not speak in terms of the 'procedural' and 'substantive' aspects of fairness.
189. Unfair Contracts, supra note 187, p.279
190. Ibid.
191. Ibid.
192. Professor SM Waddams (1978) 41 MLR 243 (Review article)
193. See Wilkinson, Extortionate Credit Bargains under the Consumer Credit Act 1974 (1979) 8 Anglo-American LR 240.
194. For a definition of 'consumer credit agreement', see section 8 of the Consumer Credit Act 1974.
195. Section 139(2) of the Act
- 196a. [1986] 2 All ER 783.
196. Ibid., section 138(2)
197. See Meston, The Law Relating to Money-Lenders, 5th ed., pp 153-207
198. RM Goode, The Consumer Credit Act: A Students' Guide, p.336
199. See Samuel v Newbold supra note 136
200. See Parkfield Trust v Portman (1937) Sol J 687; Parkfield Trust v Dent [1931] 2 KB 579 and Mills Conduit Investments v Tattersal

(1939) 56 TLR 209

201. Suora note 198, p.339

202. Section 138(2)(c) of the Consumer Credit Act 1974

203. For instance in Campbell Discount Ltd v Bridge [1962] AC 600, p.626 Lord Radcliffe refusing to apply the doctrine of unconscionability to a case involving a minimum payment clause said:

"'Unconscionable' must not be taken to be a panacea for adjusting any contract between competent persons when it shows a rough edge to one side ..."

204. [1901] 2 KB 110

205. The Times, 16th June, 1902

206. See The Debtor [1903] 1 KB 705

207. See for instance the judgement of Channell J in Carringtons Ltd v Smith supra note 133, pp 84-5.

208. Meston, op. cit., pp 171-197

209. Unfair Contracts, supra note 187

210. Ibid., pp 111-119

211. DJ Stephens, The Consumer Credit Act 1974 (1976) 29 Current Legal Problems 112, p.132

CHAPTER THREECONTROL OF THE QUALITY OF GOODS SUPPLIEDUNDER A CREDIT AGREEMENT

It was shown in the last chapter that although at common law courts can grant relief against unfair transactions, the exercise of that jurisdiction is replete with uncertainties so that it will not be effective to prevent unfair exchange in credit agreements. But there is another weakness. For the relief to be granted, the matter must at least have come before a court of law. That implies at the very least that the consumer must not only know his rights but also that an action must be brought under the agreement so that he can use those rights defensively as a shield against an attempt by the seller to enforce the agreement or offensively to challenge the fairness of the exchange which the agreement entails.

In this Chapter it is intended to show that although the law governing quality of goods supplied under a credit agreement is not indifferent to the problem of fair exchange, it suffers from the same limitation. Its enforcement depends on the willingness of one of the parties to bring an action under the agreement. Moreover, the law is facilitative rather than prescriptive. As a result if any party to the agreement breaks it, the legal consequence of the breach will depend on what the parties can reasonably be considered to have contemplated as the result of such an occurrence. Thus although this law is important to the consumer, its ability to prevent unfair exchange in these agreement

is rather limited.

But before going to the main discussion, there are some preliminary points which must be made. First, quality of the goods supplied under a credit agreement is governed by principles of contract law as well as the rule in Donoghue v Stevenson (1) and its derivatives. But because this work is concerned with contract, discussion of principles of tort law will be kept to a bare minimum. For that reason, although Derry v Peek (2) and Hedley Byrne & Co Ltd v Heller Partners Ltd (3) involve tort law, they are discussed here to the extent that they are concerned with the problem of fair exchange in contracts.(4)

Second, the issue of quality may arise in two ways. The supplier of the goods may have indicated through his words what quality the purchaser should expect or he may have said nothing but the contract itself and all the relevant circumstances surrounding it may show what quality it was intended that the purchaser should get. Although the two overlap in some respects, the principles of law governing them are not exactly the same and therefore they will be discussed separately. For the sake of convenience, the first will be called 'Statement-based' liability and the second, 'Implied' liability. Of course it should be noted here that the principles of statement-based liability discussed in this Chapter can also be used in determining liability with respect to other aspects of a credit agreement such as security, finance charges and terms of the agreement generally.

Third, the contract rules about these two modes of liability are essentially concerned with fulfilment of reasonably created

expectations. They deal with the situation where one party to a contract is made by the other to expect that the subject-matter of the contract will be of a certain nature, quality or value but the latter deviates from the fulfilment of the expectation so created either innocently or carelessly or because he never intended to deliver the performance he made the other to expect. At common law the general rule is that such conduct has no effect on the validity of the contract since a contract is regarded as a bargain in whose creation each party is entitled to use his knowledge, skill and circumspection without any obligation to take care of the interests of the other party. However if the expectation is the cause operative on the mind of the party in whom it is created, to enter into the contract, then the general rule becomes subject to two exceptions. First, where belief by one party in the existence of the disputed fact is created by the misrepresentation of the other party and second, where the existence of that fact constitutes a condition of the contract. Now to the extent that these principles of law ensure that generally a supplier under a credit agreement can not pass to the purchaser performance of the agreement which is different from what the latter has been made to expect by the supplier, it can be seen as to why they are relevant to the discussion of fair exchange in these agreements. For not only do they promote a fair bargaining process but also, in determining whether the purchaser should have had the alleged expectations, they involve approximating values exchanged in the agreement.

3.1 Statement-based Obligations

(a) Misrepresentation

Where a supplier makes a statement about his goods which later turns out to be false, at common law the legal effect of that may depend on whether or not the making of the statement amounts to deceit. To prove that it amounts to that, the purchaser must show that:(5)

- i) the statement was a false representation of fact when made;
- ii) the representation was made with knowledge that it was false or without belief in its truth or recklessly;
- iii) the representation was made with the intention that it should be acted upon by the purchaser or by the class of persons including him, in the manner which caused damage to him and
- v) the purchaser acted on the representation and suffered damage as a result.

Now a few points need to be made here. First, although generally to be guilty of deceit the supplier must have made an affirmative statement, mere non-disclosure can also be actionable as a misrepresentation of fact.(6) Similarly, an expression of opinion may amount to a representation of fact.(7)

Second, knowledge here must be understood to mean a conscious and deliberate propagation of falsehood. Thus if at the time of making the claim about quality, the supplier had honestly forgotten that it was false, it can not be argued that the statement was made fraudulently.(8) Of course it should be emphasized that if a person can not recollect a fact or does not know it, he must say so. If on the other hand he

chooses to make a categoric statement that the truth is one way or the other, he runs the risk of being deceitful. For by saying that the fact was so or not so, he takes upon himself the responsibility of a positive statement upon the faith of which he knows somebody is going to deal for valuable consideration.(9)

Third, if the supplier makes what is a false statement of fact but honestly believing it to be true, that is not a deliberate dissemination of falsehood on his part and therefore can not be deceit. But the ground on which the belief was held and his means of knowledge will be important in determining whether or not the belief was honestly held.(10) Of course lack of reasonable grounds alone, unaccompanied by wilful disregard for the importance of truth will not suffice to constitute deceit.(11) However if the inadequacy of grounds upon which the belief is held is caused by recklessness on the part of the supplier in that he deliberately ignores the truth or does not care whether or not his claim that the goods are of a particular quality is false, he can not legitimately claim to have an honest belief in the truth of the claim.(12) Consequently in the eyes of the law he will have committed fraud just as much as the person who consciously makes a false representation of fact.

Fourth, although the statement must have been communicated to the purchaser and it must have influenced his mind at the time of concluding the agreement (13), it is not necessary that it be the sole influential factor; it could be one of several factors which affected his decision. And finally, because deceit concerns what the defendant knew or believed, the alleged false statement must be interpreted in the way

the defendant understood it when he made it. If it is capable of being understood in more than one sense, then unless he used the ambiguity to deceive the plaintiff, the defendant can only be liable for deceit if he intended the statement to be understood in the sense in which it was false. And it does not matter for this purpose that the more natural and reasonable interpretation is that put upon the statement by the plaintiff and that according to the interpretation, the statement is false to the defendant's knowledge.(14)

From what has been said above it will be seen that deceit is not easy to prove. And that is particularly so because the general view is that deceit is a very grave allegation to make against anyone and that in the absence of clear evidence showing a deliberate lie on the part of the person making the disputed statement, courts tend to be wary of holding that the plaintiff's case has been established. That attitude is illustrated by the case of Derry v Peek (15) where directors of a company represented in a prospectus that the company had the right to use steam in running its trains. Although it was shown that the directors knew that when made the representation was not true, the House of Lords held that the directors were not guilty of deceit because it was not proved that they had deliberately lied when they made the statement.

But there is a suggestion that a misrepresentation of fact may be actionable at common law if it is shown to have been made without reasonable care. That is said to be the result of Hedley Byrne & Co Ltd v Heller Partners Ltd (16) where the House of Lords held that in the absence of a contractual or fiduciary relationship between the parties,

the maker of the false statement will be deemed to have been under the duty to exercise reasonable care when making the statement if there was between him and the recipient of the statement what they called a 'special relationship'.

This relationship was not defined nor was it definitively stated as to when it will be deemed to exist. But it is clear that the pith of the principle of law enunciated in that case is the express or implied assumption of responsibility for the statement by its maker.(17) Thus for the present purposes, the question to be answered is whether that comprehends the situation where a supplier of goods under a credit agreement makes a false statement to the purchaser of those goods in the process of negotiations which ultimately culminate in the conclusion of the credit agreement. In the course of his judgement Lord Devlin did say in one place that:

"... where there is a relationship equivalent to contract, there is a duty of care".(18)

And in another place he also said that where the maker of the statement does not expressly undertake responsibility for the statement, the presence of consideration may be very good evidence that such responsibility has been assumed by him.(19) The implications of that are clear. First, since the relationship most equivalent to contract is contract itself, then a carelessly made representation which causes loss to the representee who relies on it to establish a contractual relationship with the representor should be actionable under Hedley Byrne. Second, persons in the process of negotiating a contract can arguably be called parties in a relationship which is 'equivalent to

contract'. Thus an action must lie whenever 'in the preliminaries one party by making a representation which he ought to have known was false causes loss to the other'.(20) Third, the existence of consideration in the contract induced by the carelessly made representation would justify the implication of a duty of reasonable care on the part of the representor when making the representation.

That was the view of the Court of Appeal in Esso Petroleum v Mardon (21). In that case the plaintiffs let a petrol filling station to the defendant with a representation that its throughput in the third year would be around 200,000 gallons. The defendant thought that the throughput might only be half of that figure but he accepted the plaintiffs' estimate because they appeared to have greater experience in the matter than he had. When the throughput failed to reach the projected mark, the station turned out to be uneconomical and the defendant purported to give up the tenancy as a result. The plaintiffs replied by suing him for arrears of rent. Thereupon the defendant counter-claimed for damages, alleging inter alia, that he had been induced into the tenancy by a negligent misrepresentation about the throughput made by the plaintiffs. The Court of Appeal upheld the defendant's claim. In particular Lord Denning MR said:

"[If a person makes a representation of fact] to another ... with the intention of inducing him to enter into a contract with him, he is under a duty to use reasonable care to see that the representation is correct ... If he negligently gives unsound advice or misleading information or expresses an erroneous opinion, and

thereby induces the other side to enter into a contract with him, he is liable in negligence". (22)

Shaw LJ specifically addressed his mind to the question whether or not Hedley Byrne applies to pre-contractual representations. In his view, he found it difficult to see

"... why, in principle, a right to claim damages for negligent misrepresentation which has arisen in favour of a party to a negotiation should not survive the event of the making of a contract as the outcome of that negotiation. It may of course, be that the contract ultimately made shows either expressly or by implication that once it has been entered into the rights and obligations of the parties are to be those and only those which have their origin in the contract itself.

In any other case there is no valid argument, apart from legal technicality, for the proposition that a subsequent contract vitiates a cause of action in negligence which had previously arisen in the course of negotiations".(23)

But there is a more fundamental reason for holding that a pre-contractual representation which is made without reasonable care should be actionable at common law. As will be shown below, for such a representation to be regarded as a warranty one of the potent factors is the relative positions of the parties. If the representation is about something which the representor ought to know more than the representee,

the representation will be held to be a warranty.(24) Now since the legal effect of holding that a warranty exists is to give the plaintiff a right to sue for damages if the warranty is broken, there is no good reason why he should be worse off because he chooses to base his action for the same statement on misrepresentation.(25)

Remedies For Misrepresentation

i) Damages

It is not clear from the authorities whether if a contract is induced by a misrepresentation the innocent party can bring an action in contract for the misrepresentation. Historically, no such action was available. The victim of a misrepresentation had his remedy in a tort action for deceit even though the misrepresentation in fact amounted to an express term of the contract it had induced.(26) Now although through assumpsit breach of an express term of a contract came to be remediable exclusively by an action on the contract, it does not appear that misrepresentation underwent that transformation as well. On the contrary, it is still thought of as remediable by a tort action, although it is accepted that a misrepresentation renders void or voidable the contract induced by it.(27)

Of course whether the action is in contract or tort is not merely of academic interest; it has a bearing on the amount of damages recoverable. In a contract action for recovery of damages, the plaintiff is entitled to be put in the position he would have been had the defendant correctly performed his obligation.(28) In the words of Villiera J in the Malawi case of Leelasana v Tarmahomed:

"The general rule is that damages for breach of contract are a compensation to the plaintiff for the damage, loss or injury he has suffered through that breach. He is, as far as money can do it, to be placed in the same position as if the contract had been performed".(29)

On the other hand, in tort, the general rule is that the plaintiff is entitled to be put in the status quo ante, that is, he has to be restored to the position in which he was before the tort was committed.(30) As a corollary to that, if an action for misrepresentation is in tort, the plaintiff will only be entitled as a general rule, to his reliance damages whereas in contract he will be entitled to those damages plus expectation damages.

It can be said that the common law does achieve, albeit in a limited way, this contract law result. A person can claim an indemnity for the mere fact that he was induced into the contract by a false representation although the misrepresentation may be of a type which is not actionable.(31) Of course the indemnity does not cover the whole spectrum of damage suffered; it only covers expenses necessarily arising out of obligations created by the contract.(32) Now if fraud or negligence is also proved the effect of the indemnity will be to allow the plaintiff to recover a sum which in theory at least covers both reliance and expectation damages.

ii) Refusal of Specific Performance

At common law a misrepresentation, however described is a defence to an action for specific performance.(33) Specific performance being a

discretionary remedy courts will not grant it unless they are satisfied that the party seeking it has 'clean hands'. Thus if he obtained the contract which he seeks to have specifically enforced by a misrepresentation of fact he may be denied the remedy.(34)

In a credit agreement if the purchaser were to think of availing himself of this defence, his cards would be acceptance of the goods which are the subject-matter of the transaction and payment of their purchase price. He could refuse either to accept the goods or to pay their purchase price. But the supplier has the right to sue for the purchase price as well as for non-acceptance of the goods and since the exercise of that right essentially amounts to requiring the purchaser to specifically perform his part of the agreement, the question is whether the purchaser can use this defence as a shield against that right.

The Hire-Purchase Act does not expressly provide for that kind of situation nor does case-law seem to provide a direct answer for it. Nevertheless there is some ground for using the defence in this way.(35) In the Malawi case of Kharaj v Khan (36) the respondent approached the appellant to purchase a car. He was shown by the latter a receipt which indicated that work had been carried out on the car. In fact the work involved restoration of the vehicle after a serious accident. Subsequently when the respondent failed to pay the first instalment of the price of the car the appellant brought an action against him for breach of contract. The respondent counter-claimed that inter alia the vehicle was not up to warranty; that when delivered it was not roadworthy and that he refused to accept it and in fact returned it to the appellant who received it back. The trial magistrate rejected the

counter-claim but considered the question of misrepresentation on the ground of the respondent's allegation that had he known that the car had been involved in a serious accident, he would not have bought it. The magistrate found that the respondent had entered into the contract on the basis of an alleged misrepresentation by the appellant that the car was in good condition when in fact it had been involved in a serious accident which impaired its roadworthiness and he therefore entered judgement in favour of the respondent.

But the problem is that if the defence is regarded as a species of rescission, then it may turn out to be illusory. The purchaser may find himself unable to use it because rescission would not in the circumstances be possible. And that is exactly what happened in Khara] v Khan. On appeal the trial court judgement was reversed on the ground that the respondent never disaffirmed the contract. In the words of Spencer-Wilkinson CJ:

"... it has been clearly laid down that a contract procured by fraud is voidable at the election of the party defrauded but it remains valid until he has actually disaffirmed it. In the present case, the respondent never disaffirmed the contract upon the ground of fraud but sought to repudiate on other grounds. As far as the fraud was concerned, therefore, the contract remained valid because the respondent had not disaffirmed it".(37)

iii) Rescission

Another option open to the purchaser induced into a credit agreement by misrepresentation by the supplier is to bring the contract to an end, that is, to rescind it. But as indicated by Spencer-Wilkinson CJ above, misrepresentation does not render the agreement void; it merely makes it voidable. It is the innocent party's election to avoid the contract which brings the contract to an end.(38) But although this remedy is important, it is subject to a number of restrictions which may make it of little use to the plaintiff.

Bars to relief for Misrepresentation

1. The Rule in Seddon v NE Salt (39)

In England this rule is no longer applicable by virtue of legislative intervention. However the rule is still law in Malawi and therefore it will be discussed in some detail here. Put in a nutshell, the effect of the rule is that a contract which involves the transfer of rights in other than real property can not be rescinded where the contract itself has been 'executed' and the misrepresentation on the ground of which it is sought to rescind it does not amount to deceit.

The rule has a number of weaknesses which cast doubt on its correctness. Firstly, contracts other than for the sale of real property are not 'executed' so that as applied to them, this word makes little sense.(40) Secondly, there are dicta in a number of cases whose effect is to show unwillingness on the part of courts to apply the rule.(41) Thirdly, and perhaps more important, the rule is incompatible with the facts of Seddon's case itself and the judge's finding in that case.

The facts of the case were that in the course of negotiations for the sale of shares in a company, its net trading loss was represented to be between £200 and £250. On the faith of that representation the plaintiff bought the shares. Subsequently, all the company's shares having been transferred to him, the plaintiff took over running of the company. Because of that he discovered that contrary to ~~the~~ defendant's representation, the loss of the company was much larger than £250. He did inform the defendant about the discovery but instead of taking immediate steps to rescind the contract, he continued to run the company for another three to four months. It was at the expiry of that period that he issued a writ declaring that the contract was not binding and that it ought to be rescinded. He alleged that although the defendant's representation was not fraudulently made, rescission of the contract should be allowed because restitutio in integrum was still possible. However it was held by Joyce J relying on Wilde v Gibson (42), that as the contract was already executed, it could not be rescinded despite the feasibility of restitutio in integrum.

Now although the judge apparently followed precedent set by a higher court, it is clear from his judgement that he considered the plaintiff's case as being without merit.(43) To begin with, because the misrepresentation was not fraudulently made, the contract was only voidable and therefore it was for the plaintiff to repudiate it at the earliest possible moment after discovery of the real magnitude of the company's loss. But contrary to that, as Joyce J himself observed

"... the plaintiff did not do this, but taking possession, he went on treating the property as his own ... for many months, and continued to do so long after the time when he had the information which would lead him, at once to the conclusion that he had been misinformed".(44)

In other words, it can be said that he in fact affirmed the contract through lapse of time. Besides, the judge was not convinced that there had been a misrepresentation on the part of the defendant. In his opinion

"... upon the whole evidence I am not satisfied that there was any representation that induced the plaintiff to enter into the contract. I very much doubt whether there was any misrepresentation at all ... Further, I am not satisfied that the representation made had the effect of causing the plaintiff to enter into the contract now sought to be rescinded ... I think he wanted the business, and that he intended to take the risk whatever it was".(45)

Thus in spite of what the head-note says, rescission was refused in Seddon v NE Salt not because there was no fraudulent misrepresentation or that the contract had already been executed when rescission was sought but because the contract had in fact been affirmed by the plaintiff's conduct and it was doubtful that the defendant had actually misled him.

Moreover there is now clear authority that rescission of a contract for sale of other than real property is still possible months after

performance of the contract by the vendor. In the 1983 Australian case of Leason Pty Ltd v Princes Farm Pty Ltd (46) the plaintiff bought at an auction a filly which was described in the sale catalogue as having been sired by 'Grand Chaudiere'. In fact it had been sired by 'Hail to Success' but neither the defendant nor the auctioneer who sold it on his behalf knew of that error in the catalogue. When some eight months after the purchase the plaintiff discovered the error, he sought immediately to return the horse to the defendant but the latter refused to accept it back. On evidence it was clear that the plaintiff had been induced into the purchase by the innocent misrepresentation about the ancestry of the filly. It was therefore held by Helsham CJ that notwithstanding Seddon v NE Salt, Wilde v Gibson and Angel v Jay, the plaintiff's right to rescind the contract was unaffected by either its performance or by the fact that eight months had elapsed since the conclusion of the transaction. The plaintiff was thus allowed to rescind the transaction and to return the horse to the defendant.

2. Affirmation of the Contract

As indicated by the appeal court decision in KharaJ v Khan (47), rescission may be barred if the party allegedly misled by the misrepresentation upon which it is sought to rescind the contract purports to affirm the contract. It should be recalled that where a contract is rescindable, it is the act of the innocent party in either seeking a court order or intimating to the other party his wish to terminate it that brings the contract to an end. Therefore if the innocent party discovers that he is entitled to rescind the

contract but nevertheless, by word or conduct, evinces an intention to proceed with the contract, he will be regarded as having affirmed the transaction and therefore barred from subsequently rescinding it. For instance in Kharaj v Khan the respondent's failure to elect to terminate the contract was considered to bar him from subsequently repudiating it through refusal to pay the price.(48) And in Seddon v NE Salt it was seen that the fact that the plaintiff continued to run the company for some months after he had discovered that it was not as it had been represented by the defendant was regarded by Joyce J as disentitling the plaintiff from rescinding the contract to buy shares in the company.

Now where affirmation is deduced from lapse of time, there is a problem of setting the time limit. It is desirable that a limit be set beyond which the right to rescind should not be exercisable although all the relevant factors are present. Fairness at least requires that persons who sell goods to the general public should be allowed to plan ahead without the fear that they may have to undo transactions previously concluded on the ground of misrepresentations which they barely remember or of which they may only have constructive knowledge. However this factor can not be dealt with in isolation; other factors concerning the contract will need to be considered as well. The type of product involved is a relevant factor; so too the defect covered up by the misrepresentation. For while some products may still be in a returnable condition months after their purchase, they may be virtually worthless for commercial purposes. Others, on the other hand, may be

capable of retaining that commercial value for a long time after the sale.(49) Besides, while some defects just take a trial run to surface, others will require a relatively longer use to come to light. In the light of that, it can be argued that the plaintiff should be allowed a reasonable opportunity to discover the falsity of the representation made about the goods. Already section 25 of the Malawi Limitation Act provides that where fraud is involved the limitation period of an action 'shall not start to run until the plaintiff has discovered the fraud or could have discovered it'. If this provision were extended to all cases of misrepresentation, it would allow the court to consider not only the complexity of the product but also the nature of the defect concealed in deciding the question of affirmation. As it is, there is no scope for consideration of these factors.

3. Possibility of Restitutio in Integrum

It is a consequence of rescission that each party to the rescinded contract must be put in his status quo ante. Subject to what will be said below, each has to get back what he gave to the other party in performance of the contract. Put differently, the party seeking to rescind a contract for misrepresentation 'must be in such a situation as to be able to put the parties into their original state before the contract'.(50)

Of course it is not the law that a person wishing to rescind a contract should return the product which was the subject-matter of the transaction exactly as it was at the time the contract was concluded.(51) Allowance is made for reasonable deterioration. After

all, in practice it is only after the innocent party has put the chattel to use and realised that it does not perform as well as he had been made to believe that he will elect to rescind the contract. In Harper v Webster (52) decided by the then Federal Supreme Court of Rhodesia and Nyasaland, the appellant bought from the respondent 387 herds of cattle. He was induced to enter into the contract by what the court found to be a fraudulent misrepresentation that the animals were free from disease. Before the truth emerged 66 of the cattle were either slaughtered or sold by the appellant. When he later realised that the respondent had made a false representation about the animals, he brought an action to set the transaction aside, to have the price he had paid refunded and to recover damages. He offered to return the remaining cattle and to pay the value of those which had either been killed or sold. It was held by Clayden FJ that as the appellant had not dealt with the cattle in a way which barred him from rescission and as he could offer substantial restitution, he would be allowed to rescind the contract.

Indeed in enforcing restitutio in integrum the court will take into account the use of the goods while they were in the hands of the party adversely affected by the misrepresentation and the wear consequent upon such use. The court may therefore order restitution on the condition that the representor be compensated for the deterioration of the goods while in such use, it being considered equitable that he should accept the monetary award rather than retain the fruits of his wrong-doing.(53) As Blackburn said in Erlanger v New Sombrero,

"It would be obviously unjust that a person who has been in possession of property under the contract which he

seeks to repudiate should be allowed to push it back on the other party's hands without accounting for any benefit he may have derived from the use of the property or if the property ... has been in the interval deteriorated, without compensation for the deterioration".(59)

In the Canadian case of Wiebe v Butchart's Motor Ltd the plaintiff purchased a used car from the defendant on the latter's representation that the car was a new one. Soon after discovering that in fact the car was a used one, the plaintiff rescinded the contract of sale and later brought an action for damages. However he continued to use the car up to the date of the trial. The question therefore was whether the rescission could stand in view of that. In the British Columbia Court of Appeal it was held that rescission would be allowed on the arrangement that the plaintiff should return the car and receive back its price less an allowance for its use. As Robertson JA put it:

"I am of the opinion that the plaintiff can make restitutio. When rescission is granted a Court of Equity can take account of profits and make allowance for deterioration. The application of the remedy must be moulded in accordance with the exigencies of the particular case. The court must fix its eyes on the goal of doing what is practical and just ..."(55)

4. Jus Tertii

The fourth ground upon which rescission may be barred is if after

the contract a third party acquires proprietary interest in the subject-matter of the contract.(56) Such a party must of course be someone who acquires the chattel without notice of the misrepresentation and for valuable consideration. Thus if knows that the original contract was tainted with a misrepresentation his subsequent acquisition of the goods even for valuable consideration can not stand in the way of rescission.

5. When the Misrepresentation becomes
a term of the contract

A representation made prior to a contract may later become a term of that contract.(57) That may be done by the parties to the contract expressly incorporating it into the contract or by a court subsequently declaring it to be such a term.(58) Once that happens, it is said that the falsity of the representation will be treated as a breach of contract and not a ground for rescinding the contract for misrepresentation.

That is said to be the result of the case of Pennsylvania Shipping v Compagnie Nationale de Navigation.(59) In that case the defendants made certain representations about pipelines, outlets and heating coils of a ship which the plaintiffs intended to charter. The statements were embodied in the charterparty agreement as 'guaranteed'. In fact the representations were false and the plaintiffs ultimately refused to take the vessel. At trial the issue for determination was whether the contract could still be rescinded for misrepresentation even though the

alleged representations had become part of the contract between the parties. It was held by Branson J that the representations having become merged in the charterparty, the question was no longer one of rescission for misrepresentation but of breach of contract. The representations were found to be conditions precedent of the charterparty for whose breach the plaintiffs were held entitled to repudiate the agreement.

It is curious that although this issue had previously come up in litigation, Branson J thought that he was on virgin territory and his judgement can not be reconciled with that in the earlier case. That earlier case is Compagnie Francaise de Chemin Fer Paris-Orleans where a vessel was represented as being 'ready in Liverpool on July 1'. The representations was later incorporated into the charterparty agreement drawn by the parties. On the question whether the representee thereby forfeited his right to rescind the agreement for misrepresentation, Roche J said:

"...inasmuch as the representation is contained in the Charterparty and has become a term and condition of the contract, ... I agree with the answer given ... that the representation does not cease to be a representation because it is also made in the contract ... I hold that there was a representation here and that the plaintiff Company has, unless they have lost it for other reasons, the right or remedy of rescission which exists by equitable rules, and I think by common law rules as well ..." (60)

Because this case was not referred to in Pennsylvania Shipping, the

legal position on this matter is rather unclear. But bearing in mind that a misrepresentation is not necessarily a 'lesser wrong' than breach of contract, the view of Roche J is to be preferred. Indeed to hold otherwise would in some cases produce injustice because if the misrepresentation as incorporated becomes a warranty, the innocent party would be worse off than if it had remained as a misrepresentation.(61)

6) Exclusion of Liability for Misrepresentation

As shown in Chapter 2, at common law a party to a contract can by an appropriately drafted clause limit or exclude altogether his liability under the contract for certain breaches.(62) And it was suggested in Boyd & Forrest v Glasgow & SW Rly (63) that such a clause can be used to deprive the innocent party of the right to rescind the contract for misrepresentation. But it is probable that where the misrepresentation amounts to deceit, the clause may not be enforced.(64) Of course a better view would be to remove the right of the proferens to use an exclusion clause to exclude the other party's right to rescind a contract induced by a misrepresentation. As argued earlier, responsibility for misrepresentation is voluntarily assumed by the representor. Consequently if before the representation is acted upon, he expressly limits or disclaims responsibility for it, that is one thing. However it is a different thing where that is sought to be done by a contractual term. As the effectiveness of that term derives from the operation of the contract, which is itself a result of the misrepresentation of which it is sought to exclude or limit liability, it is logically unacceptable that the innocent party's relief should be

extinguished by such a term.(65)

It is perhaps worthy pointing out here that in England much of the law on misrepresentation was changed by the Misrepresentation Act of 1967. The Act is an implementation of the Tenth Report of the Law Reform Committee.(66) It has six sections but for the present purposes, only four of them will be discussed. Section 1 provides that relief for misrepresentation may still be available to the representee notwithstanding that the misrepresentation has become a term of the contract which it induced or that the contract has been executed.(67) This reverses the effects of Seddon v NE Salt and Pennsylvania Shipping v Compaigne Nationale de Navigation. Section 2 creates liability in damages for non-fraudulent misrepresentation where the representor fails to show that he had reasonable grounds for believing that what he asserted was true. It further enacts that in some cases a court may award damages for a non-fraudulent misrepresentation in lieu of rescission and that such damages will be recoverable independently of any damages awarded for lack of reasonable ground for belief in the truth of what was asserted. Section 3 restricts a representor's reliance on a clause excluding or limiting liability for misrepresentation. Section 4 provides that where a contract for the sale of goods has been induced by a misrepresentation the buyer can not be deemed to have 'accepted' the goods within the meaning of the English Sale of goods (68) unless he has had the opportunity to examine them.

The nature of this work does not allow a detailed discussion of the Misrepresentation Act (69) and for that reason much of what will be said here will be in the nature of general comments. First, it has been noted

above that prior to 1967 it was not clear at common law whether a contract for the sale of other than realty could be rescinded for misrepresentation which did not amount to deceit. The Act does not specifically deal with that problem although it is clear from the words in section 2(2) that 'where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently and he would be entitled, by reason of the misrepresentation ...', that now such a rescission is possible. But the difficulty is that there is nothing here to suggest that it was that uncertainty which was intended to be resolved by these words. On the contrary, it is possible to argue that by using the words 'and he would be entitled ... to rescind the contract', the Act was merely taking cognizance of the pre-existing distinction between contracts which were rescindible on the ground of non-fraudulent misrepresentation and those which were not and not to change the situation (at least insofar as the provision in section 2(2) is concerned).

Second, it has been shown that at common law the position is unclear as regards a clause which seeks to exclude the representor's liability for misrepresentation. The Act does not adequately solve this problem as well. It provides that reliance on an exemption clause generally may be allowed if the proferens satisfies the court that it would be reasonable to allow him to rely on it. Now whether or not reliance would be reasonable is a question of fact to be determined by consideration of a list of factors enumerated in the Unfair Contract Terms Act.(70) However these factors do not show what would be the effect of the fact that the misrepresentation whose liability it is sought to exclude amounts to

deceit or that it was made without reasonable care. Indeed it would be unjust that the question whether a clause excluding liability for an innocent misrepresentation should be enforced should be decided by reference to the same factors which would be relevant if the misrepresentation amounted to deceit or had been made negligently. To quote Lord James in Pearson v Dublin Corporation:

"The protecting clause might be inserted fraudulently ... When the fraud succeeds, surely those who designed the fraudulent protection can not take advantage of it. Such a clause would be good protection against any mistake or miscalculation, but fraud vitiates every contract and every clause in it. As a general principle I incline to the view that an express term that fraud shall not vitiate a contract would be bad in law ..." (71)

Third, it was once thought that section 2(1) imposes liability for misrepresentations made without reasonable care.(72) But it now seems that that speculation was not wholly correct. In the more recent case of Howard Marine v Odgen (73) during negotiations for the hiring of barges, the plaintiffs' manager represented the capacity of the barges to be 1,600 tonnes when in fact it was only 1,055 tonnes. Although the representation was false, it does not appear that it was made fraudulently. When after the defendants had hired the barges they discovered the truth, they refused to pay the hire rent for the barges. The plaintiffs then withdrew the barges and brought an action to recover the outstanding rent. The defendants counter-claimed for damages under section 2(1) of the Misrepresentation Act and for negligent

misrepresentation under Hedley Byrne v Heller Partners. It was held by the majority of the Court of Appeal that since the plaintiffs could not show that their manager had an objectively reasonable ground for disregarding the 1,055-tonne figure in preference for the figure he gave, there was liability under section 2(1). Besides, the plaintiffs were found liable for breach of the common law duty to exercise reasonable care when making representations. It was found that the information sought by the defendants about the capacity of the barges was important and that the defendants had no ready and direct means of establishing its veracity. These factors, said their lordships, together with the relationship between the parties, imposed a duty on the plaintiffs to exercise reasonable care when making representations about the capacity of the barges. Discussing section 2(1) Lord Denning MR said:

"This enactment imposes a new and serious liability on anyone who makes a representation of fact in the course of negotiations for a contract. If that representation turns out to be mistaken, then, however innocent he may be, he is just as liable as if he had made it fraudulently ... [H]e is made liable, unless he proves, and the burden is on him to prove, that he had reasonable ground to believe and did in fact believe that it was true". (74)

Bridge LJ, as he then was, added:

"[T]he liability of the representor [under section 2(1)] does not depend on his being under a duty of care the

extent of which may vary according to the circumstances in which the representation is made. In the course of negotiations leading to a contract the 1967 Act imposes an absolute obligation not to state facts which the representor can not prove he had reasonable ground to believe". (75)

The effect of this case is that although the common law trichotomy of fraudulent-negligent-innocent misrepresentation still subsists in England, to recover damages under the Misrepresentation Act, it is necessary only to prove that the representor had no reasonable ground for believing in the truth of what he stated.

Finally, section 2(2) establishes the new rule that the general effect of misrepresentation is either rescission of the contract or a claim for damages. Now insofar as the innocent party will recover damages only where at common law he might have been allowed to rescind the contract, this rule represents a retrogression. Besides, it is not clear whether where a misrepresentation has been incorporated into the contract as one of its terms, the innocent party can rescind the contract for misrepresentation under section 1 and additionally, claim damages for breach of contract under the general law of contract.

b) The Statement about the Quality of Goods as a Term
of the Credit Agreement

An alternative way of pursuing a false claim made about the quality of goods supplied under a credit agreement is to bring an action for

breach of the agreement. The essence of the action would be that the claim was a term of the credit agreement. But since the statement may have been made by the manufacturer of the goods or a credit broker with whom the purchaser has no contractual relationship, the preliminary task will be to see how to get around the stricture of privity of contract.

1. Agency

An agency may be described as the relationship between persons one of whom expressly or impliedly consents that the other should represent him or act on his behalf and that other person agrees to do so.(76) The one to be represented or on whose behalf an act is to be done is called the principal while the one to represent him or act on his behalf is called the agent. The latter's authority to act for the principal may arise from an express or implied consent by the principal made to the agent or to a third party.

Often manufacturers are involved in the marketing of their products in an active way. Apart from running shops which actually sell those goods to consumers, they may control these out-lets in two other ways, just to mention a few. Firstly, by manufacturing own-brands.(77) Here a retailer markets goods which appear to be his own make but which in fact are designed and produced by somebody else. The goods bear the retailer's brand name and they may be manufactured according to specifications set by him. Yet for all purposes the goods may be the product of an undisclosed manufacturer who agrees to master-mind the success of the brand. Secondly, the retailer may be operating under a franchise. Under this arrangement the owner of a product identified by

a brand name obtains distribution at the retail level through an affiliated dealer without the owner disclosing himself. The dealer has full title to the goods and runs the retail business in his own behalf. However it is the product owner who controls how it is to be merchandised through the merchandise contract under which the retailer as the franchisee agrees to adopt certain policies on pricing, advertising, sales quotas and to buy all his supplies of the product from the franchisor, i.e. the product owner.

In these circumstances it is arguable that for the purposes of the production or sale of the product concerned, the manufacturer and the retailer are either not two separate persons or are tied together by what in fact amounts to an agency relationship. Consequently the marketing of such a product or the making of any claim about its performance and quality by its apparent 'manufacturer' should legally be considered acts of an agent exercising his actual or apparent authority. And as shown in Chapter 5, this contrivance can also be applied to the dealer-finance company-purchaser situation. Of course no case has yet been brought on the basis of this contrivance and there is no indication of what would be the judicial reaction to it. But if the reasoning behind it is accepted, it could make it possible to bring an action in contract against a supplier of goods under a credit agreement for a statement about the goods printed or embossed on the goods themselves or on the wrapper in which they are supplied by their 'manufacturer' on the ground that it was made by someone acting as agent of the supplier.(78) And it would not make any difference for this purpose that the case was one of own-brand or franchisement.(79)

2. The Concept of Collateral Contract

Not all cases of 'non-privity' statements will fit under the concept of agency. As a result the purchaser may have to rely on the concept of collateral contract. It is an established principle of contract law that a statement made in advertisement can amount to a term of the contract made on the strength of that advertisement.(80) If the statement is made by the manufacturer of the goods which are the subject of that ensuing contract or by a credit broker who introduces the purchaser to the supplier of goods under credit agreements, the purchaser could sue on the statement in contract by establishing that there was a collateral contract between him and the maker of the statement.(81)

In Andrews v Hopkinson (82) the plaintiff approached the defendant, a garage proprietor with a view to buying a second-hand vehicle on hire-purchase terms. The defendant assured him that 'It's a good little bus. I would stake my life on it; you will have no trouble with it'. The plaintiff then agreed to hire the car from a finance company to whom the defendant had in the meantime sold it. Subsequently the plaintiff faced a number of problems with the vehicle as a result of which he got injured. It was held that although there was no contractual relationship between the plaintiff and the defendant, the latter was liable in contract for the plaintiff injury because the representation made about the car was a 'collateral warranty' on the faith of which the plaintiff entered into the hire-purchase agreement with the finance company. And explaining the concept of collateral contract in Shanklin Pier v Detel Products Mc Nair J said:

"[There is] no reason why there may not be an enforceable

warranty between A and B supported by the consideration that B should cause C to enter into a contract with A or that B should do some other act for the benefit of A".(83)

And in Wells (Merstham) Ltd v Buckland Sand & Silica Edmund Davies J added:

"As between A (a potential seller of goods) and B (a potential buyer), two ingredients, and two only, are in my judgement required in order to bring about a collateral contract containing warranty: (1) a promise or assertion by A as to the nature, quality or quantity of the goods which B may reasonably regard as being made *animo contrahendi*, and (2) acquisition by B of the goods in reliance on that promise or assertion. [T]he consideration given for the promise [or assertion] is no more than the act of entering into the main contract. Going ahead with that bargain is a sufficient price for the promise [or assertion], without which it would not have gone ahead at all. And a warranty may be enforceable notwithstanding that no specific main contract is discussed at the time it is given ..." (84)

The concept of collateral contract has been used exclusively to recover damages. (85) However conceptually, there is nothing to suggest that it can not also be used as a basis for returning the goods either for a replacement or to have its price paid back to the purchaser. But the fact that such an action will be brought against the manufacturer of

the goods or a credit broker makes it inconceivable that any court of law could allow that the concept be used to return the product to the supplier from whom the purchaser may have obtained it, unless there was a good chance of the supplier obtaining indemnity for that from the manufacturer or credit broker.

3. Incorporation of the Statement into the Credit Agreement between the Purchaser and the Supplier

A third way whereby the purchaser can sue in contract for the falsity of a statement about the goods obtained under a credit agreement made by the manufacturer of those goods or a credit broker is by establishing that the statement was part of the credit agreement between the purchaser and the supplier of the goods. If the latter repeats the statement at the time the agreement is entered into, the purchaser could argue that by so doing, the supplier was not only adopting the statement as his own but also (in the process) making it part of the credit agreement. But even if the supplier does not 'bring in' the statement in this way, there is another way whereby it may be incorporated into the credit agreement.

At common law, where parties have entered into contract, it is open to any one of them to put forward as part of that contract any unsigned writing relating to the subject-matter of the contract. That is normally done where the party introducing the writing wishes to limit or exclude his liability under the contract. Now so long as the writing is not first advanced after the conclusion of the contract and it is shown that the other party had notice of it before the contract was concluded, the

writing may be enforced as part of the contract. (86) Such notice is said to be established if at the time the contract was made the other party had actual knowledge of the existence of the writing or should have known about it as a matter of general knowledge or as a matter of trade knowledge or because his attention was reasonably drawn to it. (87) Of course in both cases, but more particularly in the case of constructive knowledge, the party sought to be charged with knowledge of the writing can not be bound by the writing if it is unusual, varies from previous writing on the matter or if it is inaccessible or is presented in an obscure and misleading way.

It is submitted that the same reasoning ought to be employed with respect to statements about goods made in the context under discussion here. It could be argued that the supplier of the goods knew about the statement because it is common knowledge or trade knowledge that the manufacturer of the goods in issue does (or manufacturers generally do) accompany the goods with such a statement. It could also be argued that the supplier acquired knowledge of the statement through previous dealings in that product. Indeed it may well be that the statement was part of the contract between him and the source where he obtained the goods. Of course as indicated above, if the statement is unusual or uncommon, the purchaser would have to prove that the supplier had actual knowledge of it at the time of concluding the credit agreement.

Of course incorporation of the statement into the credit agreement will not be the end of the matter. It will still have to be determined whether the falsity of the statement should be remedied by an action in contract. And whether it should be so remedied, the answer is said to

depend on whether the statement was made animo contrahendi, that is, with an intention that it should have contractual force. That question will be dealt with below. But here it should be pointed out that in answering the question there is a policy question which has to be made as to whether the supplier under the credit agreement should be allowed to exclude liability for such a statement. For if that was not allowed, the supplier would in effect be made strictly liable for the statement of which he may know nothing. On the other hand, if exclusion of the liability were allowed, there would still be cases where the incorporation advocated here would operate like a booby trap to unwary suppliers. But since suppliers generally will be in a better position to obtain indemnity for damage caused by such statements from makers of the statements, this mode of pursuing pre-contract statements is defensible even if the supplier is not allowed to exclude liability for the statements.

4. Section 17 of the Merchandise Marks Act of Malawi

Finally, the purchaser could also sue on the statement in contract if he can show that it amounts to a false trade description. Section 17 of the Merchandise Marks Act of Malawi provides that any person who sells any goods to which a trade description is applied will be deemed to warrant that the description is true. The full implications of this provision are discussed in Chapter 7. However here it is important to note that a purchaser under a credit agreement can sue for breach of contract under this provision even if the statement is not made by the supplier who supplies the goods to him under the agreement. Of course if

the statement is not printed or embossed on the goods themselves or on the wrapper or container in which they are supplied or on anything attached to the goods, the application of section 17 will be very limited. (88)

Classification of Terms of a Credit Agreement
and the Consequence of breaking those Terms

The Hire-Purchase Act seems to adopt the division of terms of a contract into 'condition' and 'warranty'. Section 11(2) of the Act provides that every credit agreement governed by it shall contain 'any warranties or conditions implied in a contract for the sale of goods under any enactment or under the common law applicable in Malawi'. But there are a number of issues which this provision raises. First, the Act does not define the words 'condition' and 'warranty' and therefore the question is whether section 11(2) is to be understood as also incorporating into the law of these credit agreements the sale of goods law on these two words. Second, the Act does not spell out remedies for breach of warranty and condition so that one wonders whether or not section 11(2) is intended to include remedies provided by the law of sale of goods for these breaches. And it should be mentioned here that the concepts of acceptance and passing of property are crucial to the grant of the remedy for breach of a condition of the contract for the sale of goods. Clearly these concepts do not fit in with credit agreements, thus further illustrating the unsatisfactoriness of section 11(2). Moreover, under the law of sale of goods even where there has been breach of what is clearly a condition of the contract, the

purchaser can elect to treat that as a breach of warranty, and a stipulation can be a warranty even if it is called a condition in the contract and vice versa.(89) Yet there is nothing in the Hire-Purchase Act to show whether or not this too is part of the law of credit agreements. Therefore the discussion which follows should be read subject to these uncertainties.

A purchaser's remedy under the Sale of Goods Act (which unless stated otherwise hereinafter refers to the Malawi Act) for a statement made about the goods which are the subject-matter of the contract for the sale of goods depends on whether the statement can be regarded as a warranty or condition of the contract. The Act also provides that a stipulation may be a condition of the contract for the sale of goods and further states that:

"Whether a stipulation in a contract is a condition ... or a warranty ... shall depend in each case on the construction of the contract; and a stipulation may be a condition, though called a warranty in the contract."

(90)

Because of this fluidity in the demarcation between a warranty and a condition, it is necessary to examine conditions under which a statement will be deemed to amount to a warranty but not a condition.

a) Warranty

The first problem which the nomenclature of the Act raises is that whereas as just seen a stipulation can be a warranty, elsewhere it is stated that a warranty is a type of contract. Section 2(1) of the Act

defines 'warranty' as

"an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract ..." (My emphasis)

Because of this courts have sometimes refused to regard a mere statement of fact as amounting to a warranty unless it was made animo contrahendi or amounted to a separate contract 'accompanying' the main agreement to transfer property in goods.(91)

For instance in the non-sale of goods case of Heilbut v Buckleton where the plaintiff acting on a statement by the defendant that his firm was bringing out a rubber company, bought shares in the 'company', it was held that the defendant was not in breach of warranty when it later transpired that the 'company' was not a rubber company. Although it was generally admitted that it was the defendant's statement which induced the plaintiff to buy the shares, the House of Lords was of the opinion that the statement could be enforced as a warranty only if it amounted to a contract collateral to the contract for the sale of shares. In the words of Lord Haldane:

"The words ... in the conversation proved by the respondent were words which appear to me to have been words not of contract but of representation of fact. No doubt this representation formed part of the inducement to enter into the contract to take shares ... and was embodied in two letters ... But neither in these letters nor in the conversation itself are the words either

expressing or ... implying a special contract of warranty collateral to the main contract, which was one to procure allotment.

It is contrary to the general policy of the law of England to presume the making of such a collateral contract in the absence of language expressing or implying it

My Lords, words which on the face of them appear to be simply representations of fact may, if the context so requires, import a contract of warranty". (92)

Lord Atkinson said:

"But it would not be enough that [the appellant] should have offered to give a warranty as a term of the bargain to take shares. The plaintiff should accept that offer and act upon it so as to make complete the collateral contract". (93)

And Lord Moulton added that to succeed on the ground of breach of warranty, the respondent had to show

"... a contract collateral to the main contract to take shares, whereby the defendants in consideration of the plaintiff taking the shares promises that the company itself was a rubber company. The question in issue is whether there was any evidence that such a contract was made between the parties".(94)

This approach was later adopted by the Court of Appeal in another case which involved sale of goods. (95)

Yet in spite of that, it would be incorrect to suggest that for a statement to be a warranty it must necessarily amount to an accepted offer to contract. Section 13(2) of the Sale of Goods Act is certainly against that view. Indeed, historically, an affirmation of fact sufficed to create a warranty so long as it could be shown that the maker of the statement intended to be responsible for it. Of course it was not necessary to show that he had assumed responsibility for the statement; it was enough that he had induced the contract of sale by warranting to be true facts which were false.

In the case of Chandelor v Lopus the plaintiff bought a stone which the seller represented to be a bezoar stone. In fact the stone was less precious than that. Consequently the purchaser brought an action seeking a remedy for breach of an express warranty. In the Exchequer Chamber the case was rejected on the ground that there was no sufficient evidence to show that what the seller said in fact amounted to an express warranty. The court said:

"The bare affirmation that it was a bezoar stone without warranting it to be so is no cause of action; and though he knew it to be no bezoar stone, it is not material for everyone in selling his wares will affirm that his wares are good ... yet if he does not warrant them to be so it is no cause of action". (96)

This decision does not deny the affirmational nature of an express warranty. Rather it is concerned with the distinction between statements for which the seller assumes responsibility, and therefore on which the

purchaser is entitled to rely, and those on which the purchaser is not entitled to rely because the seller does not assume responsibility for them. And here it is important to bear in mind that the basis of the action for breach of warranty was that the seller had warranted to be true facts which were in fact untrue. At the time when the case was decided the normal way for the seller to show that he assumed responsibility for the truth of what he said was to use the expression 'warrantizando vendit' or words conveying the same meaning. (97) And that this was so is supported by cases decided after breach of warranty came to be remedied by an action in contract. For instance in Pasley v Freeman, Bullen J said:

"... an affirmation at the time of a sale is a warranty, provided it appears on evidence to have been so intended". (98)

In Salmond v Ward Best CJ said:

"No particular words are necessary to constitute warranty ... If a man says, this horse is sound, that is a warranty". (99)

And in what appears to be the first move at common law to define warranty Lord Abinger enunciated that:

"A warranty is an expression or implied statement which the party [making it] undertakes shall be part of the contract, yet collateral to the express object of [that contract]". (100)

In recent times the affirmational nature of warranty has been affirmed by a number of Court of Appeal cases. In Dick Bentley v Harold

Smith a car dealer told a prospective buyer that a certain car had done 20,000 miles only. The buyer then purchased the car. But thereafter he discovered that the statement was false. He then sued the dealer for damages for breach of warranty. It was held that the dealer's statement that the vehicle had done 20,000 miles only was an express warranty for whose breach he was liable in damages. In the words of Lord Denning the then Master of Rolls:

"... it seems to me that if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act upon it, and actually inducing him to act upon it, by entering into the contract, that is prima facie ground for inferring that it was intended as a warranty. It is not necessary to speak of it as being collateral. Suffice it that it was intended to be acted upon, and was in fact acted on".(101)

And in the case of Esso Petroleum v Mardon (102) where the lessor of a filling station had represented that in the third year of its operation the potential throughput of the station would be 200,000 gallons, his lordship also held this projection as amounting to an express warranty for whose breach the lessor could be liable in damages.

But more than that, regarding warranty as a promissory undertaking as suggested by section 2(1) of the Sale of Goods Act gives rise to some conceptual problems. First, a promise or agreement creates two obligations: the obligation to do the promised act and the obligation to compensate the promisee if that act is not done.(103) But the second

obligation is not necessarily an alternative for the first because performance of the promised act can be enforced by a decree of specific performance (104) and it would not lie in the mouth of the promisor to argue that his real intention was not to perform the act but to pay compensation instead. On the other hand, the Act regards warranty as creating only one obligation, that is, to pay damages on its breach. The warrantor is under no obligation to ensure that what he warrants is true and in a sense he can be said merely to undertake to indemnify the other party against the eventuality of the warranty being false.

Secondly, generally, the law protects the expectation interest created by a promise to a much greater degree than the interest created by a statement or affirmation. The promisee is protected even before he has done anything in reliance on the promisor's promise. (105) Besides, by means of specific performance or an award of damages reflecting that performance, his expectations are protected in their entirety, even though they may be greater than any loss or damage actually suffered through reliance on the promise. (106) But warranty will only give rise to liability, as already said, if it is relied on. The warrantor's liability is to pay 'reliance' damages, that is, to make good any loss or damage suffered by the other party as a result of his reliance on the warranty. Thus if the plaintiff never heard of the disputed statement or never purchased the goods involved in reliance on it, there can not be any obligation on the defendant to compensate him on the ground of breach of warranty for any loss arising from the fact that the

statement was false when made.(107)

Warranty as a Lesser Term of Contract

Sometimes warranty is regarded as referring to an undertaking concerning the subject-matter of a contract where the nature of the undertaking goes only to part of the consideration of that contract.(108) In this sense, which is said to be implicit in section 13(3) of the Sale of Goods Act (109), warranty merely stands for a minor breach affecting the subject-matter of the contract which is considered to be adequately compensated by an award of damages rather than by a cancellation of the entire contract.(110) In Harris v Knowles(111) the defendants indicated that the ships which they intended to supply under a contract to the plaintiffs had each the dead-weight capacity of 460 tons. Subsequent to the delivery of the ships the plaintiffs discovered that in fact the dead-weight of each vessel was 360 tons only. In an action for breach of contract it was held that as the discrepancy between the statement and the goods delivered was a difference of degree and not of kind, the non-compliance would be treated as breach of warranty.

The Intelligent Bystander Test

Lastly, it has also been suggested that whether a statement made about the subject-matter of a contract is to be regarded as a warranty does not depend on the subjective intention of the parties but what they can reasonably be seen to have intended. (112) As Lord Denning once put it:

"The question whether a warranty was intended depends on the conduct of the parties, on their words and behaviour,

rather than their thoughts. If an intelligent bystander would reasonably infer that a warranty was intended, that will suffice". (113)

What all this amounts to is that whether or not any statement made about the subject-matter of a contract is a warranty is not something which the parties can determine beforehand. Only courts will be able to make that judgement after reliance has already been placed upon the statement and loss or damage been suffered by the purchaser.

Remedies for Breach of Warranty

Under sections 2(1), 13(2) and (3) the Malawi Sale of Goods Act breach of warranty entitles the innocent party to an action for damages and not to reject (114) the goods which are subject of the contract. Of course the Act does not entirely rule out the possibility of rejection of the goods. Section 53(1) provides that:

"Where there is breach of warranty ... the buyer shall not by reason only of such breach of warranty be entitled to reject the goods ..."

The use of the words 'by reason only of such breach' clearly indicates that there may be cases where a warranty can give rise to the right to reject the goods. One such case is probably where the parties expressly agree that the innocent party should be allowed to reject the goods if the supplier breaches any warranty made about them by the latter.(115)

Moreover, theoretically, such a right may exist even where the contract does not expressly confer it. If warranty is regarded as an undertaking collateral to the contract of sale (116) (and the Sale

of Goods defines that contract as an agreement to transfer property in the goods which are the subject of the sale (117)) breach of warranty ought not to re-vest the property back to the seller because the property passes by virtue of the contract of sale and not the warranty. However where warranty is a lesser term of the contract of sale itself, that argument is difficult to maintain and rejection should in theory be allowed unless breach of the warranty does not deprive the purchaser of a substantial benefit of the seller's performance or can be adequately compensated by an award of damages.

Another argument for wide availability of the right to reject is that the right to damages which is taken to be the basic remedy for breach of warranty will in many cases be illusory, if not wholly useless. For instance, where the purchaser suffers no other harm than the non-compliance of the goods with the warranty, recoverable damages may be so miniscule as not to justify him bringing any action against the supplier for breach of the warranty. And yet the non-compliance may cause irritations and inconveniences which deprive the purchaser of comfortable enjoyment of the goods. Consequently, he must be allowed to get the goods replaced with those which conform with the warranty without running the risk of an action by the supplier for wrongful refusal to accept the goods. As Williston once said:

"... where a buyer buys a horse, warranted sound, the real thing he is after is a sound horse. It is the performance of the warranty, not damages for the breach of it which is in his mind. He does not want an unsound horse, worth half of the money, and the difference in damages".(118)

b) Condition

It was shown earlier that under the Sale of Goods Act a statement made about goods which are the subject-matter of a contract for the sale of goods can amount to a condition of that contract.(119) But unlike warranty, the word 'condition' is not defined by the Act. Since like warranty, the word has different shades of meaning(120), to understand its usage within the context of contracts for the sale of goods, it is important to examine criteria which have been developed by courts to distinguish it from warranty.

i) Contractual Intention

To determine whether a particular stipulation made by one party to a contract amounts to a condition of that contract courts have examined what they regard as the intention of the parties with respect to that statement. The point here is that although the parties may not have expressly designated it as a condition, their conduct (121) may show that they intended that non-compliance with the statement should entitle the innocent party to withdraw from the contract.(122) For example, in Harling v Eddy the defendant put up a heifer for sale by auction. When the animal appeared in the ring no one made a bid owing to its unpromising look. Thereupon the defendant said that there was nothing wrong with it in every respect, and that he would be willing to take it back if it turned out not to be what he said it was. But the heifer died three months later from advanced tuberculosis and the plaintiff who had bought it brought an action against the defendant to recover the price which he had paid for the animal. It was held by the Court of Appeal

that the action should succeed because as Evershed MR said:

"... whether any statement is to be regarded as a condition or warranty must depend upon the intention to be inferred from the particular statement. A statement that an animal is sound in every respect would, prima facie, be but a warranty; but in this case ... the defendant went further: he promised that he would take the animal back if she were no good ...

The defendant's statement having, therefore, included words to the effect, 'If there is anything wrong I will take it back', it seems to me quite plain that the words which he used could not have been intended merely as a warranty; for a warranty would give no right to rejection to the purchaser. The final words involve necessarily a right in the purchaser to reject, to return the animal; and they convert the statement ... from a warranty into a condition".(123)

ii) The Quality of the Statement

The second approach is to look at the quality of the statement itself. If it is so vital that it goes to the root of the contract, it will be regarded as a condition breach of which will entitle the innocent party to repudiate the contract.(124) This approach should be distinguished from that discussed below in that it involves examining the statement itself rather than the consequence of deviation of the goods from it and is theoretically to be applied as at the date when

the contract was made.

In Arcos v Ronaasen timber was bought for the purpose of making cement barrels and was described in the contract as 1/2 inches thick. But when delivered, most of the timber was 9/16 inches thick. As the facts stood, that deviation did not in the least impair the usefulness of the timber for making cement barrels. Indeed an independent umpire found that when shipped, the timber was commercially within and merchantable under the contract. However it was held by the House of Lords that the buyer could reject it for the deviation from the contract description. In the words of Lord Buckmaster:

"The fact that the goods were merchantable under the contract is no test proper to be applied in determining whether the goods satisfied the contract description, and I think the phrase 'commercially' itself shows that while the goods did not in fact answer the description, they could, as a matter of commerce, be so dealt with. But the rights of the buyers under the contract are not so limited. If the article they have purchased is in fact not the article that has been delivered, they are entitled to reject it, even though it is the commercial equivalent of that which they have bought".(125)

Descriptive statements to which reference has been made in this judgement are discussed below.

iii) Effect of Deviation from the Statement

The third approach, which is more recent, is to regard the statement

as being 'innominate' at the conclusion of the contract (126) and then to consider ex post facto the consequence of deviation from it by the supplier in his performance of the contract. If the result is so grave that it deprives the innocent party of a substantial benefit of the contract, then however inconsequential the statement may have been when made, he will be entitled to repudiate the contract.(127)

This approach sounds right for ordinary consumer sales where it is not possible to categorise beforehand pre-contractual statements. Besides, it avoids the elusive canon of contractual intention and does away with the equally arbitrary test of vitalness of the statement. Many would agree that if the effect of a supplier's non-compliance with his word given at the time of making a contract is to deprive the purchase substantially of the benefit of the contract then the purchaser should, if he so wishes, be allowed to repudiate the contract and recover what he had paid thereunder.

However the approach has some serious shortcomings. First, it rids repudiation of its practical utility. This remedy is supposed to be 'self-help', that is, capable of being used by the innocent party without necessarily resorting to court.(128) But following the innominate term approach, the court will always be necessary.(129)

But more than that, it effectively erodes the purchaser's right to repudiate a contract for defective performance. For instance, where the goods which are the subject of a credit agreement are defined by description, that the goods should comply with that description will be a condition of that contract (130) so that even a partial deviation from the description will justify rejection of the goods by the

purchaser.(131) But if the criterion for justifying rejection shifts to the gravity of damage consequent upon deviation from the description, courts may be reluctant to allow repudiation in such a case and be tempted to say that there was no breach of condition at all.(132)

That happened in Cehave v Bremer.(133) A company agreed to sell to buyers 1200 tons of citrus pulp pellets to be used in the manufacturing of cattle food. The contract provided that the goods were to be shipped 'in good condition'. On arrival part of the cargo was found to be severely damaged. An arbitrator found the pellets unmerchantable and not in compliance with the requirement that they be shipped 'in good condition'. However because the pellets were usable to make cattle food almost in the manner they would have been used had that stipulation been complied with, the Court of Appeal held that there was no breach which entitled the buyers to repudiate the contract.

Of course to be fair, it must be said that these criticisms are not confined to the innominate terms approach only. They apply to all the three approaches as well as to the criteria for determining the existence of warranty discussed above. By making the court the final arbiter of whether any statement made about the subject-matter of the contract should entitle the aggrieved party to repudiate the contract, they render the right to elect enshrined in section 13(1) of the Sale of Goods a mere shadow and in effect make repudiation as a self-help remedy nugatory. With respect to many consumer goods that can not be described as a desirable state of affairs because as already said, the loss or damage consequent upon the supplier's deviation from his word may not be such as to justify bringing the matter to court at all.

c) Descriptive Statements

Before discussing remedies provided by the Sale of Goods Act for breach of condition, it is perhaps worthwhile to say something about descriptive statements. Section 15 of the Act states that where there is a sale by description, that the goods should comply with that description will be a condition of the contract of sale. And as shown above, a slight deviation from that description will justify repudiation of the contract by the purchaser of the goods.

Interpreting 'sale by description' under the corresponding provision of the English Sale of Goods Act 1893 in Grant v Australian Knitting Mills, Lord Wright said:

"... there is a sale by description even though the buyer is buying something displayed before him on the counter: a thing is sold by description though it is specific, so long as it is sold not merely as a specific thing, but as a thing corresponding to a description, e.g. woollen undergarments, a hot-water bottle, a second-hand reaping machine ..." (134)

But more recently that seems to have been narrowed down in the House of Lords where it was said:

"The 'description' by which ... goods are sold is ... confined to those words in the contract which are intended by the parties to identify the kind of goods which are to be supplied".(135)

In the Malawi case of Imperial Clothing Co Ltd v Shankar Exports Ltd the plaintiff entered into a contract with the defendant whereby the

latter agreed to supply him with 40,000 yards of printed polyester cotton shirting material. The defendant sent thirty wooden cases to the plaintiff which contained cheap coarse check material completely unsuitable for making shirts. The plaintiff then sued the defendant for breach of contract, alleging inter alia, breach of section 15 of the Sale of Goods Act. The High Court of Malawi found the defendant liable. In the words of Skinner CJ:

"I find that there was a contract for the sale of printed polyester cotton shirting material, that seems to me to be the description of the goods and what the defendant agreed to supply. The defendant was allowed to choose the design but that does not destroy the description of the quality of the cloth any more than if the defendant was allowed to pick its colour ... The evidence shows that the bulk of the cloth supplied was something inferior to ordinary polyester cotton shirting material, indeed even inferior to a stock lot of such material. I find that the implied condition, provided by section 15, was breached to the detriment of the plaintiff".(136)

And in the second case of Chatata Paint & Lacquer v Autocraft Panel Beaters (137) where 15 drums of 568 line thinners were represented by the seller to be of good quality when in fact they were rusty and damaged and the purchaser showed that he had bought them on the strength of the seller's statement, the same judge found that the goods had been sold by description and that therefore there was an implied condition that the paint should comply with that description. Since it did not,

the seller was held to have breached the contract of sale contrary to section 15 of the Sale of Goods Act.

But that the description should have been found to amount to a condition of the contract of sale in both cases is surprising because its role was not the same. In Imperial Clothing the description served to define and identify the contract goods so that in its absence it would not have been possible to know the subject-matter of the agreement.(138) On the other hand, in Chatata Paint & Lacquer the descriptive statement merely referred to goods which had otherwise been identified and agreed upon. Thus applying the judgement of the House of Lords quoted earlier, there should have been a breach of section 15 in the first case and not in the second.

Of course it must be mentioned here that the implication of the meaning placed by the House of Lords on 'sale by description' in that judgement is not wholly convincing. Where a description is used to define what the parties have agreed to deliver and accept, respectively, the purchaser can not accept goods which do not comply with that description by virtue of the agreement between him and the seller and not by virtue of section 15 or any other provision of the Sale of Goods Act.(139) By that agreement he undertakes to accept goods which have been defined by the parties as the subject-matter of their contract.(140) In other words, the point here is that section 15 must be taken to assume that the goods which are the subject-matter of the contract into which the condition created by that provision is to be implied, have otherwise been defined by the parties. Thus it must be understood to provide that where goods which are the subject-matter of a

contract for the sale of goods are otherwise defined by parties to that contract, any description given by the seller of those goods is prima facie a condition. And the expression 'prima facie' is used here because there may be evidence to show that in fact the description is a mere warranty and not a condition of the contract.

This view of section 15 is supported by the case of Andrews v Singer (141). In that case the plaintiffs agreed to purchase from the defendants 'new Singer cars' on terms that 'all conditions, warranties and liabilities imposed by statute, common law or otherwise are excluded'. The defendants delivered a car which had already run some 550 miles and when the plaintiffs sued them for breach of the condition that goods supplied under the contract should correspond with the contract description, the defendants contended that that condition had been excluded by the contract. It was held that that the cars to be delivered under the contract should correspond with the description was not implied into the contract by statute or common law but arose expressly by virtue of the contract itself. Clearly what the court was saying here was that 'new Singer cars' was not a description compliance with which was an implied condition of the contract of sale but a means of definition of the subject-matter of the sale so that what the defendants had broken was their undertaking to deliver the contract goods.

Remedies for breach of Condition

If there is breach of condition, the purchaser may 'reject the goods and treat the contract as repudiated'.(142) What this means is that he can (rightfully) refuse to accept the goods and to pay for them. If the

price is already paid, he can claim it back.

In Mohamed Raza Nathan v Leyland (143) the respondent orally agreed to purchase from the appellant a second-hand car. The agreement stipulated that the respondent should pay a certain part of the purchase price straight away and the balance by monthly instalments, and that although he was to take immediate possession of the vehicle, property in it would remain vested in the appellant until payment of the purchase price was completed. It can just be observed in passing that in Malawi, but for the fact that the agreement was oral, this transaction would clearly be within section 2(1) of the Hire-Purchase Act. The respondent entered into the agreement in reliance on a representation by the appellant that the car was 'in perfect condition'. In fact it was not and much of its woodwork was rotten. When the respondent discovered that defect, he stopped paying instalments of the purchase price of the car and took it back to the appellant. The latter then sued him for the remainder of the price. The respondent counter-claimed for the money already paid under the agreement and for damages, including expenses incurred in repairing the vehicle. It was held, relying on the English cases of Randall v Newson (144) and De Lassalle v Guildford (145), that because of the breach the appellant had to compensate the respondent for the alleged expenses, and return part of the purchase price already paid by the respondent under the agreement less a reduction for the value of the use to which he had put the car while it was in his possession.

Of course the purchaser who rejects goods for breach of condition is generally not under an obligation to return them to the seller. He is merely required to intimate unequivocally to the seller that he refuses

accept them.(146) But while the goods remain in the purchaser's possession, he will at common law be treated as a bailee so that he may be liable for any failure in his duty in that behalf. Besides it should be noted here that apart from rejecting the goods for breach of condition, the purchaser can recover damages for any loss or damage caused to him by the breach. Damages recoverable here cover personal injury (147), damage to property (148) and financial loss.(149)

Repudiation of the Contract and Replacement of the Goods

Repudiation for breach of condition does not terminate the contract ab initio as in the case of misrepresentation. As the late Lord Diplock said in Berger v Gill & Dufus (150), repudiation has the effect of terminating all primary obligations of the parties under the contract which have not yet been performed at the time of the breach. However that does not prejudice the right of the party electing to treat the contract as repudiated to claim damages from the party in breach for any loss sustained as a result of the latter's failure to perform his primary obligations under the contract. Indeed in spite of the repudiation, the party in breach can claim or set off damages for any past non-performance by the innocent party of his obligations before the repudiation.

There are two points which can be deduced from this. As applied to credit agreements what this means is that once the contract has been repudiated, the purchaser is under no obligation to pay future instalments of the hire rent or purchase price and to keep the goods which were supplied under the agreement.(151) However he will still be

liable for any breaches he may have committed prior to the repudiation. (152) The second point is that it confirms the hint given earlier that there is no provision here for the supplier to cure a defective performance of the agreement.

Disregarding legal technicality for a moment, it is common practice that where there is misperformance of a contract by the seller, the purchaser will want to get a conforming performance without bringing the contract to an end. If the performance is curable and the seller is willing to provide the required performance, conforming performance is always given. On the other hand, where the situation is one of non-performance or of misperformance which can not be readily cured, the purchaser can call off the transaction and recover what he may have paid under it. This second situation can properly be called 'rightful' refusal to accept performance proffered by the seller which seems to be recognised by section 37 of the Sale of Goods Act. This provision states that:

"Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right to do so, he shall not be bound to return them to the seller..."

Clearly this provision does not apply to the first situation where the purchaser refuses to accept goods with a view to obtaining a better performance from the seller. All the indications are that what is contemplated here is the case where the innocent party is exercising his 'right to reject the goods and treat the contract as repudiated' (152) for under the Sale of Goods Act, that is the only case where he has the

right to refuse delivery in performance of a contract for the sale of goods.(154) And as it was mentioned at the beginning of this section, the Hire-Purchase Act is silent on this matter.

There is therefore need to deal with the problem of curing a defective performance specifically. The cure could be in the form of either a replacement of the goods or their repair. The latter may be suitable where the imperfection involved is not serious and replacement is either not possible or would be unreasonable. An example in this regard is section 2-508 of the United States Uniform Commercial Code which provides that:

"(1) Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably (155) notify the buyer of his intention to cure and then may within the contract time make a conforming delivery.

(2) Where the buyer rejects a non-conforming tender which the seller had reasonable ground to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender".

Of course as section 2-508(2) suggests, once the conforming performance has been delivered, the parties may have to make adjustments to the price originally agreed upon in accordance with the cure thus made. And the size of the adjustments will depend on the facts of each case.

Loss of the Right to Repudiate

i) Voluntary Waiver and Election

As shown at the beginning, although there has been a breach of condition, the purchaser may not be allowed to repudiate the contract under the Sale of Goods Act. Section 13(1) of the Act provides that:

"Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition ... not as a ground for treating the contract as repudiated".

This provision shows that the right to repudiate may be waived if the purchaser excuses fulfilment of the condition. Of course that will not be possible under credit agreements caught by the Hire-Purchase Act because section 21 of the Act renders of no force or effect waiver of any right under the Act.(156) But if the condition is broken instead of repudiating the contract for the breach the purchaser could choose to retain the goods and simply sue for damages. That would have the effect of saving the contract and all the parties' primary obligations under it. Now since in that case the purchaser would not be giving up his rights but merely choosing to pursue one of them only, that may not be covered by section 21 of the Hire-Purchase Act.(157) But once the election is made, it is irreversible so that the purchaser would have to stick to his action for damages.

ii) Compulsory Election

Secondly, unless there is an express or implied provision to the contrary, the purchaser can not reject the goods and treat the contract as repudiated under the Sale of Goods Act where the contract of sale is not severable and he has accepted the goods which are the subject-matter of the sale or part of them or where the contract is for specific goods the property in which has passed to him.(158) However it seems that this provision can not apply to credit agreements. As will be shown later, as a general rule, these agreements are terminable (159) and as long as the agreement subsists, the purchaser has nothing more than mere possession of the goods supplied under the agreement. Consequently he can neither 'accept' them nor have passed to him the property in them in terms of the Sale of the goods. That was also the view of the Court of Appeal in Farnworth Finance Facilities v Attryde where the hire-purchase agreement was supposed to run for three years but the purchaser sought to terminate it after it had run a small part of that period. Having held that he was entitled to do so, Lord Denning MR said:

"After all [this] was a contract of hiring. The machine [which was the subject-matter of the agreement] was not his until the three years had been completed, and the price paid. Owing to the defects, [he] was entitled to throw up the hiring; to say he would have no more to do with it ..."(161)

iii) Exclusion of Liability

Under the Sale of Goods Act the right to repudiate a contract for breach of condition may also not be exercisable if it is excluded by the contract.(162) But while the Hire-Purchase Act preserves the supplier's right to make such an exclusion, it provides that before he can be allowed to rely on the exclusion clause, he must prove that before the agreement was made, the provision was brought to the notice of the purchaser and its effects made clear to him.(163)

The full implications of this provision are discussed in Chapter 6. But suffice it to say here that the provision does place a useful restriction on the supplier's right to exclude liability for breach of condition. That is well illustrated by the case of Sprite v Tawurai.(164) In that case the defendant purchased from the plaintiff a caravan on hire-purchase terms. When he fell in arrear with instalments of the purchase price of the caravan, the plaintiff brought this action to recover the amount due but unpaid. The defendant counter-claimed that the caravan contained a latent defect in the form of a cracked crowbar which made the caravan substantially unfit for the purpose for which it had been purchased. Clause 8 of the hire-purchase agreement excluded the application of any conditions or warranties except those implied by section 12 of the 1956 Federation of the then Rhodesia and Nyasaland Hire-Purchase Act which corresponds to section 11 of the Malawi Hire-Purchase Act. It was held that the effect of the clause was to exclude all terms except those which in terms of section 12(1) (section 11(1) in the Malawi Act) the parties were not allowed to exclude. However because the plaintiff could not show that he had brought the

clause to the notice of the defendant and explained its effect to him as required by section 12(3) which under the Malawi Act corresponds to the provision now under discussion, it was held that he could not rely on the clause to exclude the implied condition that the caravan was to be reasonably fit for the purpose for which it had been hire-purchased.

Of course even if the procedure laid down by section 11(3) is followed, the exclusion clause may nevertheless not be enforced if for instance, its effect is misrepresented (165) or the clause falls within the rules discussed in Chapter 2 on judicial control of unfair contracts.

3.2 Implied Obligations

As stated at the beginning of this chapter, the expression 'implied liability' is used here to denote the obligation which arises at law because of the existence of certain circumstances in the contractual relationship between a purchaser and supplier of goods. This obligation may arise by virtue of either section 16 of the Sale of Goods Act or the rule in Donoghue v Stevenson. (166) But as already said, this rule will be dealt with briefly. The major concern here is with section 16 which applies to credit agreements by virtue of section 11(2) of the Hire-Purchase Act.

The rule enunciated by Lord Atkin in Donoghue's case was that where a manufacturer sells his goods in a way which indicates that he intends them to reach the consumer in the form in which they leave him and he knows that if reasonable care is not exercised in the preparation or assembly of the goods, injury will be caused to the consumer of those goods or to his property, the manufacturer owes a duty to the consumer

to exercise that care if there is no reasonable possibility that the goods will be examined before being used by the consumer. It should perhaps be mentioned that contrary to what may have been thought once (167), the present view of the law on intermediate examination seems to be that an opportunity for inspection of a dangerous defect, even if successfully taken by A who is injured by it, will not destroy his proximity to B who created the danger or exonerate B from liability to A, unless A was free to remove or avoid the danger in the sense that it was reasonable to expect him to do so. (168)

Clearly when Lord Atkin was propounding this rule, he had in mind makers of goods. However in recent times courts have extended the rule to cover retailers and dealers in goods as well. Their duty has been said to be to exercise reasonable care to ensure that they do not render unsafe goods in which they transact. For instance, in the case of Makwakwa v Oil Company of Malawi the plaintiff took his car to the defendants' filling station where it was filled with what was believed to be petrol. In fact the substance was a mixture of petrol and diesel. As a result the pistons of the vehicle decomposed and various forms of damage were caused to its engine. In a tort action against the defendants to recover damages for the damage, it was held by the High Court of Malawi that the defendants were liable in negligence for the damage because when the fuel arrived at their premises, one of their employees negligently failed to change the coupling of the re-fill pump with the result that an amount of diesel was put into the tank which contained petrol. In the words of Skinner CJ:

"A retailer has a duty not to render goods defective or

dangerous and he is liable for damage caused by the breach of that duty. Again, a retailer owes a duty to the person to whom he supplies goods to warn him of any danger in the goods of which he knows".(169)

And as the last part of the judgement shows, a retailer also owes the consumer a duty to warn him of any danger in the goods of which the retailer has knowledge.(170)

Now what all this implies is that in the law of negligence, a supplier of goods is not under an absolute duty to supply safe goods. This in turn suggests that he is not expected to subject the goods to examination to ensure that they are safe when supplied to the consumer. Indeed considering that should he render them unsafe in the examination process he might be guilty of negligence, he will try as hard as he can to supply them as he received them from his supplier.

a) Section 16 of the Malawi Sale of Goods Act

This provision adopts a different line from that of the law of negligence. But before going into its discussion there are some preliminary points to be made. First, there are not many credit agreement cases on the obligations which arise under this provision. Consequently discussion of those obligations will be based largely on sale of goods cases. Secondly, it is not clear whether or not common law will imply into credit agreements the obligation that the goods supplied should be of a merchantable quality.(171) Similarly, there is doubt as to the exact nature and extent of the obligation relating to the

fitness of the goods which common law will imply into these agreements.(172) In Astley Industrial Trust v Grimley, for example, Pearson LJ thought that one who lets goods on hire-purchase terms assumes some contractual responsibility for the fitness of the goods for the purpose for which the hirer requires them. However he did not make it clear as to what that responsibility was and whether or not the obligation involved was a condition or a mere warranty. He simply said:

"... the existence and extent of this obligation depends upon the contractual intention of the parties, which is to be ascertained from the provisions of the particular agreement and from the relevant facts of the situation in relation to which the agreement was made".(173)

At least Upjohn LJ did say that the seller's responsibility is to ensure that the goods are as fit for the purpose for which they are hired 'as reasonable skill and care can make them.(174) Of course even him too did not show whether or not the obligation is a condition or warranty. Now although this seems to suggest that the seller will be liable only if he would also be liable under the rule in Donoghue v Stevenson, it is possible that the obligation is stricter than that.(175) Indeed the Court of Appeal at least seems to have accepted that a 'congeries of defects' in the goods let under these agreements may render the goods so unfit for their purpose as to justify rejection and repudiation of the agreement by the purchaser.(176)

By contrast, section 16 of the Malawi Sale of Goods Act provides that:

"Subject to this Act and every written law in that

In a way section 16 is no more than a statement of the self-evident principle that the seller must supply the goods upon which the parties have agreed. If the purchaser requires goods capable of fulfilling a certain purpose, the seller can not unilaterally supply different goods in performance of the contract between him and the purchaser.(178) Similarly, where the parties agree on goods of a certain description, those goods are intended to be the subject-matter of the contract and not any other type of goods which the seller may unilaterally choose. Consequently, it sounds curious that the Act should call the seller's obligations in this respect 'implied' conditions liability for whose breach can be excluded by the seller.(179) Secondly, although section 16 distinguishes between fitness for purpose and merchantable quality, the two do overlap as shown by the following judgement of Best CJ in the nineteenth century case of Jones v Bright:

"If a man sells an article, he thereby warrants that it is merchantable- that it is fit for some purpose. If he sells it for a particular purpose, he thereby warrants it fit for that purpose ... Whether or not an article has been sold for a particular purpose is, indeed, a question of fact; but if sold for such purpose, the sale is an undertaking that it is fit."(180)

This is essentially the position under the English Sale of Goods Act 1979. And no wonder that one criticism made against this provision is that it concentrates exclusively on fitness for purpose and does not make it sufficiently clear that other aspects of quality such as

behalf, there shall be no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows-

(a) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgement, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there shall be an implied condition that the goods shall be reasonably fit for such purpose:

Provided that in the case of a contract of the sale of a specified article under its patent or other trade name, there shall be no implied condition as to its fitness for any particular purpose;

(b) where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there shall be an implied condition that the goods shall be of a merchantable quality:

Provided that if the buyer examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed".

The Act also states that an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade and that an express warranty or condition can not negative a warranty or condition implied by the Act unless inconsistent with it.(177)

appearance, freedom from minor defects, durability and safety are equally important.(181) This point will be amplified below.

1) Disclosure of Purpose

If the purchaser discloses in express terms the purpose for which he requires the goods and the credit agreement is concluded on the basis of that disclosure, there will be little difficulty in finding that the supplier was in breach of his obligation to supply the contract goods if the goods that he supplies are unsuitable for the disclosed purpose. But in the majority of cases the purpose will not be expressly disclosed so that it will have to be determined whether or not the supplier should have known it in that it was disclosed by implication. Section 16(a) does not say when a purpose will be deemed to have been disclosed by implication so that as Best CJ said in Jones v Bright quoted above, that is a question of fact. But the view of the courts seems to be that so long as the name of the goods or the way in which they have been asked for points to a particular purpose, that purpose will be deemed to have been disclosed to the supplier so that other factors being present, section 16(a) will apply. Thus in Drummond v Van Ingen the fact that the goods were ordered as 'worsted coatings' was held to be enough to show that the purchaser expected material of the character and quality which would be suitable for making coats. In the words of Lord Herschell:

"It is true that the purpose for which the goods were required was not ... stated in express terms, but it was indicated by the very designation of the goods 'coatings'. I think that upon such an order the merchant

trusts to the skill of the manufacturer, and is entitled to trust to it, and that there is an implied warranty that the manufactured article shall not by reason of the mode of manufacture be unfit for use in the manner in which goods of the same quality of material, and the same general character and designation, ordinarily would be used".(182)

Similarly, in the Malawi case of Imperial Clothing Ltd v Shankar Exports (183) where the defendants agreed to supply to the plaintiff 40,000 yards of what the latter referred to as 'printed polyester shirting material', it was held that the latter had by implication made known to the defendant the particular purpose for which the cloth was required. And in Preist v Last where the plaintiff went into a shop and asked for a 'hot-water' bottle, Collins MR said:

"[I]n the case where the discussion begins with the fact that the description of the goods, by which they were sold, points to one particular purpose only, it seems to me that the first requirement of the subsection, namely, that the particular purpose for which the goods are required should be made known to the seller, has been satisfied".(184)

But the problem is that often these transactions involve three parties. Preliminary negotiations leading up to the credit agreement take place between the purchaser and an intermediary who sells the goods which are the subject-matter of the agreement to the person who actually supplies them to the purchaser under the agreement. Now if, as will probably happen, the purchaser discloses the purpose for which he

requires the goods to the intermediary, there may be a problem to show that the disclosure was made to the supplier in accordance with section 16(a). Consequently, it may not be easy to apply the condition implied by that provision since the condition applies if the disclosure is made to the supplier and, as will be shown below, the purchaser relies on the former's skill and judgement.

Perhaps therefore what is needed is an extension of the provision so that it covers this sort of situation. An analogy to that is section 14(3) of the English Sale of Goods Act which provides that that condition will be implied where the whole purchase price of the goods or part of it is payable by instalments and the goods were previously sold by a 'credit broker' to the supplier who supplies the goods in the course of a business to the purchaser and the latter expressly or impliedly discloses to the credit broker any particular purpose for which he requires the goods. The Act defines 'credit broker' as 'a person acting in the course of a business ... of effecting introduction of individuals desiring to obtain credit to [inter alia] persons carrying on any business so far as it relates to the provision of credit'.(185)

ii) Reliance on the Supplier's Judgement

On the face of it the requirement that the supplier should be liable for failure to supply suitable goods should depend on the purchaser's disclosure of the purpose for which he requires the goods sounds sensible. At the very least, the supplier can refuse to go into the contract on the ground that he does not have goods which could perform

the disclosed purpose or that he does not know whether the goods which he has can perform that function. In other words, it gives him the chance to exercise his skill and judgement in the matter and this is emphasized by the Act actually providing that besides proving that he disclosed the purpose for which he required the goods, the purchaser must also show that the disclosure was made 'so as to show that the purchaser relies on the supplier's skill and judgement'. But in practice this does not make any difference to the liability of the supplier. To begin with, he may not have any expertise on the goods which are the subject of the agreement. As one commentator put it:

"The shopkeeper in these days of prepacked goods, has no room to exercise his skill and knowledge. Who can see inside a lemonade bottle, whether the contents are acid or lemonade ? (186) The shopkeeper's stock is selected for the most part, not by his own skill and knowledge but by what the consumer sees advertised around him ..."(187)

Moreover, even if the supplier has expertise, that may not be of much use to him. Since the disclosure may be made by implication, it may be made without him knowing that it has been made. Besides, section 16(a) uses the words 'so as to show' implying that the purchaser's reliance on the supplier's skill and judgement can be inferred. Furthermore, there is a suggestion that the reliance need not be total or exclusive; so long as it is substantial and an effective inducement which leads the purchaser to acquire the goods, that will suffice.(188) Arguably this suggests that the purchaser could rely on the supplier's skill and

judgement even though the latter does not know about it.

iii) Supply of the Goods under a Patent or Trade Name

Section 16(a) provides that where the goods are asked for by their patent or trade name, there will be no implied condition as to their fitness for a particular purpose. The suggestion here seems to be that by using such a name the purchaser is explicitly not relying on the supplier's skill and judgement to supply goods suitable for the particular purpose.(189) Of course this proviso does not exempt him from supplying goods which will be able to fulfil their ordinary purpose. Indeed it will be a question of fact in every case whether the supplier is covered by the proviso because although a name is technically a patent or trade name, it may nevertheless not be a patent or trade name for the purposes of this proviso. For instance in Bristol Tramways v Fiat Motors (190) where there was a sale of 'Fiat' omnibus, it was held that the proviso did not apply because 'Fiat' had not become a patent or trade name.

Moreover, since the proviso becomes applicable because of the purchaser's apparent non-reliance on the supplier's skill and judgement, where such reliance is clear, it would seem that there will be breach of the duty to supply goods which are fit for a particular purpose even though the purchase is under a patent or trade name. In Baldry v Marshall the plaintiff asked the defendant motor dealers for a motor car which was suitable for touring purposes. The defendants thought that a 'Bugatti car' in which they specialised, would do the job and showed him a sample. The plaintiff ordered the car but when it was delivered, it

proved to be uncomfortable and unsuitable for touring purposes. In an action by the plaintiff to reject the car and recover the money paid for it, the defendants contended that inter alia he could not reject the car because the implied condition that it should be suitable for touring purposes had been excluded by the fact that the purchase had been made under a patent name. Rejecting the defendants' argument Bankes LJ said:

"The mere fact that an article sold is described in the contract by its trade name does not necessarily make the sale a sale under a trade name. Whether it is so or not depends upon the circumstances.... In my opinion the test of an article having been sold under its trade name within the meaning of the proviso is: Did the buyer specify it under its trade name in such a way as to indicate that he is satisfied, rightly or wrongly, that it will answer his purpose, and that he is not relying on the skill and judgement of the seller, however greater that skill and judgement may be ?"(191)

This judgement sounds sensible. When a person goes to a shop and asks for a product without using its trade name he relies no more or less on the seller than when he asks for the same product under a trade name. That he chooses one method and not the other may be fortuitous so that it may be wondered whether as matter of policy, the purchaser's right to a remedy should be made to depend on luck.(192)

iv) The Supplier's Course of Business

A person selling goods will not be under the obligation implied by

section 16(a) unless the goods are of a description which it is in the course of his business to supply. At first sight this would seem to suggest that the goods must be the supplier's usual line. However it seems that the 'course of business' element is intended to protect individuals who dispose of their goods without being involved in a commercial venture. In other words, so long as the supplier is engaged in trade or commerce and the transaction involves disposal of a business asset (whether it is part of his stock-in-trade or not), the sale may be caught by section 16(a) even though it was the first time for him to deal in those goods.(193)

Section 16(b)

1) Description of the Goods

As used here, the word 'description' seems to have a scope as wide as that which it has under section 15 (194) although it is possible for goods to be of a merchantable quality even though they do not comply with the 'description' under which they are supplied within the meaning of that provision. In other words, a credit agreement will attract the obligation that the goods supplied under it be of a merchantable quality if the goods have not been seen by the purchaser and he relies merely on the description for their definition and identification or where the transaction is over the counter and the goods are supplied not merely as specific chattels but as goods corresponding to a description. Of course there is no suggestion that the description must be applied to the goods by the supplier only. Therefore it is possible that words on the package of the goods or used in advertisement by the manufacturer of the goods

will suffice to constitute description within the meaning of section 16(b). Thus in Chatata Paint & Lacquer v Autocraft Panel Beaters (195) where paint was sold as '568 line thinners of good quality', it was held by the High Court of Malawi that there was breach of section 16(b) when the paint turned out to be rusty and damaged.

ii) Merchantable Quality

In discussing this expression, it is important to recognise that under the Sale of Goods Act 'quality' includes the 'state or condition' of the goods.(196) Thus it seems that although goods are chemically and physically in order, they may nevertheless not be of the right quality within the meaning of section 16(b) merely on account of the way in which they have been packed or the description applied to them.(197) Of course although the goods as delivered to the purchaser would be saleable under the description applied to them, they will not be of a merchantable quality if they are unfit for the purpose for which they are ordinarily acquired.(198) But in considering these factors, the court will also look at the price offered for the goods. The point being that even if under the description which they are supplied, the goods are not capable of reasonably fulfilling that ordinary purpose, they may still be of a merchantable quality if that imperfection is traded off with a price reduction. Thus 'merchantable quality' can be seen as a means of approximating value for money. In Australian Knitting Mills v Grant Dixon J expressed this view by saying that goods are of a merchantable quality if they are

"... in such a state that a buyer, fully acquainted with

the facts, and therefore knowing what hidden defects exist and not being limited to their apparent condition would buy them without abatement of the price obtainable for such goods if in reasonably sound order and condition and without special terms".(199)

In the case of Chatata Paint & Lacquer Skinner CJ found that the paint was not of a merchantable quality because

"... the drums [of paint] were in such condition and the contents were of such quality that a reasonable trader would, after a full examination, not accept them in performance of his offer to buy them..."(200)

It is doubtful that the judge in this second judgement intended to suggest that the standard in these cases is one of the reasonable trader; he probably intended to emphasize the 'value-approximation' approach inherent in Dixon J's judgement. And it is perhaps worthwhile to point out here that this approach has been adopted by section 14(6) of the English Sale of Goods Act which provides that:

"Goods of any kind are of merchantable quality ... if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances".

Of course it is important to note that insofar as price is relevant to the determination of quality in these agreements, it has one draw-back. The ultimate price which the purchaser pays in a credit

agreement will in most cases be a compound two items: the cash price of the goods and finance charges imposed on the ground that that price is payable in instalments. And it is known that traders do sometimes appear to reduce the cash price of goods when in fact they recover that reduction through an increase in finance charges. Now if that does happen, any reduction which the supplier may appear to make for imperfections in the goods supplied will not be a good indicator of what quality the purchaser should in fact expect.

iii) Examination of the Goods by the Purchaser

If the purchaser examines the goods before the credit agreement is concluded, the proviso to section 16(b) states that there will be no implied condition that the goods are of a merchantable quality with respect to defects which that examination ought to have revealed. That suggests two things. First, that it is not merely the existence of an opportunity to examine which makes the proviso applicable (201) but the actual examination of the goods by the the purchaser. Consequently, the purchaser can refuse to avail himself of the opportunity to examine the goods without his rights under section 16(b) being affected. Second, that generally where an examination is made, the supplier will not be liable under this sub-section for the presence in the goods of patent defects on the ground that such defects are discoverable just by examining the goods. Thus for example, in Daniels v White & Tarbard (202) and Wren v Holt (203) where a drink was sold which turned out to be contaminated by poison, it was held that an examination of the drink by the purchaser could not bring the proviso into operation because the

examination could not have revealed the presence of the poison in the drink.(204) But it is unclear whether if the purchaser employed an expert to examine the goods, that argument could be used to excuse the supplier from liability for all latent defects in the goods. However it is clear that once an examination has been made, it need not be thorough; a partial examination could still bring the proviso into operation if it could have revealed the defects complained of.(205)

3.3 The Extent of the application of Conditions implied by the Sale of Goods Act

This issue is of practical importance since credit agreements run for months, if not years. The question which is bound to rise therefore is whether these conditions will apply to the whole duration of that period or just part of it. Neither the Sale of Goods Act nor the Hire-Purchase Act seems to have a clear answer to that question. However there are indications that these conditions apply for a 'reasonable time' after the purchaser takes delivery of the goods.(206) For instance in Lambert v Lewis the late Lord Diplock thought that:

"The implied warranty of fitness for a particular purpose relates to the goods at the time of delivery under the contract of sale in the state in which they were delivered. I do not doubt that it is a continuing warranty that the goods will continue to be fit for that purpose for a reasonable time after delivery, so long as they remain in the same apparent state as that in which they were delivered, apart from normal wear and tear.

What is a reasonable time will depend on the nature of the goods".(207)

On the other hand at common law there is one case which suggests that if goods do not last as long as it is reasonable to expect, that will be evidence that they were not of a merchantable quality when sold by the seller. In Jones v Bright (208) the defendant sold to the plaintiff copper for sheathing a ship. This copper was known to last, on average, for four years. But in this case because of intrinsic manufacturing defect, it lasted for four months only. It was held by Best CJ that there was breach of the implied undertaking that the copper would be of a merchantable quality.

Ordinarily, the supplier can impose upon the purchaser under a credit agreement the duty to keep the goods in good repair while the agreement continues to run. But that obligation can only apply to damage caused to the goods by the purchaser, and probably to damage arising from ordinary wear and tear. It can not certainly apply to protect the supplier from damage attributable to his breach of section 16.(209)

3.4 Section 17 of the Merchandise Marks Act

This provision states that any person who sells any goods to which a trade description is applied will be deemed to warrant that the description is true unless the contrary is expressed in writing signed by or on behalf of the seller and delivered at the time of the contract of sale and accepted by the purchaser. The full implications of this provision are discussed in Chapter 7. Here it is intended to concentrate

on the first part of it.

A 'trade description' is defined by section 2 of the Act as any statement, description or other indication, direct or indirect, relating to inter alia, the quantity, standard of quality, fitness for purpose, performance and mode of manufacture of any goods. The provision also states that the use of any figure, word or mark which is commonly taken by the trade to be an indication of any of these aspects will be a trade description within the meaning of the Act. And the word 'sell' is defined to include exposure for sale or have in possession for the purpose of sale or for any purpose of trade or commerce.(210)

Thus where information relating to those aspects is applied to goods which are the subject-matter of a credit agreement, the purchaser may sue the supplier for breach of warranty if the information is false or misleading in a material degree as regard the goods. If the trade description does amount to a condition of the agreement, the purchaser could also repudiate the agreement and reject the goods as already shown. But it should be recognised that the word 'apply' here has a rather narrow meaning; it does not cover trade descriptions which are orally made and applies to trade descriptions made in sales promotion literature subject to some qualifications. Section 2 of the Act defines the expression 'to apply to' as meaning to emboss, impress, engrave, etch or print upon, weave or otherwise work into or annex or affix to. And under section 3(1) a person is deemed to 'apply' a trade description to goods if he

- a) applies it to the goods themselves or
- b) applies it to any covering, label, reel or other thing in or attached

to which the goods are sold or

- c) places, encloses or annexes the goods which are sold in, with or to any covering, label, reel or other thing to which a trade description has been applied or
- d) uses the trade description in any manner so as to be likely to lead to the belief that the goods in connection with which it is used are described by that trade description.

Sub-section (2) further provides that:

"Goods delivered in pursuance of an offer or request made by reference to a ... trade description appearing in any sign, advertisement, invoice, wine list, business paper or other commercial communication shall for the purposes of subsection (1)(d), be deemed to be goods in connexion with which the ... trade description is used".

Similarly, any person who applies to goods any words, name, letter, figure or mark which is likely to lead to the belief that the goods are the manufacture of some person other their real manufacturer, will be deemed to apply a false trade description to the goods.(211)

It is clear from this discussion that the common law together with the Sale of Goods Act, the Hire-Purchase Act and the Merchandise Marks Act does offer the consumer a number of safeguards against unfair exchange in credit agreements. However the protection of these safeguards has many limitations. Firstly, they can only be available if the matter comes to court. In other words, unless at least the consumer is willing to enforce his rights in court, he will not be able to avail himself of the protection offered by this legal regime. Secondly, even

if the consumer is ready to pursue his rights, he may find the protection illusory either because it has been excluded by the supplier or because he is barred from availing himself of it. Consequently, although this body of law represents a useful form of control of contract power to ensure fairness of exchange, the fact that it is facilitative rather than prohibitive makes its utility very limited.

Footnotes

1. [1932] AC 562
2. Infra note 10
3. Infra note 16
4. As will be shown below, misrepresentation vitiates the contract induced by it
5. Langridge v Levy (1837) 150 ER 1456
6. Schneider v Heath (1813) 170 ER 1462
7. Bisset v Wilkinson [1927] AC 177, p. 182 and Edgington v Fitzmaurice (1885) 29 Ch D 459, p. 485
8. Armstrong v Strain [1951] 1 TLR 856, p.871. Affirmed by the Court of Appeal in [1952] 1 KB 232
9. Kerr on Fraud and Mistake, 17th ed., p. 17
10. Derry v Peek [1886-90] All ER Rep 1, p.2
11. Ibid., pp 19 and 20
12. JG Fleming, The Law of Torts, 5th ed., p.621
13. Cf Horsfall v Thomas (1862) 158 ER 813, p.817
14. Akerhielm v De Mare [1959] AC 789, p. 805 and Smith v Chadwick [1882] 20 Ch D 27, pp 79-80
15. Supra note 10
16. [1964] AC 465
17. Ibid., p. 529
18. Ibid., p. 530
19. Supra note 17
20. Weir, Liability For Syntax [1936] CLJ 216, p.220
21. [1976] 2 WLR 586, p. 595 and Howard Marine v Ogden infra note 73

22. This decision is supported by two further Commonwealth cases of Capital Motors v Beecham [1975] 1 NZLR 576 and Sealand of the Pacific v Ocean Cement (1973) 33 DLR 625. But Cf MLC v Evatt [1975] AC 793 and Lambert v Lewis [1980] RTR 152, p. 183
23. Esso Petroleum v Mardon *supra* note 21, p. 607
24. *Ibid.*, p. 593; Dick Bentley Ltd v Harold Smith (Motors) Ltd [1965] 2 All ER 65 and Oscar Chess Ltd v Williams [1957] 1 All ER 325
25. Greig, *Misrepresentation and Sale of Goods*, 87 LQR 179, p. 203
26. Holdsworth, A History of English Law, vol. 8, pp 67-70
27. See section 59(2) of the Malawi Sale of Goods Act
28. *Ibid.*, sections 51 and 53
29. Civil Cause No. 1103 of 1980 (Unreported)
30. McGregor on Damages, 14th ed., para. 10
31. GH Treitel, The Law of Contract, 4th ed., p.239
32. For the difference between damages and indemnifiable loss, see Whittington v Seale-Hayne (1900) 82 LT 49
33. Anson's Law of Contract, 24th ed., 239
34. Lamare v Dixon (1837) LR 6HL 414
35. The Canadian case of Pomehuichuk v Gale [1950] 2 WWR 66 (Manitoba) held that the defence is available at least against an action for the price under a provision similar to section 49 of the Malawi Sale of Goods Act.
36. (1923-60) African Law Reports (Malawi Series) 381
37. *Ibid.*, p. 387
38. Clough v London & NW Rly Co (1871) LR 7 Ex 26, p. 34
39. [1905] 1 Ch 326. For a detailed discussion of the case, see HA

Hammelman, 55 LQR 90.

40. Cf Long v Lloyd [1958] 2 All ER 402
41. Lever Bros v Bell [1950] 1 KB 671, p. 695; Armstrong v Jackson [1917] 2 KB 822, p. 825 and Leaf v International Galleries [1950] 2 KB 86, pp 90 and 91
42. [1843-1860] All ER Rep 494, p.502 Per Lord Campbell
43. And according to Cheshire and Fifoot, that seems to be his major reason for denying rescission in that case: The Law of Contract, 6th ed., p. 251
44. Supra note 39, p. 334
45. Ibid., pp 334-5
46. [1983] 2 NSW 381, discussed in (1984) 58 ALJ 523
47. Supra note 36
48. In Long v Lloyd supra note 40, it was held that the plaintiff's continued use of the lorry, for barely a week, after he discovered that its condition had been misrepresented to him by the seller precluded him from returning it to the latter in rescission of the contract of sale.
49. See for instance, Leason Pty Ltd v Prince Farm Pty Ltd supra note 46
50. Clarke v Dixon 120 ER 463, p. 466
51. For example, in the Canadian case of McKinnon v Brockington (1921) 60 DLR 303 restitutio in integrum was held to be possible even though the purchaser had made repairs to the goods after their purchase
52. (1956) Rhodesia and Nyasaland LR 10

53. Cheshire and Fifoot, op. cit., p. 247
54. (1878) 3 App Cas 1218, p.1278
55. (1949) 4 DLR 838, p. 840
56. It should be noted here that sale by the purchaser of goods which are the subject of a credit agreement will give the other party under the agreement the right to sue the purchaser for breach of the agreement,
57. See section 6(1) of the Hire-Purchase Act
58. Bannerman v White (1861) 140 ER 685
59. [1936] 2 All ER 1167
60. (1919) 1 Ll LR 235, pp 237-8
61. Cf section 1 of the English Misrepresentation Act
62. L'Estrange v Graucob [1934] 2 KB 3
63. (1915) SC (HL) 20
64. Pearson v Dublin Corpn [1907] AC 351, p. 362
65. Greig, op. cit., pp 201-2
66. (1962) Cmd 1782
67. Cf Seddon v NE Salt and Compagnie Francaise de Chemin Fer supra notes 39 and 60
68. See section 35 and 36 of the Malawi Sale of Goods Act
69. For a detailed discussion of the Act, see PB Fairest [1967] CLJ 239; PS Atiyah and GH Treitel (1967) 30 MLR and Cheshire and Fifoot, The Law of Contract, 9th ed., pp 260-62 and 276-9.
70. Section 11 and Schedule 2 of the English Unfair Contract Terms Act
71. Supra note 64
72. Anson's Law of Contract, supra note 33, pp 236-7

73. [1978] 2 All ER 1134
74. Ibid., p. 1142
75. Ibid., p. 1145
76. Bowstead on Agency, 13th ed., p. 1
77. M Guirdham, Marketing: The Management of the Distribution Channels, PP 40-79
78. And it should be noted here that the rule relating to the law of principal and agent is saved by section 59(2) of the Malawi Sale of Goods Act.
79. It is suggested that this idea could also be used with respect to rescission for misrepresentation.
- 79a. For a general discussion of this point, see AG Guest, The Law of Hire-Purchase, pp 365-373
- 79b. Cf Campbell Discount Co Ltd v Gall [1961] 1 QB 431
80. Carlill v Carbolic Smoke Ball Co [1893] 1 QB followed by the Canadian case of Goldthorpe v Logan [1943] 2 DLR 519
81. For a discussion of 'collateral contract', see KW Wedderburn [1959] CLJ 58.
82. [1956] 3 All ER 422
83. [1951] 2 All ER 471, p. 472. See also Murray v Sperry Rand Corpn (1979) 96 DLR 113
84. [1965] 2 QB 170, p. 180
85. See also Webster v Higgin [1948] 2 All ER 127; Brown v Sheen & Richmond Car Sales Ltd [1950] 1 All ER 1102; Smith v Spirling Motors Bodies Ltd, The Times Nov 10, 1961 and Yeoman Credit Ltd v Odgers [1962] 1 WLR 215. But Cf Lambert v Lewis supra note 22, p. 181

86. Parker v SE Rly Co (1877) 2 CPD 416, p. 423 and Roscorla v Thomas (1842) 3 QB 234
87. For a discussion of how notice may be acquired, see M Clarke [1976] CLJ 51.
88. The Malawi Merchandise Marks Act, section 3(1)(d), (2) and (4)
89. The Malawi Sale of Goods Act, section 13
90. Ibid., section 13(2)
91. Benjamin, A Treatise on the Law of Sale of Personal Property, 8th ed., p. 166
92. [1913] AC 30, pp 36-7
93. Ibid., p. 44
94. Ibid., p. 47
95. Routledge v McKay [1954] 1 WLR 615, p. 620
96. (1603) 79 ER 3, p. 4
97. Williston on Sales, Revised ed., vol I, para. 195
98. (1798) 100 ER 450, p. 453. It is generally thought among academics that what Bullen J meant here was 'intention to make a definite statement of fact calculated to induce the purchaser' and not animus contrahendi: Williston on Sales, supra note 97, para. 198 and Waddams, Products Liability, p. 4.
99. (1824) 172 ER 96
100. Chanter v Hopkins (1834) 150 ER 1484, p. 1487
101. [1965] 2 All ER 65, p. 67. But Cf Lambert v Lewis [1979] RTR 61, pp 93-4
102. [1976] 2 WLR 583, p. 593
103. Salmond and Winfield, Principles of the Law of Contracts, p. 29 et

- seq.104. The Malawi Sale of Goods Act, section 51(1)
105. Note in this respect the contract remedy for anticipatory breach of contract.
106. Atiyah, Promises, Morals and Law, pp 16 and 163
107. See for instance, Lambert v Lewis supra note 101
108. Refer to the discussion of 'innominate' terms which follows below
109. Benjamin, op. cit., p. 69
110. See Bettini v Gye (1876) 1 QBD 183 and Heyworth v Hutchinson (1876) LR 2 QB 447
111. [1917] 2 KB 606, p. 610
112. Promises, Morals and Law supra note 106, p. 15
113. Oscar Chess Ltd v Williams [1957] 1 WLR 370, p. 379. But Cf Sealy [1965] CLJ 178
114. It seems that 'rejection' can only be justified if it is done with a view to terminating the contract because for instance, section 13 of the Malawi Sale of Goods Act speaks of the 'right to reject the goods and treat the contract as repudiated'.
115. For instance, Head v Tattersall (1871) 7 LR Exch 7 and Harling v Eddy infra note 123
116. As does the Malawi Sale of Goods Act, section 2(1)
117. Ibid., section 3(1)
118. S Williston, Rescission for Breach of Warranty 16 Harv. LR 465, p. 472
119. The Malawi Sale of Goods Act, sections 13(2) and 15
120. Stoljar gives twelve such meanings: 69 LQR 485, pp 486-8
121. Oscar Chess v Williams supra note 113, p. 375

122. That is also recognised by the Malawi Sale of Goods Act, section 13(2)
123. [1951] 2 All ER 212, p. 215
124. Atiyah, The Sale of Goods, 6th ed., p. 41
125. [1933] AC 470, p. 474 and Re Moore v Landauer [1921] 2 KB 519
126. The dictionary meaning of this word is 'having no name'.
127. See Hong Kong Fir Shipping v Kawasaki Kisen Kaisha [1962] 1 All ER 471 and The Mihalis Angelos [1971] 1 QB 164
128. That idea is very implicit in section 37 of the Malawi Sale of Goods Act.
129. See Bunge v Tradax [1981] 2 All ER 513, p. 537
130. Section 15 of the Malawi Sale of Goods Act as read together with section 11(2) of the Hire-Purchase Act
131. See Arcos v Ronaasen supra note 125 and Stoljar 15 MLR 425, pp 430-1
132. Sale and Supply of Goods, Law Commission Paper No. 85 (1983) para. 231
133. [1976] QB 44. See also Millard v Turpie (1976) SLT (Notes) 66
134. [1936] AC 85, p. 100
135. Ashington Piggeries v Christopher Hill [1972] AC 441, p. 503
136. Civil Cause No. 1109 of 1980 (Unreported)
137. Civil Cause No. 875 of 1980 (Unreported)
138. See also Beale v Taylor [1967] 1 WLR 1193
139. See JL Montrose (1937) 15 Can. Bar Rev. 760
140. Chanter v Hopkins supra note 100, pp 1486-7
141. [1934] 1 KB 17

142. The Malawi Sale of Goods Act, section 13(2) and (3)
143. (1948) Zanzibar IR 20
144. (1877) 2 QBD 102, p. 109
145. [1901] 2 KB 215, p. 221
146. The Malawi Sale of Goods Act, section 37
147. Godley v Perry [1960] 1 WLR 9
148. Wilson v Rickett Cockerell [1954] 1 QB 598
149. Frost v The Aylesbury Dairy [1905] 1 KB 608
150. [1984] 2 WLR 95, p. 99
151. Muhammad Raza Nathan v Leyland *supra* note 143
152. The Hire-Purchase Act, section 17(2)
153. The Malawi Sale of Goods Act, section 13(2)
154. *Cf* Brian Smith v Whitsheaf Mills [1939] 2 KB 302; Borrowman, Phillips & Free v Hollis (1878) 4 QBD 500 and Devlin, *The Treatment of Breach of Contract* [1966] CLJ 192, p.194 where it is suggested that at common law it is possible to cure defective performance without necessarily bringing the contract to an end.
155. An action is taken 'seasonably' if it is taken at or within the time agreed or if no time is agreed at, within a reasonable time: section 1-204 of the United States Uniform Commercial Code.
156. This provision is discussed in more detail in Chapter 6
157. The view taken of the matter in this thesis is that election is also covered by section 21 of the Hire-Purchase Act,
158. The Malawi Sale of Goods Act, section 13(3)
159. The Hire-Purchase Act, section 17(1)
160. For what amounts to 'acceptance' and 'passing of property', see

sections 35, 36 and 20 of the Malawi Sale of Goods Act.

161. [1970] 1 WLR 1053, p. 1059
162. The Malawi Sale of Goods Act, section 55
163. The Hire-Purchase Act, section 11(3)
164. (1961) Rhodesia and Nyasaland LR 290
165. Curtis v Chemical Cleaning & Dyeing Co [1951] 1 KB 805
166. Supra note 1, p. 599
167. Farr v Butter Bros & Co Ltd [1932] 2 KB 606
168. [1984] 1 All ER 930, p. 938. See also Griffiths v Arch Engineering Co Ltd [1968] 3 All ER 217, p. 222
169. Civil Cause No. 77 of 1981 (Unreported)
170. See Knight v Hemming (1938) Rhodesia and Nyasaland LR 555, p. 560
171. AG Guest, op. cit., p. 295
172. This is discussed by NE Palmer in his Conditions and Warranties in English Contracts of Hire (1975) 4 Anglo-American LR 207.
173. [1963] 2 All ER 33, p. 40
174. Ibid., p. 46
175. NE Palmer, op. cit.
176. Farnworth Finance Facilities v Attyrde supra note 161. See also Charterhouse Credit Co Ltd v Tolly [1963] 2 QB 683
177. Section 16(c) and (d)
178. See Randall v Newson supra note 144, p. 109
179. JL Montrose, op. cit.
180. (1829) 130 ER 1167, p. 1172
181. Law Commission Working Paper, supra note 132, paras. 2.5-2.13
182. (1887) 12 App Cas 284, p. 293. But Cf Biggie v Parkin (1862) 158 ER

758, p. 760

183. Supra note 136
184. [1907] 2 KB 148, p. 153
185. Section 61(1). See also section 189(1) of the English Consumer Credit Act
186. This was in reference to Daniels v White & Tarbard infra note 202
187. C Davies, Merchantability and Fitness for Purpose: Implied Conditions of the Sale of Goods 1893 (1969) 85 LQR 74, pp 88-9
188. Cammel Laird v Manganese Bronze [1934] AC 402
189. Bristol Tramways v Fiat infra note 190, p. 839; Chanter v Hopkins supra note 100 and Ollivant v Bailey (1843) 114 ER 1257
190. [1910] 2 KB 831
191. [1925] 1 KB 260
192. C Davies, op. cit.
193. See Buckley v Lever Bros Ltd [1953] 4 DLR 16, p. 27 and Ashington Piggeries v Christopher Hill supra note 135, p. 875
194. See Arcos v Ronaasen supra note 125
195. Supra note 137
196. The Malawi Sale of Goods Act, section 2(1)
197. Niblett v Confectionary Material Co [1921] 3 KB 387, p. 395
198. Supra note 134
199. [1930] 50 CLR 387, p. 418
200. Supra note 137
201. Thornett & Fehr v Beers & Sons [1919] 1 KB 486
202. [1938] 4 All ER 258
203. [1903] 1 KB 610

204. See also Wilson v Rickett Cockerell supra note 148
205. Supra note 201
206. Beer v Walker (1877) 46 LJQB 677 and Olett v Jordan [1918] 2 KB 41
207. [1982] AC 225, p. 276 and Mash & Murrel v Joseph Emmanuel [1961] 1
WLR 826, p. 865
208. Supra note 180
209. [1963] 2 QB 494, p. 500
210. The Merchandise Marks Act of Malawi, section 2
211. Ibid., section 3(4)

CHAPTER FOURFAIR EXCHANGE AND THE CREDIT PROVISIONSOF THE HIRE--PURCHASE ACT

As indicated in Chapter 1, a person who wishes to purchase (1) goods on credit can obtain the credit in two ways. The most obvious way is whereby the supplier of the goods allows him to take immediate possession of the goods and make full payment for them at a later date, that is, through what is referred to throughout this thesis as the 'credit agreement'. But instead of obtaining both the goods and the credit in this way, the purchaser can borrow money from a third party and use it to buy the goods in cash from the supplier. This can be described as a 'pure loan' and will be so called throughout this discussion.

Although as far as the purchaser is concerned these two types of transactions perform the same basic function, the law in Malawi not only treats them differently but also provides different principles of law for them. The credit agreement is regulated by the Hire-Purchase Act while pure loans are governed by the Loans Recovery Act and the common law.(2) The Hire-Purchase Act (3) recognises four types of credit agreements, viz., hire-purchase agreement, conditional sale agreement, instalment sale agreement and the simple hire agreement. Here it is not intended to discuss again the anatomy of these agreements; rather, the intention is to examine how the Act regulates credit obtained through them in order to protect the purchaser as a consumer of credit. All the regulatory provisions of the Act are discussed in more detail in Chapter

6.

This chapter deals with four issues. First, the basis upon which protection offered by the Act is predicated; second, disclosure of terms of credit agreements; third, curbs on the use of oppressive terms in these agreements and fourth, financial control. Although assignment of credit agreements could have fitted here, for the sake of convenience it has been pushed to Chapter 5.

4.1 The Limit of Credit which can be obtained

Under a Credit Agreement

The Hire-Purchase Act does not make any distinction between credit intended for personal use and credit for commercial purposes. Both are treated in the same way. The only distinction which it makes in this respect is that if the purchase price (4) under the credit agreement does not exceed £1,500 the purchaser is entitled to the legal protection which is the subject of this chapter. The implication of this is that a person who obtains on hire-purchase a car for say, £2,000, for personal use will not be able to avail himself of that protection. On the other hand, a company which uses the same type of agreement to purchase vacuum cleaners or cash register machines for commercial use could take advantage of the provisions of the Act provided the purchase price of the goods was within the stipulated limit.(5) But there is another point here. Although a purchaser can not obtain an amount exceeding the ceiling limit in one agreement and hope for protection under the Act, he can get that same amount of credit by entering into more than one agreement with either the same creditor or different creditors and still

be entitled to legal protection with respect to the credit. For instance, if he wanted to buy under an instalment sale agreement an article whose purchase price exceeds £1,500, he could borrow part of the money and use a credit agreement to get the remainder. The Loans Recovery Act would give him limited protection for the pure loan agreement while the Hire-Purchase Act would protect him from any unfair exchange arising under the credit agreement. In other words, there is an element of inelegance about the way protection under the Hire-Purchase Act is predicated.

That was also recognised by both the Molony and Crowther Committees in their survey of consumer protection in England. They observed that imposing a monetary limit as a basis for legal protection is not only arbitrary and indiscriminate in its operation but also tends to get out of date quickly and once that happens, there is always a big time lag before the threshold is changed.(6) Consequently they recommended that the monetary limit which existed under the English Hire-Purchase Act 1938 be removed. They argued that protection under the Act should be predicated on the use to which the goods supplied were reasonably expected to be put and not on the basis of the amount of their purchase price. Talking about £1,000 which had been suggested as the new credit limit, the Molony Committee report said:

"It must be emphasized that this is the suggested hire-purchase price. The cash price represented by a £1,000 hire-purchase price depends on the amount of the deposit (or trade-in), the period of the agreement- both of these being at the present subject to statutory

control- and the amount of the service charge. If the deposit is 20 per cent (the current minimum) and the period for repayment is 3 years (the current maximum), and a usual scale of hire-purchase charges is applied to these figures, it will be found that a transaction involving a cash price of £839 falls outside the proposed new limit.... We regard this as an anomaly which ought not to be accepted.... We do not think that the impact of the law ought to depend on such inconsequential factors".(7)

In spite of that, the English Consumer Credit Act adopts the 'ceiling' approach but as suggested by the Molony Committee, the limit is set in terms of principal (8) and not the total amount repayable by the purchaser. Thus section 8(2) of the Act provides that a 'consumer credit agreement' is a personal credit agreement by which the creditor provides the debtor with credit not exceeding £5,000. By contrast, in the United States under the Uniform Consumer Credit Code protection is based on the use to which the credit is intended to be put. A person is entitled to legal protection under the Code if the credit is used in the

"... sale of goods, services, or an interest in land in which [inter alia] the goods, services or interest in land are purchased primarily for a personal, family, household or agricultural purpose".(9)

But the problem with the Uniform Consumer Credit Code approach is that it may not work properly in an integrated legal regime of consumer

credit unless it was possible in every case where a cash loan was required to establish in a reliable way the use to which the applicant intended to put the credit. As that will not be easy to do, those who require credit for commercial use may be able to take advantage of the protection intended for private consumers. Of course this criticism can be levelled against the 'ceiling' approach as well. For instance, if a company wished to purchase business vehicles on credit, it could use names of its directors to make the purchase and claim legal protection so long as the amount of credit involved per vehicle was within the prescribed limit. Consequently it could be argued that none of these two approaches is more advantageous than the other.

However there is one point which must be recognised here. Although these approaches are equally disadvantageous on the ground that they can be exploited by commercial users of credit, the ceiling approach has the extra disadvantage that if the limit is fixed at an unrealistically low point that may serve to draw individuals into multiple indebtedness in order to get around the ceiling without losing the protection of the law. As shown earlier, an individual who wanted to purchase on credit a car whose price was outside the legal limit would be forced to borrow part of the money and use the credit agreement with respect to the remainder. For this reason, it is submitted that a better approach under the Malawi Hire-Purchase Act is to predicate protection on the basis of the use to which the goods supplied under the credit agreement are intended to be used by the purchaser. Of course there will be cases where it will not be easy to determine whether or not the purchaser's claim that the goods are intended for personal use is true. But that is

basically a problem with which society must be prepared to put up if it is to have some protection for its consumers against goods-related problems.

4.2 Disclosure of Terms of the Credit Agreement

Although the law can not manage to make every purchaser understand each and every word used in a credit agreement into which he enters, it at least attempts to give him an opportunity to do so. For that reason, it places the supplier under that agreement under a duty to disclose the terms of the agreement to the purchaser as a pre-condition for enforcement of the agreement by the former. Of course disclosure of terms has a more practical function to fulfil; it will enable the purchaser to shop around and compare prices and rates of finance charges offered by different suppliers of goods on credit. As the Crowther Committee found, a large section of consumers who use credit do not shop around because they are often unaware that they could get more for their money and better credit terms by visiting a number of retail outlets, particularly those outside their immediate neighbourhood.(10) Besides, disclosure of terms helps the consumer to make an intelligent decision about the wisdom of using credit instead of paying cash. And after the agreement has been concluded, disclosure may assist him to plan the use of his future income.(11)

Firstly, the Hire-Purchase Act requires that every credit agreement must be in writing and be signed by or on behalf of the parties to it.(12) Secondly, the agreement must contain a statement of the cash

price of the goods (13), and where the purchase price does not exceed £1,500, the following additional information:

1. the amount of the purchase price payable by the purchaser;
2. the percentage of the cash price of the goods which must be paid by the purchaser as initial payment under section 24(1)(a) of the Act;
3. the amount of each instalment in which the purchase price is to be paid;
4. the mode of paying those instalments;
5. the date or mode of determining the date on which each instalment is payable and
6. the rate of interest chargeable on an instalment of the purchase price which is in arrear.(14)

The Act also requires that every credit agreement under which the purchase price exceeds £10 must state that the initial payment mentioned in (2) above can be paid in goods or money before the purchaser takes possession of the goods which are the subject-matter of the agreement, and that the full purchase price must be paid before the expiry of 24 months from the date on which the agreement is concluded.(15) More important than that, section 6(2) provides that no supplier must use any form of agreement the provisions of which, whatever their nature, are not set out in clear legible print or typed letters of substantially the same size.

To underline the importance of disclosure, the Act also gives the purchaser the right to ask the supplier to send him a statement signed by or on behalf of the supplier containing any of the following pieces of information which the purchaser may specify:

1. the amount paid under the agreement by or on behalf of the purchaser and the date of any such payment;
2. the amount due and unpaid under the agreement, the date upon which each instalment of that amount became due and the size of each instalment and
3. the amount which is to become payable under the agreement, the date or mode of determining the date upon which each future instalment of the purchase price is to become payable and the size of each instalment.

The object of this provision seems to be to assist the purchaser to know his indebtedness under the credit agreement from time to time as the agreement continues to run. It must be mentioned here that the purchaser can also ask for, and the supplier must supply him, with a copy of the agreement.(16)

Should the credit agreement fail to make the disclosures enumerated above, sections 4(2) and 24(3) provide that the agreement will be deemed to be a contract for the sale of goods 'on credit at a price, payable in the same manner as that stipulated in the agreement, which is twenty five per centum less than the purchase price [fixed by the agreement]'. Besides, the supplier will not be allowed to enforce any contract of suretyship, indemnity or guarantee relating to the agreement against a surety or guarantor who was not the original supplier under the agreement.(17) And if the supplier fails without reasonable cause to supply the purchaser with information or a copy of the agreement after the latter has asked for it and the default continues for a period of thirty days, the defaulter commits an offence punishable by a fine of

£50 or, in default of payment, imprisonment for thirty days.

All this shows a clear departure by the Hire-Purchase Act from the position under the general law of contract. As shown in Chapter 2, under that law the seller is under no obligation to put into writing terms of the contract and even where the Statute of Frauds applies, the obligation will be merely to witness the agreement in writing. If the agreement is in writing the seller is not obliged to present its terms in any manner so that if the purchaser alleges afterwards that he could not read them the issue will be resolved not by asking whether the terms were legible but whether the purchaser had reasonably adequate notice of them. And the test of adequacy of notice is such that the purchaser could be attributed with knowledge of the terms even though he did not see them. Furthermore, whereas as shown in Chapter 3, the rules relating to the quality of goods will apply only if the goods are supplied in the supplier's course of business, there does not seem to be a similar qualification here, or indeed with respect to other protective devices of the Act which will be discussed later.⁽¹⁸⁾ The position is clearly that as long as there is a credit agreement and the purchase price does not exceed £1,500, the supplier must comply with the Act as regards the quality of the credit which he provides, whether or not he is acting in the course of business.

But in spite of that, there are a number of criticisms which can be raised against these provisions. First, section 11(3) of the Act places the supplier under an obligation to explain to the purchaser the effect of a clause which seeks to exclude or modify the implied conditions of fitness for purpose or merchantable quality. Curiously, he is not under

a similar obligation with respect to obligations relating to the credit aspect of the agreement. Since the aim of requiring explanation of the exclusion clause is not only to bring the clause to the purchaser's notice but also to let him understand its import (19) so that if he wishes, he can go elsewhere, one would have expected that the same obligation should apply to items of information which must be disclosed under the provisions under discussion here. After all, as already said, one of the purposes of requiring that these disclosures be made is to assist the purchaser to shop around.

Second, to the extent that the aim of disclosure is to assist the purchaser in comparative shopping and in deciding whether or not he should buy on credit, the approach of the Act is flawed. For disclosure to be useful in this respect, it has to be made before the purchaser commits himself to any transaction. But contrary to that, the Hire-Purchase Act as already shown, requires the disclosures to be made in the agreement itself, that is, after the purchaser has already made a commitment not only that he should use credit but also on the terms on which to obtain the credit. Clearly that is not helpful to him. As one commentator puts it,

"The contract document is too inaccessible to the debtor who is searching for credit cost information. In order to procure it, he will usually have to visit a dealer or creditor, conclude a set of negotiations with him and endure the form-filling procedures. He must at that point refuse to sign the form and insist on taking it away for

examination. Moreover, in so far as he requires a basis for comparison, he will at least once have to repeat the process with another dealer or creditor. No rational debtor would submit himself to such an ordeal. Not only would it be absurdly time-consuming and costly, but also it would require of him a formidable combination of cunning and tenacity ..."(20)

This can be contrasted with section 2.302(2)(a) of the United States Uniform Consumer Credit Code which requires at least that the disclosures be made before credit is granted by the creditor.

Third, the Act requires that terms of the agreement should be 'clearly legible print or typed letters of substantially the same size'.(21) No doubt that offers some improvement over the position under the general law of contract. However it offers no real guidance on how the question of legibility of the terms is to be settled, if in dispute. At least at common law there is a test, that of reasonably adequate notice. But here there is no such test and one is left to wonder how the court will determine whether or not the terms are legible to the right degree.

Fourth, the Act requires disclosure only of some of the terms of the agreement but not all of them. In particular, there is no requirement for disclosure of the rate of finance charges which the supplier may demand and how those charges are to be computed. It is submitted that that undermines the very purpose of making disclosures. For if the purchaser does not know the finance charges which the supplier demands for the grant of credit, how is the former to make comparative shopping?

And the position is made all the more unsatisfactory because, as already shown, the Act requires the disclosures to be made in the contract document itself.

4.3 Prevention of the Use of Certain Provisions in Credit Agreements

The relevant provision of the Act in this respect is section 7(1). This provision states that a term in a credit agreement will not be of any force or effect if it expressly or impliedly

1. authorises the supplier or any person acting on his behalf to enter upon any premises to take possession of goods which are the subject of the agreement and/or frees him from liability from the entry;
2. excludes or restricts any right conferred by the Act on the purchaser to determine the agreement;
3. imposes liability on the purchaser for terminating the agreement in accordance with the Act which is in excess of the liability provided by the Act for that;
4. imposes liability on the purchaser for terminating the agreement otherwise than in accordance with the Act which is in excess of the liability to which he would have been subject had the agreement been terminated in accordance with the Act;
5. makes any person acting on behalf of the supplier to conclude the agreement an agent of the purchaser;
6. relieves the supplier from liability for the acts or defaults of the person acting on his behalf to conclude the agreement or
7. requires the purchaser to pay interest on any instalment of the

purchase price which is in excess of the maximum rate set by the Act.

Besides, section 24(4) provides that a provision in a credit agreement will not be enforceable insofar as it provides for the payment of a purchase price which exceeds the cash price of the goods supplied under the agreement by more than the appropriate amount fixed by rule 2 of the Hire-Purchase (Finance Charges) Notice. And lastly, the Act also provides that any waiver by the purchaser of any right conferred on him by it will be of no force or effect.(22)

No doubt these measures are useful. However they do not go far enough. For a start, they merely render of no effect the provision concerned. The presupposition is that if such a clause is used in a credit agreement, the purchaser will be able to bring an action to challenge its validity or use it as a defence to an action by the supplier to enforce the agreement. Consequently, if for one reason or another he can not do that, the utility of these provisions will have been defeated.

Secondly, conspicuous by its absence is a provision dealing with the effect of a term in the agreement which seeks to relieve the supplier from liability for any pre-contractual claim he may have made about the credit. As shown in the last chapter, section 11(3) deals with a clause which purports to modify or limit the application of implied conditions of fitness for purpose and merchantable quality. But the fact is that exclusion clauses cover more ground than that so that section 11(3) on its own is not enough.

Thirdly, all the provisions mentioned above apply to the credit

agreement itself; they do not apply to the security contract which may be made in relation to that agreement. As will be shown in the next chapter, there are a number of aspects in the security contract with respect to which the supplier may wish to protect himself from liability and the law which seeks to protect the purchaser needs to show how such a clause will be enforced.

Lastly, one would have expected the Act to have a provision to deal with unfair solicitation of custom. However no such provision is available- indeed, as will be shown later in this work, one major weakness of the law in Malawi is that it does not have any legal control of advertisement aimed at private consumers. By contrast, section 44(1) of the English Consumer Credit Act empowers the Secretary of State to make regulations as to the form and content of advertisements which ensure that an advertisement conveys a fair and reasonably comprehensive indication of the nature of the credit offered by the advertiser and of their true cost to persons using them. Of course it is important to note here that the difficulty with this sort of control is to draw a line between the right of traders who provide credit to inform the public about the availability of those facilities and the need to ensure that the information so provided complies with the requirements of fair dealing. And that is the problem which seems to have been recently highlighted under the English Consumer Credit Act.

For section 44 of the Act to apply, section 43(1) requires that the advertisement must have been published for the purposes of a business carried on by the advertiser and must indicate that he is willing to provide credit or to enter into an agreement for the bailment of goods.

In Jenkins v Lombard Centre PLC a company which provided to the public various financial services, including credit facilities, supplied a car dealer with stickers to be placed on cars offered for sale. The stickers displayed the cash price of each car in bold print, and the company's name and logo in small print. The company was charged with an offence under section 167 of the English Consumer Credit Act for failure to comply with regulation 6 of the Consumer Credit (Advertisements) Regulations 1980 made under section 44 of the Act. It was the prosecution's case that the stickers constituted an advertisement 'indicating' that the company would be willing to provide credit to a suitable customer who required credit to acquire the particular vehicle to which the sticker was attached. They contended that the appropriate test to be applied was whether an ordinary person would take the advertisement as an indication that the advertiser was willing to provide credit, and in considering the reaction of the ordinary person, account should be taken of the widespread knowledge of members of the public of the reputation of the company as providers of credit facilities. It was held that on the true construction of section 43(1) an advertiser 'indicated' that he was willing to provide credit if he stated as a fact, rather than merely suggested, that he was willing to do so. Now since the stickers did not state as a fact that the company would provide credit for the purchase of cars on which the stickers were attached, the company could not be said to have committed the alleged offence. It is perhaps important to note what Robert Goff LJ said:

"No doubt it is right that the advertisement must be construed sensibly in its context, and it may well be

that some members of the public, who happen to be aware of the business of the respondents, might think that the placing of a price display in this form on a vehicle at a garage 'suggested' that the respondents might be willing to give credit in respect of the vehicle in question. This could lead such a person to inquire within the garage whether credit facilities were in fact available

[But] ... a suggestion is not enough, a fortiori where the suggestion is derived in part from the knowledge of the advertisers' business, obtained not from the advertisement itself. I ask myself ... whether the sign constituted a statement of the relevant fact ... that the advertiser was willing to provide credit in respect of the car on which the sign was placed. Construing the sign in its context, I answer that question ... by saying that there is nothing on the relevant sign to state as a fact the matter of which complaint is made".(23)

Looking at this judgement, it seems that three considerations influenced the court's decision. First, it found that the company had otherwise genuinely sought to comply with the regulations passed under section 44. (24) Second, it did not wish to open the way for suppliers of credit to be prosecuted under sections 43 and 44 for other than what they had voluntarily assumed responsibility. And thirdly, the court seems to have recognised that the very essence of section 43 is to allow traders at least to advertise their existence without automatically coming under

the regulations passed under section 44. Unfortunately, however, the effect of this case is to render those regulations nugatory. As one commentator has put it,

"[Whilst] prospective creditors must be allowed to advertise their mere existence, this decision surely undermines the legislative aim of preventing consumers being induced into dealing with them by advertisements not complying with specified disclosure requirements. What could the display by a motor dealer of the defendant company's name alongside the cash price on his car on his premises possibly 'indicate' to a consumer except its willingness to provide credit in some form ?" (25)

4.4 Financial Control

Common law has no specific principles of law for financial control in credit agreements. The general rule is that it is for the parties to fix the terms of their contract, and not for the law to do so for them. Consequently, no interest or other financial charge is recoverable unless that was the common understanding of the parties from their previous course of dealings or unless there was a term to that effect in the agreement. Similarly, unless it is compound interest which was intended by the parties, the general rule is that where no specific mode of computing interest is agreed upon, only simple interest can be recovered. Moreover, as indicated in Chapter 2, whatever interest or other finance charge is stipulated by the agreement may be impeached on the ground that it makes the agreement 'harsh and unconscionable'.(26)

However the wide discretion given to courts in determining whether or not an agreement is 'harsh and unconscionable' and the fact that much depends on the circumstances of each case, means that a rate of finance charges could pass through the net even where it is clearly exorbitant.(27) But more than that, if the debtor wishes to re-pay the debt ahead of time, there is no definitive indication of how his liability in terms of finance charges will be determined.

In Yeoman Credit Ltd v McLean the cash price of the goods was £640 and the hire charges were at the rate of 25% over the three-year period of hiring and amounted to £163 5s. The goods were re-possessed when the agreement still had two and a half years to run, and the accelerated receipt of the proceeds of sale amounted to £310. The issue was whether and to what extent a rebate could be made for the early receipt of his capital outlay by the seller. It was held by Master Jacob:

"... the capital outlay and the hire charges, are directly interconnected and related to each other—the one being a percentage of the other, and the two together making the aggregate of the hire-purchase price payable by instalments during the currency of the agreement. The accelerated receipt of £310 ... reduces the amount of the capital laid out by the plaintiffs and this, in my view, has the necessary effect of increasing the amount of the plaintiff's profit. It seems to me, therefore, that ... the court should make a reasonable allowance or discount for the accelerated receipt by the plaintiffs of part of

their capital outlay, a sum which represents a reasonable percentage on the amount of the capital received in respect of the period between the date of its receipt and the date of the expiry of the agreement."(28)

As for the rebate which was to be made in this case, he thought that one of the methods was to multiply the amount received by the seller from the proceeds of sale by the period between the receipt of that sum and the expiry of the agreement and the rate of the hire charges per year. That is, £310 x 8 x 9% x 2 1/2 years.(29) But this only shows that although it is agreed that where the debtor accelerates payment of the debt, he is entitled to a rebate on the unearned finance charges, there is no agreement on how the rebate is to be calculated.

On the other hand, the Hire-Purchase Act has specific rules on these matters. In the pages which follow, it is intended to mention these rules first and to discuss them afterwards. To begin with, section 24(1) requires that in every credit agreement where the purchase price exceeds £10 (30), the agreement should provide that at least 20% or 33 1/3% of the cash price of the goods supplied under that agreement is payable by the purchaser before he can take possession of the goods. And as said earlier, this payment can be made in money or goods.(31) Then the Act provides that where the initial payment is in the form of money, section 24(1) will not have been complied with if the payment

"is made out of moneys borrowed directly or indirectly from or through the seller or any person whose business it is by agreement with the seller to advance money for payment under agreements with the seller".(32)

The suggestion here is that the money used to discharge the initial payment obligation must be the purchaser's own money or if it is borrowed, the purchaser must have borrowed it independently of the supplier. Furthermore, the Act says that

"no payment in goods shall, to the extent to which the amount thereof exceeds the normal market price of the goods, be deemed to be a payment for the purposes of [discharging the initial payment]".(33)

What this means is that the value of goods used to pay the initial payment will be measured with reference to the market price of similar goods. Consequently, if the initial payment is say, £200 and the purchaser discharges it by giving the supplier a stereo whose value the purchaser claims is £200 but it is shown that on the open market that stereo could fetch £150 only, then according to this provision, the purchaser would still have £50 unpaid on the initial payment.

Second, the Act defines the purchase price payable under a credit agreement as the total sum payable by the purchaser under the agreement (34) including initial payment (35) but excluding the following:

- a) compensation or damages for breach of the agreement by the purchaser
- b) insurance premium paid to insure the goods supplied under the agreement (36)
- c) interest due on an instalment of the purchase price in arrear and
- d) installation charges where the same are not fixed by the agreement.(37)

In fact as shown by Master Jacob in the judgement quoted above, once these exclusions have been made, it is clear that the purchase price

comprises two sums: the cash price of the goods supplied under the credit agreement and finance charges demanded on that price. These charges cover not only the cost incurred by the supplier by having to forgo immediate payment for the goods supplied but also the cost of opening and running an account for the purchaser while the agreement subsists, stationery and other overheads.(38) Now to control the amount which the supplier can recover in these charges, section 26(1) gives the Minister power to 'fix the amount by which the purchase price under a credit agreement may exceed the cash price'. And paragraph 2 of the Hire-Purchase (Finance Charges) Notice goes on to state that:

"For all classes of agreement the purchase price shall not exceed the cash price by more than an amount which together with the accountancy costs, credit control and collection expenses and all other administrative costs connected with the agreement, other than the sums excluded from the purchase price in terms of section 2(1) of the Act-

a) in respect of new goods, is an amount calculated at the rate of 15.69 per centum per annum of the balance of the cash price remaining unpaid before the due date of each instalment;

b) in respect of used goods, is an amount calculated at the rate of 17.54 per centum per annum of the balance of the cash price remaining unpaid before the due date of each instalment".

Three points can be noted here. First, there are no fixed rates under the Hire-Purchase Act but a mere power to fix them from time to time. Second, the Hire-Purchase (Finance Charges) Notice corroborates the view expressed earlier that the finance charge is an aggregate of a number of costs incurred by the supplier in connection with the credit agreement. It also supports the conclusion that the purchase price comprises the cash price of the goods and finance charges made on that price. Third, the Notice gives the formula to be used in computing finance charges payable under credit agreements caught by the Act. The formula is 15.69% or 17.54% 'per annum of the balance of the cash price remaining unpaid before the due date of each instalment of the purchase price'.

Before the application of this formula is examined, another observation needs to be made. Earlier it was shown that before the purchaser can take delivery of the goods which are the subject of a credit agreement, he must pay 20% or $33\frac{1}{3}\%$ of the cash price of the goods as initial payment. It is not clear whether or not any finance charges are payable on that payment. But since finance charges are supposed to compensate the supplier for the cost incurred with respect to that part of the cash price whose payment is deferred, one would expect that no finance charges should be payable on the initial payment which is paid 'straight away'. Thus strictly speaking, the purchase price payable under a credit agreement should comprise the cash price of the goods supplied under that agreement plus finance charges payable at the rate of 15.69% or 17.54% on either 80% or $66\frac{2}{3}\%$ of that cash price.

Calculating Finance Charges

The formula prescribed by the Hire-Purchase (Finance Charges) Notice is the opposite of what is called the 'add-on' method. As the name suggests, this method involves calculating the finance charge on the initial balance of the principal or in this case, the cash price of the goods, and then adding the amount so found to the principal to get the total sum repayable by the debtor. The assumption is clearly that the principal remains constant throughout the duration of the agreement so that in effect the debtor ends up paying finance charges even on instalments of principal which have already been paid.

By contrast, the Hire-Purchase Act formula recognises that the principal is always decreasing as more and more payments are made. As a result it stipulates, as already seen, that finance charges payable under the agreement should be calculated on 'the balance of the cash price remaining unpaid before the due date of each instalment' of the purchase price. What this will mean is that as the cash price remaining unpaid falls, the purchaser will pay decreasing amounts in finance charges. If the cash price is made re-payable in equal instalments this will in turn mean that the purchaser will pay ever-decreasing instalments of the purchase price.

If one takes £100 to be the balance of the cash price after payment of the initial paymenty (39), repayable over a period of one year in 12 equal instalments, the size of each instalment of the cash price will be £8.33. (40) As the cash price is being re-paid, its successive balances will be £100, £91.67, £83.34, £75.01£8.37. According to the formula of the Hire-Purchase Act, the finance charge payable as part of the first instalment of the purchase price will be calculated on £100,

the second on £91.67, the third on £83.34 and so on until the whole cash price is re-paid. What this means is that if the goods involved are new the total purchase price payable in the first instalment will be

$$\begin{aligned} & \text{£}8.33 + \frac{15.69 \times 100}{100 \times 12} = \text{£}9.63 \end{aligned}$$

The second instalment will be

$$\begin{aligned} & \text{£}8.33 + \frac{15.69 \times 91.67}{100 \times 12} = \text{£}9.53 \end{aligned}$$

The last instalment will be

$$\begin{aligned} & \text{£}8.33 + \frac{15.69 \times 8.37}{100 \times 12} = \text{£}8.44 \end{aligned}$$

When all the twelve finance charges are added together they come up to £8.50 so that the total purchase price payable by the purchaser will be £108.50. This example also illustrates the point made earlier that as the cash price continues to be paid, the amount of each instalment of the purchase price declines. And the same applies to the amount of finance charges in each such instalment. In the first, it is £1.30; in the second, it is £1.20 whereas in the last it is £0.11 only.

It must be noted that this formula does not place any restriction on how these sums are to be paid. The parties are free to agree that the purchase price be paid in instalments of equal amounts or to reserve the biggest amount for any one instalment. On the other hand under section 3.402 of the United States Uniform Consumer Credit Code if any instalment is more than twice as large as the average of earlier instalments, the debtor is entitled to refinance the amount

of that instalment at the time it is due without any penalty. Similarly, the Code provides that finance charges are to be calculated according to the 'actuarial' method whereby payments made by the purchaser are allocated between the finance charge and principal in such a way that the payment is applied first to the finance charge and the balance is applied to the unpaid principal.(41) Under this method finance charges are computed on declining balances of the principal just like under the formula prescribed by the Hire-Purchase Act. However it differs from the latter in that while the amounts applied to the finance charge decline, those applied to the principal increase. But as far as the purchaser is concerned this method is less advantageous than the Hire-Purchase formula because it does not decrease the amounts actually paid as time runs. By contrast if the cash price is split into equal portions it is possible under the Hire-Purchase Act to make the purchaser pay the purchase price in ever-decreasing amounts. And that has already been shown by the example given above.

A point which should be noted about this formula is that it presupposes that there will be an unbroken payment of the purchase price. This follows from the fact that the Act puts a limit on the time within which the debt is re-payable. Now although that limitation may have some effect on the incidence of debt, its contribution to the protection of the purchaser is dubious. Even financial institutions do accept to re-schedule payment of a debt or to grant an extension of time so long as that ensures a better re-payment prospect and avoids

financial dislocation on the part of the debtor. It is true that once a person contracts a debt he undertakes to comply with the manner or time for its re-payment. However there is no reason why in appropriate cases the law should not allow the parties to agree to re-finance or consolidate a debt or to defer all or part of any instalment of the debt so long as any charge payable for that is controlled by the Act.(42)

The third form of financial control under the Hire-Purchase Act is that there is a limit on the amount of interest which a supplier can recover on an instalment of the purchase price which is in arrear.(43) Section 7(2) provides that the rate of interest chargeable in such circumstances should not exceed 'the rate per centum per annum specified by the Minister in fixing ... the maximum amount by which the purchase price under agreements of the class in question may exceed the cash price'. And as has just been shown, the rates are 15.69% for new goods and 17.54% for old goods. But this provision fails to indicate on which sum the interest is to be calculated. As a result it is not clear whether the interest will be on 15.69% or 17.54% per annum of the cash price which should have been paid by the date of demand or of the purchase price due but unpaid by that date or merely 15.69% or 17.54% per annum of the finance charges which are due but unpaid by that date. If we go back to the example given above, it will be noted that in the fourth and fifth instalments of the purchase price the purchaser would be expected to pay £9.31 and £9.20, respectively, of which £0.98 and £0.87, respectively are finance charges and the remainder, the cash price. Now if the purchaser fails to pay these instalments on time, on

what sum or sums is interest to be computed? Will it be on the sums £9.31 and £9.20 or the finance charges £0.98 and £0.87 or £18.51 which is the total of the two instalments of the purchase price whose payment is overdue or £16.66 which is the actual cash price due but unpaid?

Since the purpose of imposing interest is to compensate the supplier for having been deprived of the use of his money during the period within which it remains overdue, it follows that in this example he should receive interest on the amount which he would have received had the purchaser complied with the credit agreement and paid the instalments of the purchase price involved on time. That is, interest should be paid on the sums £9.31 and £9.20. Now because these amounts would have been due at two different times, interest recoverable for delay in their payment will have to be calculated on each sum according to the period by which it is overdue. Thus if the demand was made say, in the seventh month, the fourth instalment of £9.31 would have been overdue by three months while the fifth, £9.20, by two months only. Assuming that the goods involved are new, the interest recoverable on that instalment would be

$$\begin{aligned} & \text{£ } \frac{15.69 \times 9.31 \times 3}{100 \times 12} = \text{£}0.37 \end{aligned}$$

and on the fifth instalment, it would be

$$\begin{aligned} & \text{£ } \frac{15.69 \times 9.20 \times 2}{100 \times 12} = \text{£}0.24 \end{aligned}$$

Fourthly, the Hire-Purchase Act requires that there should be a rebate of finance charges where payment of the purchase price is accelerated. As suppliers extend credit for profit, they may not be

inclined to reduce that profit where the debt is discharged prematurely. At the worst, the purchaser may be required to pay the full amount of finance charges which would have become payable had the agreement run its full course. Obviously that would be unjust to the purchaser because it would overlook not only the relevance of the time factor in determining the amount of finance charges which are to be paid by the debtor but also that accelerating re-payment of the debt may in fact reduce the supplier's cost in respect of that debt. Consequently, having granted the purchaser the right to accelerate re-payment of the purchase price at any time, the Act also entitles him to get a rebate on each instalment of the purchase price not due at the time the acceleration is made.(44)

But before examining the formula to be used in calculating these rebates it must be pointed out that the purchaser is entitled to a rebate in finance charges only if he re-pays the purchase price due in full. Thus if he merely accelerated payment of part of it he must pay all the finance charges due on that part without any deduction. The position is the same even under the United States Uniform Consumer Credit Code. Section 2.209 provides that a debtor may pre-pay in full the unpaid balance of a consumer credit agreement at any time and section 2.210 adds that once that has been done, he is entitled to be rebated 'an amount not less than the unearned portion of the credit service charge'. Under the English Consumer Credit Act a debtor under a regulated consumer credit agreement can discharge his indebtedness at any time by payment to the creditor of all amounts payable by the debtor to the creditor under the agreement.(45) However, unlike under both the

Hire-Purchase Act and the Uniform Consumer Credit Code, there seems to be room under the English Act for a rebate in finance charges even where the acceleration is only of part of the unpaid principal. Section 95(1) of the Act says that a rebate in finance charges can be made if the debtor's

"indebtedness is discharged or becomes payable before the time fixed, or any sum becomes payable by him before the time so fixed".

It is submitted that this is a better view for no other reason than that it gives the debtor an incentive for prompt reduction of his debt, wherever that is possible. On the other hand, as the law stands under the Hire-Purchase Act the purchaser has no incentive to reduce his indebtedness unless he wishes to discharge the whole debt. By accelerating payment of part of the debt and get no reduction in finance charges payable on it, he is worse off than if he invests that money until the due date(s) of the instalment(s) whose payment he could have accelerated and in the meantime earn some profit on that money.

Calculation of Rebates

Because it is not possible to determine in advance the point in time at which acceleration of payment may be made and the amount of the supplier's costs at that time or the periods between the various instalments of the purchase price, the formula for calculating rebates can only be based on assumptions. It can not be fixed with reliable accuracy. After all, as Master Jacob indicated in Yeoman Credit Ltd v McLean (46) when calculating how much is to be discounted for early

return of the creditor's capital outlay the idea is not to achieve 100 per cent accuracy but rather to obtain 'a sum which represents a reasonable percentage of the amount of capital received in respect of the period between the date of its receipt and the date of the expiry of the agreement'. In that case he thought that the finance charges should be reduced at the rate at which they would have accrued in the agreement. Under the United States Uniform Consumer Credit Code, on the other hand, the method adopted is what is called the Rule of 78 (47) so that the rebate to which the debtor is entitled will be

"a fraction of the [finance] charge of which the numerator is the sum of the periodic balances scheduled to follow the computational period in which pre-payment occurs, and the denominator is the sum of all periodic balances under the [credit] agreement".(48)

The assumption in both methods seems to be that there is a proportional relationship between the creditor's costs and either the period over which the agreement is supposed to run or the principal itself. Clearly, that is not so. As Professor Goode says:

"The creditor's costs are not distributed according to some neat mathematical formula, but depend on the nature and timing of a vast range of different outlays, each of which has its own time pattern ..." (49)

By contrast, the assumption under the Hire-Purchase Act is that the cost to the supplier of granting credit is generally higher at the beginning of the credit agreement than towards the expiry of its

period of time. Consequently, the portion of unearned finance charges rebated to the purchaser is made smaller than what the supplier retains. Section 15 provides that the reduction to be made in every instalment whose payment is accelerated must be 'five per centum per annum on such instalment in respect of the period by which the payment of such instalment is accelerated'. The suggestion here is clearly that although the purchaser is entitled to a rebate only if he pre-pays in full the amount unpaid, the reduction to be made in finance charges will be made from every instalment of that amount not due at the time acceleration of payment is made according to the period by which payment of the instalment is accelerated.(50)

To illustrate this, let it be supposed that a purchaser buys on hire-purchase terms new goods whose cash price less initial payment is £100, re-payable over 24 months in three monthly instalments of £12.50 each and after paying three instalments in accordance with the agreement, he decides to accelerate payment of the remaining five instalments. First of all, here is how payments would be distributed if made in accordance with the agreement:

<u>No. of Instalment</u>	<u>Cash Price in</u> <u>each Inst'ment</u>	<u>Finance Charge in</u> <u>each Inst'ment</u>	<u>Purchase Price in</u> <u>each Inst'ment</u>
1	£12.50	£3.92	£16.42
2	12.50	3.43	15.93
3	12.50	2.94	15.42
4	12.50	2.45	14.95
5	12.50	1.96	14.46

6	12.50	1.47	13.97
7	12.50	0.98	13.48
8	12.50	0.49	12.99

When added together the finance charges come to £17.64.(51) Now as the purchaser accelerates payment after paying the first three instalments on schedule, it means that he will have instalments 4, 5, 6, 7 and 8 only whose payment will be accelerated. If it is assumed for the sake of convenience that the acceleration is made just at the beginning of the 3-month interval between instalments 3 and 4, then instalment 4 would have been accelerated by three months; 5 by six months; 6 by nine months; 7 by 12 months and 8 by 15 months. Therefore the rebate which the purchaser will get on these five instalments will be equal to the sum of

$$£ \frac{5 \times 14.95 \times 3}{12 \times 100} = £0.19$$

$$12 \times 100$$

$$£ \frac{5 \times 14.46 \times 6}{12 \times 100} = £0.36$$

$$12 \times 100$$

$$£ \frac{5 \times 13.97 \times 9}{12 \times 100} = £0.52$$

$$12 \times 100$$

$$£ \frac{5 \times 13.48 \times 12}{12 \times 100} = £0.67$$

$$12 \times 100$$

$$£ 5 \times 12.99 \times 15 = \underline{£0.81}$$

$$\underline{£2.55}$$

In other words, instead of paying £7.35 in finance charges in the last five instalments, by accelerating their payment the purchaser can pay £4.80 only.

One advantage of this method is that it is easy to apply. Whatever the duration of the intervals between each instalment may be or the point at which the acceleration of payment is made, it is a matter of ascertaining the period by which payment of any instalment is accelerated and then multiplying that by 5% per annum of the amount of the instalment. On the other hand, because the Rule of 78 is based on the assumption that the periods between the instalments individually bear a proportional relationship to each other, it will involve rather complex calculations where the intervals between the instalments whose payment is accelerated are of unequal duration.⁽⁵²⁾ Moreover, by allowing rebates to be calculated on each instalment of the purchase price according to the period by which its payment is accelerated, the formula prescribed by the Hire-Purchase Act makes sense. As contended above, where an instalment of the purchase price is in arrear, because the supplier has been deprived of the use of the amount of that instalment beyond the period set by the credit agreement, interest recoverable for the delay must be the product of the period by which payment of the instalment is overdue and 15.69% or 17.54% per annum of the amount of that instalment. Now if instead of being in arrear, the instalment is paid before its due date, there does not seem to be any reason why the same reasoning should not apply so that the purchaser is allowed a reduction in finance charges payable with that instalment in

respect of the period by which payment of that instalment is accelerated.(53)

Lastly, the Hire-Purchase Act places a limit on the amount which the supplier can recover from the purchaser where the latter exercises his statutory right to terminate the credit agreement.(54) Section 17(2) provides that in such a case the purchaser can only pay the lesser of the following sums:

- a) the difference between half of the purchase price and the sum of all instalments paid before the termination of the agreement and those due but unpaid at the date of the termination or
- b) any sum stipulated by the agreement as payable upon such a termination of the agreement.(55)

The effect of the first alternative is that if the total amount which the purchaser pays (including the initial payment) together with any amount which is due but unpaid, amounts to half of the total purchase price or more, then there will be no further liability on the purchaser although he may be liable to pay damages for failure to take reasonable care of the goods.(56) On the other hand, if the amounts paid and those which are due but unpaid are less than half of the total purchase price, the purchaser will have to pay a further sum so as to bring the amount up to one-half.(57) But there is one question which may arise here: supposing the actual loss suffered by the supplier as a result of the termination of the agreement by the purchaser is smaller than the lesser of the sum given above, how is the supplier going to be compensated? If section 17(2) is to apply then no doubt the supplier would be over-compensated. Therefore it is submitted that in these cases the

court should be given power to determine whether or not the formula provided by the Act enables the supplier to receive reasonably adequate compensation for the purchaser's termination of the agreement under the Act and to decrease or increase that compensation accordingly. If it is satisfied that a sum less than the lesser of the two sums proposed by section 17(2) would be equal to the loss sustained by the supplier, it should order payment of that smaller sum in lieu of either of those sums.(58)

Analysis of Finance Control Provisions of the Act

In an economy like that of Malawi where the credit market has many imperfections ranging from consumer illiteracy to unavailability of information about the market itself, it is idle to expect that market forces will regulate the supply and demand of credit in a way which can meaningfully protect the consumer. Consequently there is no doubt that some kind of positive legal control is justifiable. And therefore the real issue is not whether there must be any statutory control at all but whether there is any justification for the controls set by the Act.

This question has been partially answered in the preceding pages so that what will be done here is to examine any additional argument there may be for or against these controls. The criticism often made against the requirement of initial payment is that it may serve to deprive some consumers of access to legitimate sources of credit or that it may force them into multiple indebtedness. It is said that if a person does not have enough money on him to pay the initial payment stipulated by the

Act, then if he has to buy the goods involved he will have no other choice than to borrow money to discharge the obligation. The result is that in order to buy one article he will have contracted two debts- and may end up paying more for the article if one of the sources of the credit charges more than the other in finance charges. It will be recalled that it is this argument which was also advanced earlier for rejection of the 'ceiling' approach as a basis of predicating protection of the purchaser under this Act.

But although initial payment can be attacked on this ground, it is submitted that its advantages by far outweigh this disadvantage. First, it is to the supplier's advantage that he should get some initial payment on every agreement into which he enters. Indeed he would still insist on its payment even if the Act had omitted to provide for it. A retailer who supplies goods on credit commits his capital without an immediate cash return, and additional sales to him mean more stock-piling. For that reason, unless he can receive some cash on each transaction as soon as it is concluded, he will have to rely heavily on external finance to run his business.

Second, where a purchaser makes an initial payment (which may be irrecoverable if he terminates the agreement prematurely) he gets a stake in the agreement whose value will depend on the amount so paid. And it is apparently to strengthen that stake that the Act requires, as noted earlier, that the money used to make the initial payment must be obtained by the purchaser without intervention by the supplier.(59) At the very least, the existence of that stake will provide the purchaser with an adequate incentive to proceed with the agreement. Third,

requirement of initial payment may also ensure that the purchaser does not decide to use a credit agreement before considering its financial implications.(60) Finally, if the purchaser makes the initial payment the supplier will at least be assured of the purchaser's seriousness. As one author says

"A man who can not find a reasonable deposit is financially suspect".(61)

Statutory setting of finance charge rates where there is no major economic crisis has also been the target of criticism. It is argued that consumers who in a competitive and free market can get credit only at a rate higher than the ceiling set by the law will not be able to get credit in a market where rates are set by law, at least not from suppliers who abide by the law. Moreover, as the total profitability of the credit sale transaction depends on the combination of the merchandise profit and the financing profit, it is contended that statutory imposition of finance charges rates will not protect consumers from overcharging because 'if a seller is restricted in the finance charge involved, he can forego part of the possible finance profit, increase his cash selling price, and make the profit there'.(62)

The first of these arguments is inconclusive because it can be used against any rate of finance charges whether fixed by market forces or the intervention of statute. So long as there are some consumers who can not be granted credit economically at that rate, the rate will act as bar to them to consume credit unless there are other suppliers who can take the risk of offering rates which are lower than those offered by

the rest of the market. More than that, the argument seems to suggest by implication that finance charge rates should be left to be fixed by market forces. But as stated above, insofar as the market in Malawi is concerned, that would be a futile exercise because of flaws in the market itself.

The second argument has some appeal although it too can not weaken the wisdom of statutory control of finance charge rates. Even where rates are fixed by competition between suppliers, if a supplier wished to appear to be offering competitive rates, he could shift the cost of credit from the finance charge to the cash price of the goods. What could stop him from doing that is some legal intervention requiring prices of goods to be clearly labelled on the goods themselves.(63) In Malawi there are no special shops for credit transactions only; all shops sell for cash or on credit depending on the customer's preference. Now if the cash price is properly labelled on the goods, it would be stretching imagination a little too far to suggest that the seller would sell the goods at the displayed price if a customer offered cash and somehow raise the cash price if the purchaser changed his mind and decided to buy on credit instead. In other words, it is possible to have finance charges rates fixed by statute and still avoid the problem suggested by the second criticism.

Furthermore, it is sometimes argued that if the market fails to fix rates equitably, the system could be propped up by a statutory provision which gives courts the power to re-open any transaction which is extortionate or unconscionable.(64) But as Chapter 2 showed, that alone is not an effective measure of consumer protection. Indeed the case by

case approach which it entails means that it will not be possible for a proper assessment to be made as to the extent to which consumer credit should be allowed before the point is reached at which the dangers to society or the individual exceed the benefits.(65)

It is also said by opponents of rate regulation that for legal rate ceilings to work effectively, they require a big administrative machinery to monitor their operation and that that will make consumer protection costly. The policing of compliance with standards of fair dealing in credit agreements is discussed in Chapter 7. However one point can be made here and that is that cost alone can not justify abandonment of consumer protection unless it can be shown that the cost heavily outweighs the benefit obtained by consumers from that protection. Moreover, as will be shown in Chapter 7, it is possible to make this protection self-financing without adversely affecting prices paid by consumers.

Lastly, it must be emphasized that with the exception of rebates, the Hire-Purchase Act does not actually fix finance charge rates. What it does is to empower the Minister to control them whenever need arises.(66) And the exercise of that power at the present time can be justified on the ground that the credit market in Malawi has not yet reached a stage where it can control supply and demand of credit in a manner that will be positively beneficial to consumers. But the advantage of this form of control is that it is flexible and will allow trends in the entire economy and in the conduct of credit suppliers to influence the level of finance charge rates. Besides, if properly used,

this will allow speedy review of the market and introduction of relevant changes in it.

But having said that, the question which must still be answered is whether the rates currently in force are justifiable. In the absence of any information on how these rates are working in practice, and short of an evaluation of the economy itself, it is not easy to pass any judgement on the rates. However it can be observed that if the ceiling of finance charge rates is placed too low it may not be to the advantage of consumers in the long run. Suppliers will not find it economical to grant credit at the rate where it is just possible that the purchaser might default. Now in an economy where most consumers do not have a stable source of income to qualify for a bank loan, the result will be a backlog of unfulfilled demand for credit which will create an opportunity for loan shark operations on a large scale.(67) A ceiling at the other extreme of the spectrum may have not only the same effect but also its regulatory effect would not be apparent. Most people would not regard it as offering any protection at all although the actual charges which it would entail would not be excessive especially where the principal was small or it was re-payable in a short period of time such as, for instance, six months.

The second point is that when setting the ceiling it needs to be realised that those who supply goods on credit are businessmen and not a charitable organisation. This means that the ceiling must be set at such a level that they have a profit margin which will enable them to survive in business without at the same time keeping off a large

number of consumers from legitimate sources of credit. The solution for those who are in the lower rungs of the income ladder does not certainly lie in forcing finance charge rates down to a level where the survival of the honest and law-abiding supplier is endangered. Again what the right level should be can not be determined theoretically; it requires consideration of a number of factors in the economy as a whole, in particular, lending terms and rates offered by financial institutions and wage distribution in the population. The first factor is important because these institutions will be the source of a sizeable portion of the credit offered in credit agreements so that the money a supplier under such an agreement has to pay to them is one of the costs which will be included in finance charges demanded by him from his customers. Wage distribution not only shows how much future income is available for potential mortgaging in these agreements (68) but can also give a rough indication of likely consumer responses to finance charge rates.

It is clear from this discussion that the Hire-Purchase Act departs from the position under the general law of contract. Not only does it put forward the way in which terms of a credit agreement should be brought to the notice of the purchaser but by controlling finance charge rates recoverable in these agreements and prohibiting the use of a number of terms, it in effect prescribes the terms at which the supplier should offer his credit to the consuming public. Thus it destroys the main pillar of freedom of contract which is that it is for the parties to a contract to fix the terms at which to purchase each other's

performance. Of course as shown, the problem is to find the right combination of terms which will ensure fair exchange to both sides. But there is another point. While the Act covers some aspects of a credit agreement, it leaves the parties to determine the others. One such aspect is the measure of damages which can be recovered for breach of the agreement. One is therefore left to wonder whether this combination is appropriate. Perhaps the biggest draw-back is that the regulatory model of the Act follows the approach of the general law of contract. If the supplier fails to comply with any provision of the Act, that will merely give the purchaser the right to bring an action in contract or to resist enforcement of the agreement by the supplier. What this means is that if the purchaser can not bring the action or make the resistance, enforcement of the regulatory system will have been impaired and the supplier can go on to enjoy the fruits of his wrong-doing. Arguably the effectiveness of such a system to prevent unfair exchange to the purchaser in credit agreements will be very minimal, to say the least.

Footnotes

1. Of course it should be noted that the word 'purchase' here includes 'hire' as well.
2. In England they are now regulated by one statute: The Consumer Credit Act, 1974. For a discussion of this Act, see Goode, The Consumer Credit Act: A Students' Guide.
3. See the Hire-Purchase Act, section 2(1).
4. The definition of 'purchase price' is given below.
5. Cf the Hire-Purchase Act, section 27 which empowers the Minister to exempt certain agreements entered into by any corporation from the application of the Act.
6. The Molony Committee Report (1962) Cmnd 1781, para. 553.
7. Ibid., para. 551.
8. That is, the purchase price under a credit agreement.
9. See section 2.104(1) of the United States Uniform Consumer Credit Code.
10. The Crowther Report (1971) Cmnd 4596, vol. 1, para. 3.6.4.
11. TG Ison, Credit Marketing and Consumer Protection, pp 174-180.
12. The Hire-Purchase Act, section 4(1)(a).
13. Ibid., section 4(1)(b).
14. Ibid., section 6(1)(a).
15. Ibid., section 24(1) and the Schedule to the Act.
16. Ibid., section 8(1)(b).
17. Ibid., section 4(2) and 24(3).
18. Of course this distinction is difficult to justify.

19. That this is so seems to follow from the fact that should the effect of the clause be misrepresented, the seller will not be allowed to rely on it: Curtis v Chemical Cleaning & Dyeing [1951] 1 All ER 631
20. Consumer Credit Rate Disclosure in the United Kingdom and Australia: A Functional and Comparative Appraisal (1986) 35 ICLQ 87, p. 89
21. This problem appears to be a universal one. For instance section 226.6(a) of the United States Consumer Protection Act merely provides that:

"The disclosure required to be given ... shall be made clearly, conspicuously [and] in meaningful sequence ..."
22. The Hire-Purchase Act, section 21
23. [1984] 1 All ER 828, p. 835
24. Ibid., p. 831
25. JWA Thornely [1984] 43 CLJ 236, p. 237
26. [1906] AC 461, pp 473-4
27. See for example, Carringtons v Smith [1906] 1 KB 79 where the rate of interest charged was 75% but the agreement was nevertheless held not to be harsh and unconscionable
28. [1962] 1 WLR 131, pp 132-3
29. Ibid., p. 135. See also Overstone v Shipway [1962] 1 All ER 52, p. 62
30. Of course the purchase price as a whole must not exceed £1,500 for this provision to apply- see the Hire-Purchase Act, section 3
31. Ibid., section 24(1)(a)
32. Ibid., section 24(4)

33. Ibid. It is curious that while the market price is the yardstick here, the Act does not provide that the same criterion be used in fixing the cash price of the goods as a whole.
34. Ibid., section 2(1)
35. See supra note 31
36. The suggestion here seems to be that ensuring the goods is an obligation to be borne independently by the purchaser.
37. The Hire-Purchase Act, section 17 as read together with section 18(1)
38. This is brought out clearly by para. 2 of the Hire-Purchase Act (Finance Charges) Notice.
39. It should be recalled here that the effect of sections 24(1) and 26(1) and (2) seems to be that for the purposes of computing finance charges, the first balance of the cash price will be the total cash price less 20% or 33 ¹/₃% of that price.
40. The expression 'instalment of the cash price' is used here because it is on the successive balances of the cash price that finance charges payable with each instalment of the purchase price must be calculated under the Act.
41. Section 1.301 of the United States Uniform Consumer Credit Code
42. See for instance, ibid., sections 2.204, 2.205 and 2.206
43. The Hire-Purchase Act, section 7(1)(g)
44. Ibid., section 15
45. The English Consumer Credit Act, section 94(1)
46. Supra note 28
47. See Goode, op. cit., pp 253-5

48. Section 2.210(2) of the United States Uniform Consumer Credit Code
49. Goode, op. cit., p.253
50. The Molony Committee Report, supra note 6, para. 533
51. Note that the rate used to calculate these charges will be 15.69% or 17.54% per annum of the respective balances of the cash price.
52. See section 2.210(3),(4) and (5) of the United States Uniform Consumer Credit Code
53. Of course this argument still leaves unanswered the question whether the rate of 5% per annum is appropriate.
54. It will be recalled that the position at common law with respect to this payment was discussed in Chapter 2.
55. To the extent that this sum may be the sum which the purchaser pays, it can be said that it is the agreement of the parties which is paramount here.
56. The Hire-Purchase Act, section 17(2)(b)
57. AG Guest, The Law of Hire-Purchase, para. 606
58. This was the position under the English Hire-Purchase Act 1965
59. The Hire-Purchase Act, section 24(4)
60. Goode and Ziegel, Hire-Purchase and Conditional Sale, p. 67
61. H Clemens, Bank Lending, p. 14
62. H Kripke, Gesture and Reality in Consumer Credit Reform (1969) 44 NYULR 1, pp 66-7
63. See the Malawi Control of Goods Act which is discussed in Chapter 7
64. See, for instance, section 139 of the English Consumer Credit Act
65. TG Ison, op. cit., p. 209
66. This can be contrasted with section 2.201 of the United States

Uniform Consumer Credit Code

67. TG Ison, op. cit., p. 206

68. The point to note here is that a credit agreement is no more than a mortgage of future income to fulfil a present demand.

CHAPTER FIVEREGULATION OF THE SECURITY AGREEMENT MADE IN RESPECT
OF A CREDIT AGREEMENT

In the last chapter it was shown that the Hire-Purchase Act has set up a number of controls for the benefit of the purchaser under a credit agreement as a consumer of credit. It was argued that although the controls are important, there are some changes which need to be made in them to make them more effective in ensuring fair exchange in these agreements. In this chapter it is intended to examine the law which governs security which may be given in respect of a credit agreement and determine how and whether it furthers the cause of fair exchange.

A person who supplies goods on credit advances the credit to the purchaser of the goods on the basis of the latter's ability to re-pay the debt. However, more often than not he will demand security from the purchaser for the credit. Now although the credit agreement itself is not legally regarded as a security agreement, there is no doubt that the goods supplied under it in effect act as a sort of security for the financial accommodation granted to the purchaser. But apart from that, security can be provided through a mortgage on property belonging to the purchaser or a third party who is often related to the purchaser. The purchaser can also furnish security in the form of either a negotiable instrument drawn in favour of the supplier or a contract of guarantee executed by a third party who undertakes to be responsible for the payment of the debt if the purchaser defaults. Lastly, it is not uncommon for the person granting credit to require that the debtor

should pledge some property with the former for the credit advanced to the debtor. In Malawi property pledged for small amounts of credit usually comprises readily saleable items such as wrist watches, radios, bicycles and sewing machines.

Generally the formality required for the formation of a security agreement will depend on the form which the security takes. A negotiable instrument must comply with the Bills of Exchange Act; a chattel mortgage with partly the common law and partly the Bills of Sale Act and a pledge and a contract of guarantee, with the common law. It should be noted here that there is no Pawnbrokers Act in Malawi. But insofar as the security agreement is made in respect of a credit agreement, its enforceability will also depend on whether or not the latter complies with the provisions of the Hire-Purchase Act. And it is with this interplay of the Hire-Purchase Act, on the one hand, and what may be called the lex specialis of security agreements, on the other, that this chapter will be principally concerned.

5.I Goods supplied under a Credit Agreement

As already shown, the Hire-Purchase Act recognises four types of credit agreements.(1) First, the 'conditional sale' whereby goods are sold subject to the condition that notwithstanding their delivery to the purchaser, their ownership can not pass to him except in accordance with terms of the agreement. Second, the 'hire-purchase' under which the purchaser takes delivery of the goods and has the right to purchase them outright after payment of a certain portion of the purchase price.

Third, the 'instalment sale' otherwise known as the 'credit sale' whereby ownership in the goods supplied passes to the purchaser either before or upon their delivery but notwithstanding that, the supplier is entitled to their return if the purchaser fails to comply with any provision of the agreement. Lastly, the hire agreement which entitles the hirer after the payment of two or more instalments of the hire rent to continue or renew from time to time the hiring at a nominal rent, or to continue or renew from time to time the right to be in possession of the goods, without any further payment or against payment of a nominal amount periodically or otherwise.

Clearly, the reason for allowing the supplier at least in the first two cases to reserve to himself title in the goods supplied despite their delivery to the purchaser, is to ensure that should the purchaser default in, inter alia, discharging his indebtedness, the supplier can re-possess the goods so long as they are still intact when the default is committed. That also explains why under an 'instalment sale' (where ordinarily the goods would be regarded as sold unconditionally), the Act gives the supplier the right to claim back the goods if the purchaser breaches the agreement. The same reason seems to lie behind the provision in sections 9 and 10 of the Hire-Purchase Act which allows the supplier to require the purchaser to notify him of the addresses where the purchaser may keep the goods from time to time during the subsistence of the agreement, and not to remove or permit removal of the goods from Malawi without the supplier's consent.

Now if, for instance, the purchaser fails to re-pay the debt and the supplier recovers possession of the goods, the latter will be

putting himself in the position of a secured party who resorts to security after failing to get payment under the credit agreement. And because just like the party who provides security, the purchaser has some rights over the goods (2), the Act imposes some restrictions on the supplier's right to recover the goods for the purchaser's default. First, if he recovers the goods because the purchaser is in arrear with the payment of the purchase price, section 14(1) allows the latter to regain possession if he pays the amount due but unpaid within 21 days of the seizure unless the goods were re-possessed under a court order or the purchaser terminated the agreement after the goods were seized by the supplier. What this means is that the purchaser has an inalienable right to redeem the goods before the supplier forecloses or sells them. By contrast, under the common law the purchaser can not redeem the goods unless that is expressly or impliedly provided for by the credit agreement. In Amade v Khoury the seller seized a lorry which he had let out under a hire-purchase agreement on the ground that the purchaser was in arrear with the hire rent. When the latter subsequently paid the arrears and brought an action to resume possession of the vehicle, it was held that he could not do so. It was said by the judge:

"There is no redemption clause in the agreement permitting the hirer to have the right to resume the hiring provided he repaid the arrears of hiring up to the date of repossession... The inclusion of such a clause would appear to be necessary in order that a hirer having made default can obtain back the vehicle upon his paying

the balance of the amount due under the original agreement".(3)

Second, if the default occurs after the purchaser has paid half of the purchase price, the supplier can not recover possession of the goods and exercise his right of foreclosure. He must apply to a magistrate who will appoint a person to sell them. But before the appointment is made, the magistrate will need to be satisfied that every negotiable instrument drawn by the purchaser in respect of any instalment payable under the agreement is cancelled or returned to the purchaser or that the supplier has arranged to indemnify the purchaser against liability in respect of the instrument(s) 'which may be in excess of the amount outstanding under the agreement after the disposal of the proceeds of the sale of the goods'.(4) Of course if the person has been appointed and the purchaser fails within 14 days of receiving notice of the appointment to deliver the goods to him, the supplier will be entitled to recover possession (5), and could exercise his right to foreclose. If on the other hand, the goods are delivered to the appointee, after he has sold them, he must deduct from the proceeds of the sale his reasonable expenses and pay to the supplier any amount outstanding under the credit agreement. The remainder, should there be any, is to be paid to the purchaser. However if the proceeds of the sale are insufficient to discharge the amount outstanding under the credit agreement, the supplier is entitled to recover what remains unpaid from the purchaser himself. This indicates that re-possession of the goods does not extinguish the supplier's right to sue on the debt to

recover what is owed to him by the purchaser under the credit agreement.

There is a third way whereby the Act protects the purchaser's stake in the goods supplied under a credit agreement. Where the agreement fails to make disclosures discussed in the last chapter, the goods which are supplied under it will be deemed to have been sold to the purchaser, inter alia, 'without any reservation as to the ownership of the goods or, as the case may be, without any stipulation as to the seller's right to the return of the goods'.(6) The effect of this is that the goods can not subsequently be used as security for the credit advanced to the purchaser. Consequently, should the purchaser default in discharging his indebtedness, the supplier can not re-possess them without being guilty of trespass. The supplier will only be entitled to bring an action on the debt itself whose amount will be 75% of the purchase price (7) payable under the agreement.

This is illustrated in a way by the Malawi case of Kunyamula v Brown & Clapperton.(8) In that case the plaintiff sold agricultural implements to the defendant in 1977 for K20,206.77 (£10,103.39) which was to be paid in instalments. Soon after the parties agreed that a hire-purchase agreement should replace the contract of sale. Accordingly a document was prepared which sought to confer on them the rights of supplier and hirer and stated that a sum of K30,840 (£15,420) which comprised K20,206.77 and a fictitious 33 1/3% initial payment was payable under the agreement by the defendant as the purchase price of the implements. A year later, in November 1978, after the defendant had defaulted in his

payments, the plaintiff purporting to exercise his rights under the 'hire-purchase' agreement, entered upon the defendants premises and seized some of the implements and then brought an action against him for part of the sum still owing. The defendant counter-claimed for conversion, arguing that the defendant had no right to seize the goods at all. In the High Court of Malawi the counter-claim was dismissed on the ground that there was a binding hire-purchase agreement between the parties which entitled the plaintiff to make the seizure. However the court held that as the agreement failed to comply with section 24(1) of the Hire-Purchase Act in that no initial payment was in fact paid by the defendant, in accordance with section 24(3), the goods would be regarded as sold unconditionally to the defendant at a cash price which was 25% less than the purchase price stipulated by the disputed hire-purchase agreement. The defendant then appealed against the decision.

With due respect, the High Court misdirected itself on the law in two respects. First, assuming that there was a binding hire-purchase agreement between the parties, section 24 of the Hire-Purchase Act could not apply to the transaction because the price payable for the implements was far in excess of £1,500. As shown in Chapter 4, section 3 of the Act states that except for section 4 which prescribes the form which all credit agreements concluded in Malawi should take, and sections 22 and 23 which deal with the bankruptcy of the supplier and purchaser, respectively, the Act does not apply to any credit agreement under which the purchase price exceeds the sum of £1,500.

Secondly, even if section 24 applied, sub-section 3 of that provision could convert the transaction into an unconditional

contract for the sale of goods not because of non-payment by the defendant of the initial payment as the court thought but for failure by the agreement itself to provide that such a payment was payable by the purchaser before he took the goods supplied under the agreement. But as already indicated, although no initial payment was in fact paid by the defendant, and none was intended to be paid, the so-called hire-purchase agreement did stipulate that 33 ¹/₃% of the cash price was payable by the purchaser as initial payment.

On appeal the decision of the High Court was reversed. However the Supreme Court did not deal with these problems. Instead it concentrated on challenging the validity of the hire-purchase agreement, holding that as the goods had initially been unconditionally sold to the defendant, the plaintiff had no ownership in them which he could reserve to himself under the hire-purchase agreement. Consequently, continued the court, by seizing the goods, the plaintiff committed conversion. Skinner JA summed it all in the following words:

"We think that the intention of the parties was not to have a true hire-purchase agreement at all. It must be remembered that the goods had already been sold to the defendant on credit terms. In our judgement the true inference of fact from the arrangement made between the parties and the whole of the circumstances surrounding them, was that the parties really intended that the goods should remain with the defendant but that in form- and in form only- there should be a 'hire-purchase

agreement..."(9)

5.2 Security in the form of Negotiable Instrument

The first point to note is that this type of security must be made and delivered to the supplier conditionally to become operational only in the event of the purchaser's default under the credit agreement otherwise acceptance of the instrument by the supplier or its subsequent discounting to a third party could be construed as payment of the purchase price payable under the agreement.(10) Of course as will be shown below, the supplier can not accept the instrument unconditionally because if he did so he might be in contravention of the Hire-Purchase Act. Besides such an acceptance would not be in his interest for it *would* leave the supplier only with a claim on the instrument.

There are two types of negotiable instruments which may be used as security. The first is a bill of exchange which is basically a written promise that the person who takes it as a form of payment will be paid in cash when he presents it at the proper place and time for payment. Section 3(1) of the Malawi Bills of Exchange Act defines a bill of exchange as:

"an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer".

It is clear from this definition that an instrument which orders an act

to be done in addition to the payment of money is not a bill of exchange.(11) When the bill is not payable on demand the presentment must be made on the date when the bill falls due. On the other hand, if it is payable on demand, it must be presented within a reasonable time after its issue or endorsement.(12) But delay in making the presentment is excused if it is caused by circumstances beyond the holder's control and not imputable to his fault, misconduct or negligence.(13) Should the bill be dishonoured because either the addressee does not accept it or there is no money to meet it, notice of the dishonour must be given to the drawer within a reasonable time and in a proper manner.(14) If the notice is not given, the drawer of the instrument will be discharged from responsibility.

The second form of negotiable instrument which is often used as security for credit granted through a credit agreement, is the promissory note. This is defined by section 89 of the Bills of Exchange Act as 'an unconditional promise in writing made by one person to another signed by the maker, engaging to pay on demand or at a fixed or determinable future time a sum certain in money, to, or to the order of, a specified person'. Because the maker of a promissory note promises to pay the holder on the date stipulated on the note, the note need not be presented to the maker for payment. Once the date arrives, it is for the maker to seek the holder of the note and pay him the sum shown on it. Only in two cases is presentment for payment necessary. First, where the note is made payable at a particular place, then it must be presented for payment at that place in order to render the maker liable. Second, if the note has been indorsed (15), and it is payable on demand, it must

be presented for payment within a reasonable time of the indorsement otherwise the indorser is discharged from responsibility for the note.(16)

The quality of being negotiable imparts two features to an instrument. First, title to the monetary obligation embodied in it is transferable by delivery of the instrument or by endorsement and delivery. Second, a transferee who takes the instrument in good faith and for value, without notice of any defect in the title of the transferor, obtains a good title to the monetary obligation embodied in the instrument even if the transferor had a defective title or none at all. If the instrument is complete and regular on its face and the transferee receives it before it is overdue, and without notice of dishonour, he is called 'holder in due course'. Under the Bills of Exchange Act such a person takes the instrument on its face value, without being subject to 'equities'. This means that any defences which the drawer of the instrument may have against the person who transferred the instrument to the transferee, can not be raised against the transferee.

What all this means is that it is possible for a purchaser who furnishes a negotiable instrument as security for credit advanced to him to be subject to liability which exceeds his liability under the credit agreement. For example, as shown earlier, if the agreement omits to make compulsory disclosures, the supplier is entitled only to 75% of the purchase price payable under the agreement. Now although the Hire-Purchase Act makes all contracts of suretyship, guarantee or indemnity relating to such a credit agreement unenforceable by the

the supplier (17), it does not say anything about security given in the form of a negotiable instrument. But even if such a provision was present in the Act, the fact is that if the supplier discounted the instrument, the purchaser would be liable to pay the transferee the full amount shown on the instrument and not only an amount which represents 75% of the purchase price payable under the credit agreement for which the instrument was drawn. The same would also happen if subsequent to giving the instrument to the supplier, the purchaser accelerates payment of the purchase price under the credit agreement. Under section 15 of the Hire-Purchase Act the purchaser would be entitled to a rebate of 5% per annum on any instalment of the purchase price in respect of the period by which its payment is accelerated. But this would not also reduce the amount payable under the negotiable instrument so that the purchaser may pay to the transferee who receives the instrument from the supplier money which would take his liability beyond that under the credit agreement.

Of course the position should be that in all these cases the purchaser should look to the supplier for indemnity in respect of the amount by which the purchaser's liability under the credit agreement is exceeded by reason of the supplier's negotiation of any instrument given as security for credit advanced to the purchaser under the agreement. However that kind of indemnity is not provided for by the Hire-Purchase Act. The only case where it allows the purchaser to claim an indemnity from the supplier is where the latter seeks to terminate the credit agreement and recover the goods supplied under it after the purchaser has paid 50% of the purchase price. As shown earlier, in that case only

a person appointed by court can recover possession of the goods from the purchaser, and the appointment can not be made unless the court is satisfied that any negotiable instrument given by the purchaser in respect of any instalment payable under the agreement has been cancelled or returned to the purchaser or

"the [supplier] has made arrangements to indemnify the purchaser against any liability on the part of the purchaser in respect of such instruments which may be in excess of the amount outstanding under the agreement after the disposal of the proceeds of the sale of the goods".(18)

The Act affects this kind of security in another way. Under section 13(2) if the instrument is other than a dated cheque which is not post-dated, after taking it from the purchaser, the supplier is required to write clearly on its face the words 'Issued in connection with a hire-purchase agreement or instalment sale agreement etc'. The provision also requires the supplier to write at the top of the first page of the credit agreement such words as indicate that a negotiable instrument has been issued in connection with the agreement.(19) Arguably such writing will bring notice to the transferee not only that the instrument is tied to a credit agreement but also that the transferor of the instrument was not entitled to negotiate it unconditionally and render its maker liable irrespective of the terms of that agreement. Such knowledge should put the transferee on enquiry as to the enforceability of the instrument by the transferor against the maker of the instrument (who may be the

purchaser under the credit agreement in respect of which the instrument was drawn). If the transferee fails to make that enquiry, he can not legitimately claim 'holder in due course' status even if the instrument is regular and complete on its face when transferred to him. In the words of one writer

"Anyone who receives the instrument with knowledge of circumstances which would arouse suspicion or knowledge of facts which should have put him on enquiry but to which he turned a blind eye, will not take free from equities. This includes knowledge of the circumstances in which the instrument was received, and irregularities in the instrument itself".(20)

Another solution which can be suggested for the protection of the purchaser against double liability is to prohibit the supplier from taking negotiable instruments as security. That is the approach of the English Consumer Credit Act. It provides that if he takes the instrument in contravention of the Act, he can not claim holder in due course status or enforce the instrument.(21) However if the maker of the instrument becomes liable to anybody entitled to holder in due course status, the creditor must indemnify the maker of the instrument in respect of that liability.(22) This suggests that although the creditor can not claim holder in due course status, someone who receives the instrument from him can enjoy that status and enforce the instrument against the debtor or whoever may have made it. Clearly the effect of that will be to render nugatory the provision prohibiting the taking of negotiable instruments as security for credit. By contrast, under

section 8 of the Hire-Purchase act if upon request by the purchaser for certain information relating to his indebtedness under the credit agreement, the supplier fails without reasonable cause to supply that information, then as long as the default continues, no security given by the purchaser in respect of money payable under the agreement can be enforced by any holder thereof against the purchaser.(23) If the security is in the form of a negotiable instrument the effect of this provision will be to deny holder in due course status to anyone who receives the instrument from the supplier, however ignorant he may be of the supplier's non-compliance with section 8. That is clearly more effective than sections 123 and 125 of the English Consumer Credit Act and can be justified on the ground that by denying all those who take the instrument from the supplier the right to enforce it, the law will have the desired ultimate effect of making it difficult for suppliers to discount negotiable instruments when they are in breach of section 8 of the Hire-Purchase Act.

But that can be attacked on the ground that it limits the supplier's freedom to finance his business in a manner which best suits him. The point is that by discounting negotiable instruments made in relation to credit agreements in which he has entered, the supplier can raise money with which he can finance his business while he waits for the debts under the agreements to mature. But that will only be possible if those who purchase the instruments are assured that they will not be affected by any defect in the supplier's title of which they had no knowledge at the time of purchasing the instruments. Thus by removing that assurance

section 8 of the Hire-Purchase Act not only subordinates the rights of the innocent third party financier to those of the innocent maker of the negotiable instrument but also in doing that, bars the supplier access to this form of raising finance for his business. Viewed from this angle, sections 123 and 125 of the English Consumer Credit Act are no more than a compromise around this problem. But section 8 of the Hire-Purchase Act can be defended on the ground that as between the innocent maker of a negotiable instrument made in respect of a credit agreement and the innocent financier who purchases it from the supplier under the credit agreement, the latter is better placed than the former to shift costs arising from the supplier's defaults. Indeed he can get indemnity from the supplier for any equities arising from the instrument more easily than the innocent maker of the instrument. Now to the extent that the financier can be persuaded to accept that indemnity, section 8 is defensible.

5.3 Chattel Mortgage

To obtain credit the prospective purchaser may be required to provide security in the form of goods or real property. But to keep this work manageable, only personal security will be discussed.

Such security can be created by the purchaser passing to the supplier under the credit agreement ownership or mere possession of the goods concerned, upon the express or implied condition that the ownership or possession should revert in the purchaser once he has discharged the debt. The effect of that condition will be to give

the purchaser the right to redeem the security. Where ownership in property is passed as security for a debt, and the debtor has a contractual right to redeem the property, the agreement is called a legal mortgage.(24) And it is with that that this section is concerned. The passing of mere possession in the goods to secure the debt will be discussed a little later.

Because a chattel mortgage made in respect of a credit agreement will give the supplier under the agreement the right to seize goods comprised in the mortgage, the security agreement will be a bill of sale within the meaning of the Malawi Bills of Sale Act. Section 2(1) of the Act defines a bill of sale as including, inter alia, 'authorities or licences to take possession of personal chattels as security for any debt'. But it must be reiterated here that although the credit agreement in effect gives the supplier power to seize the goods supplied under it in the event of default by the purchaser, the agreement is not a bill of sale within this definition.(25) Explaining this point Professor Goode says:

"... security in the legal sense derives from grant by the debtor, not from reservation by the creditor. It is for this reason that the reservation of legal title under a sale, hire-purchase or rental agreement does not constitute security interest. The effect of the reservation is not to create security but to ensure the continuance of the owner's interest in the asset".(26)

A chattel mortgage can be made by word of mouth (27) or by a written instrument. If it is written, to be valid, section 7 of the Malawi

Bills of Sale Act requires that it must

- a) be attested and
- b) be registered within 14 days of its execution or if executed outside Malawi, within 14 clear days after the time on which it would in the ordinary course of post arrive in Malawi if posted immediately after its execution and
- c) set out consideration for which it is given.

Besides, it must have annexed to or written under it a schedule containing an inventory of goods comprised in it. The mortgage will then have effect only in respect of the goods described in the schedule and be void, except as against the mortgagor, in respect of any goods not so specifically described.(28) Similarly, under section 11 of the Act a bill of sale is void except as against its grantor in respect of any goods described in the schedule but of which the grantor was not the true owner at the time of the execution of the bill.

There is a certain ambiguity about these two last provisions. On one reading their effect seems to be that if the supplier under a credit agreement in respect of which the security is given were to use the bill of sale as security, the sub-mortgagee would have title only to goods specifically described in the schedule to the bill and of which the purchaser under the credit agreement or whoever may have given the bill, was the owner when the bill was executed. On the other hand, as against the purchaser, the supplier could seize the excepted goods. Viewed in this way, it can be said that these provisions seek to protect the purchaser under a credit agreement not against the supplier under that agreement who accepts the bill as security, but against anyone who takes

the bill from the latter as security.

However it is also possible to read the words 'as against the grantor' in these provisions as precluding the purchaser from creating a security interest in goods in the form of a bill of sale unless the goods are his and they are specifically described in the bill at the time of its execution. This interpretation would allow anyone taking the bill of sale, whether from the purchaser or the supplier, to use the excepted goods as security for any debt. In other words, here the words 'except as against the grantor' would simply mean that the supplier or anyone who takes the bill from him can hold it on its face value without being subject to any inadequacy in the description of the goods comprised in it or the defectiveness in the purchaser's title to those goods.

The Bills of Sale Act also provides that a bill of sale is void if not made in the prescribed form (29) or if taken in consideration of a sum which is less than £30. (30) And under section 13 of the Act the mortgagee can not seize the goods which comprise the security except if

- a) the mortgagor defaults in discharging the debt secured by the bill of sale or
- b) the mortgagor defaults in the performance of any provision of the bill which is necessary for maintaining the security (31) or
- c) the mortgagor fraudulently removes or permits removal of the goods or some of them from the premises where it was agreed by the parties that the goods should remain during the subsistence of the credit agreement (32) or

- d) upon demand in writing by the mortgagee requiring the mortgagor to produce receipts for rent, rates and taxes, the latter fails without reasonable cause to comply or
- e) execution has been levied against the goods under any judgement.

Section 16 provides that all goods so seized must remain on the premises where they have been seized and can not be removed or sold until after the expiry of 5 days from the date of the seizure. And the proviso to section 13 suggests that within that period, the mortgagor can commence proceedings to redeem the seized goods. It says:

"Provided that the grantor may, within five clear days from the seizure or taking possession of any chattels on account of any of the abovementioned causes, apply to the High Court and the Court may, if satisfied that, by payment of money or otherwise, the said cause of seizure no longer exists, restrain the grantee from removing or selling the said chattels".

To understand the implication of these two last provisions, it is necessary to bear in mind the basic features of a legal mortgage. Because the mortgagee has ownership in the mortgaged goods, if the mortgagor defaults in discharging his obligations under the credit agreement, one option open to the mortgagee is to seize the goods and become their absolute owner. The second option is to sell the goods and recover from the proceeds of the sale what is outstanding under the credit agreement. However the mortgagee can not exercise either of these options without giving the mortgagor the opportunity to redeem the security. And that is what section 16 and the proviso

to section 13 quoted above are about. As just shown, they in effect provide that once the mortgagee has seized the goods comprised in a bill of sale, the mortgagor has 5 days within which to redeem them.(33) If he fails to do so within that period, the mortgagee can foreclose, i.e, become the absolute owner of the goods, or he can sell them. Of course if the mortgagee forecloses he thereby elects to take the goods in satisfaction of the sum which may still be owing under the credit agreement so that he can not bring an action to recover any amount by which the value of the goods falls short of that sum. On the other hand, if he exercises his power of sale, he will be deemed to sell for the account of the mortgagor so that he must account for any surplus by which the proceeds of sale exceed the sum outstanding under the credit agreement. And conversely, he can sue the mortgagor for the amount by which that sum exceeds the proceeds of the sale.(34)

But despite all this corpus of technicality, it is the agreement between the purchaser and the supplier which will fix the specific terms of the bill of sale. It will determine, for instance, how much security is to be provided for the credit advanced or what should be the condition of the goods used as security or who will be responsible for their maintenance while the credit agreement subsists or how loss or depreciation of the security is to be borne between the purchaser and the supplier. In other words, the Bills of Sale Act is largely irrelevant as a means of ensuring fair exchange in credit agreement. By leaving the specifics of a security agreement to be worked out by the parties, in effect it gives the supplier licence to over-reach the purchaser. And that this does happen in practice is illustrated by

the following two cases.

In the United States case of Williams v Walker-Thomas Furniture (35) the appellants bought a number of household items from the respondent, payment for which was to be in monthly instalments. The contract provided that title to the items would remain vested in the respondent until the total of the instalments paid equaled a certain value of each item. The contract then secured the appellants' indebtedness with respect to each item purchased by conferring on the respondent the right to re-possess all items previously purchased by the appellants so that each new article bought automatically became subject to a security interest arising out of previous purchases. Pursuant to this arrangement, the second appellant bought a stereo at \$514.95 and when she defaulted in paying one of the instalments of its price, the respondent sought to re-possess all items purchased from him over the previous 5 years whose value was \$1.800. And in the English case of Kruse v Sealy (36) where the plaintiff borrowed £300 repayable at 82 1/2% per annum interest, the money-lender demanded security in the form of a promissory note for £500 and a bill of sale comprising a number of personal possessions, and furniture which had been purchased 18 months earlier at £1750. In default of payment of any instalment of the debt and the interest payable on it, the bill gave the money-lender power to sell all these chattels.

Secondly, although it is recognised that a bill of sale will be made to secure a debt, the Bills of Sale of Act does not tie enforceability of the bill to the agreement under which the debt arises. The Act merely

contents itself with providing the form which the security agreement should take to be considered a valid bill of sale.

Of course the Hire-Purchase Act does give one instance when though validly created, a bill of sale may not be enforced. It was shown earlier that under section 8 of the Act if the supplier fails without reasonable cause to supply the purchaser with certain information relating to the latter's indebtedness under the credit agreement, then while the default continues no security given by the purchaser in respect of money payable under the agreement can be enforced by any person holding it against the purchaser. However there are other situations where the position is less clear. Supposing for instance, instead of the supplier failing to supply the mentioned information, the agreement omits to make the compulsory disclosures discussed in the last chapter, what will be the position with respect to the security given for the credit granted to the purchaser under the agreement? It is clear that despite that kind of omission, the credit agreement is still enforceable but subject to certain limitations as regards ownership of the goods supplied and the amount of the purchase price which the supplier can claim from the purchaser. But there is no indication as to what will happen to security in the form of a bill of sale given in respect of the agreement. The Hire-Purchase Act merely provides that in such a case the supplier can not enforce any contract of suretyship or guarantee made in respect of the credit agreement.

5.4 Pledge of Personal Property

Instead of mortgaging goods as security for credit to be supplied

under a credit agreement, the prospective purchaser may be required to pledge the goods with the supplier of the credit. The difference between this and the mortgage of personal property is that whereas the mortgagee's security is ownership of the goods put up as security, a pledgee's security is mere possession of the goods. Thus the mortgagee may take possession of the security to enforce or protect it but he does so by virtue of having title to the security. By contrast, a pledgee is given possession as his security, while ownership in the pledged goods remains with the pledgor. Because of that, a document embodying the terms of a contract of pledge can not be a bill of sale under the Malawi Bills of sale Act. As shown above, a bill of sale is 'an authority or licence given to the grantor of the bill to seize or take possession of goods comprised in the bill'; it is not evidence of actual possession of those goods, which is what a contract of pledge will be.

That difference was explained in Ex Parte Hubbard where Lord Esher MR said:

"... the words [of the Bills Sale Act] are 'authorities or licences to take possession of personal chattels as security for any debt... But a right to take possession means a right to take it whether the grantor likes it or not. If the real transaction does not depend on the power of the one party to take possession against the will of the other, but on the one voluntarily giving and the other receiving possession- if the transaction does not begin at all until the grantor voluntarily gives possession of the goods to the grantee- that is not an

'authority or licences to take possession of personal chattels'. This excludes from the definition such a transaction as a pledge of goods, for the essence of a pledge is that the grantee says to the grantor, I will lend you money on the security of an authority to take possession of certain goods".(37)

Besides this possessory interest, common law grants the pledgee the right to sell the goods pledged to realise the money owed by the pledgor under the credit agreement. The pledgee can not foreclose since he has no title to the goods. The power of sale will arise on default by the pledgor to discharge his debt by the time stipulated by the credit agreement, or if no time is fixed, upon the creditor making a demand for re-payment of the debt and the expiry of reasonable time thereafter. Any surplus of the proceeds of sale must be paid to the pledgor after the pledgee has recovered the amount of the debt still outstanding and costs incurred in the sale. If there is any deficiency, the pledgor can be sued for it since exercise of the power of sale does not, as already indicated, extinguish the creditor's claim on the debt.

But like the law of chattel mortgages, the common law proceeds on the ground that it is for the debtor and the creditor to decide on how much and which personal property is to be pledged for any amount of debt. No guidelines are available to ensure that the creditor does not over-secure his interest. No doubt rules along these lines are needed considering that, as will be shown below, in some cases even if the pledgor has re-paid the debt, he may not be able to recover the pledged goods from the pledgee. Besides, the common law does not show what will

happen to the pledge upon the occurrence of certain events which affect the enforceability of the credit agreement under which the debt is contracted. Of course it can be assumed that if the creditor rescinds the credit agreement, that will remove the consideration for the pledge so that the pledge can not be enforced. But supposing the pledge is made in respect of a credit agreement which omits to disclose the terms required by the Hire-Purchase Act to be disclosed in every credit agreement and the amount payable under the agreement gets reduced by 25% (38), what will be the position as regards the pledge ? Will the supplier keep it as if the purchase price re-payable by the purchaser was still 100% ? It was shown earlier that the Act has no answer to this question because the only form of security which is said to become unenforceable in such a case is a contract of suretyship, indemnity or guarantee made in respect of the delinquent credit agreement.

Another source of problem here is that because the pledgee is entitled to have possession of the pledged goods, so long as the pledgor has not paid off the debt, the pledgee can sub-pledge the goods without being in breach of the original contract of pledge (39) or giving the pledgor a cause for bringing an action against him for conversion or detinue.(40) Now if the pledgor subsequently re-pays the debt but the pledgee can not recover the goods from the sub-pledgee, the pledgor's remedy against the pledgee would be an action for damages.(41)

Thirdly, the pledgee as a bailee is expected only to use reasonable care in looking after the pledged goods. Should they disappear or be

destroyed before their redemption, the pledgor can only be compensated for the loss through an award of damages, and that if it is shown that the pledgee failed in his duty to use reasonable care as bailee of the goods.(42) But it is not clear as to what will happen if instead of the goods disappearing or getting destroyed, their value appreciates or depreciates.

Similarly, there does not seem to be provision for proper identification of the pledged goods. No doubt the pledgor will put some mark on the goods to distinguish them from others which he may be holding or he may keep a description of the goods in his records. But what is required is that for a contract of pledge whether it is oral or written, to be valid, the pledgor must be given a copy of the description of the pledged goods. That will ensure that when time for redemption comes, there is minimum confusion and disagreement between the parties as to the identity of the pledged goods.

By contrast, the English Consumer Credit Act has rather elaborate provisions on this matter. To begin with, the creditor who accepts a pledge as security must give the pledgor a pawn-receipt which the pledgor must surrender to him at the time of redeeming the pledge.(43) The pledge is redeemable at any time within 6 months after it is taken although the parties can agree on a longer period.(44) Under section 120(1), should the goods not be redeemed at the end of the redemption period, then if that period was 6 months and the pledge was 'security for fixed-sum credit not exceeding £15 or running-account credit (45) of which the credit limit does not exceed £15', ownership in the pledged

goods passes to the pledgee. In any other case, if the goods are not redeemed by the end of the period of redemption, they become realisable by the pledgee. But until they are realised or the property in them has passed to the pledgee (46), section 116(3) states that they remain redeemable by the pledgor. According to section 121 the pledgee can not proceed to realise the pledge unless he has first given the pledgor notice in the prescribed form of his intention to sell which gives the 'asking price' and such other particulars as may be prescribed by regulations made under the Act. And within the time after the sale which may be prescribed, the pledgee is to give the pledgor written information about the sale, its proceeds and expenses. Any amount by which the proceeds of the sale exceed the sum which if the pledge had been redeemed on the date of the sale would have been payable for the redemption, is to be paid to the pledgor. Where this does not apply, section 121(4) provides that

"the debt shall be treated as from the date of sale as equal to the amount by which the net proceeds of sale fall short of the sum which would have been payable for the redemption of the pawn on that date".

The implication here seems to be that thereafter the ordinary rules of the common law will apply and give the pledgee the right to sue the pledgor for the deficiency. Finally, the Act does not prohibit the sub-pledging or selling of the pledged goods by the pledgee before the expiry of the period of redemption. However section 119(1) states that if the pledgee without reasonable cause refuses to allow the pledgor to

redeem the pledge, the pledgee commits an offence. But it is difficult to say what 'reasonable cause' means and whether it includes failure by the pledgee to re-deliver the pledged goods to the pledgor because they are being held by a sub-pledgee. Thus overall, although the English Consumer Credit Act makes valuable changes in the common law, it does not deal with some of the major problems to which the giving of security for credit gives rise.

5.5 The Contract of Guarantee

The three types of security so far discussed can be furnished by the purchaser himself. However there is another form of security which can only be provided by a third party undertaking to be answerable for the debt if the principal debtor fails to discharge it. As shown below, the legal position in such a case is as if the creditor had granted unsecured credit to the debtor and the third party. Consequently, where credit is granted on the strength of a contract of guarantee, the creditor may also ask for more security in the form of a chattel mortgage or pledge to make his position more secure. Indeed where security is furnished in the form of a promissory note the creditor may insist that it be counter-signed by a third party who will then be liable as if he had expressly undertaken to pay the debt if the person who actually contracted it failed to discharge the debt. That third party is known as a 'surety' or 'guarantor' and his undertaking, whether express or implied, the contract of guarantee or suretyship.

As may have been noted in the preceding pages, the Hire-Purchase Act

does make reference to the contract of guarantee and the contract of indemnity.(47) These two types of contract are distinct. A contract of indemnity is an undertaking by one person to keep the promisee or someone else harmless from the loss which may arise from the agreement between the promisee or that other person and the debtor. In other words, here it is the promisor who assumes primary liability so that if loss is incurred under the credit agreement, he will be liable for it. On the other hand, under the contract of guarantee, it is the debtor who is primarily liable, the guarantor's liability only arising if the former defaults. Thus if the purchaser under a credit agreement exercises his statutory right to terminate the agreement prematurely, the guarantor's liability would cease with that termination (48) whereas the promisor under a contract of indemnity would be liable to the supplier for the loss caused to him by reason of the termination.(49)

The distinction between these two types of contract will in a number of cases be fine. Nevertheless it is important because apart from its effect on the extent of the promisor's liability, a contract of guarantee, unlike a contract of indemnity, is enforceable by action only if it is evidenced in writing.(50) In Ankrah v Aryee (51) the first defendant entered into a hire-purchase agreement with the plaintiff for the purchase of a motor car and the agreement contained the word 'guarantee' which was followed by the signature of the second defendant. It was held that this word, without more, was vague to constitute a promise by the second defendant to answer for the default of the first defendant under the hire-purchase agreement and that even if there was

such a promise, it was not supported by a sufficient note or memorandum in writing as required by the Statute of Frauds. The second defendant was therefore found not liable to pay when the first defendant fell in arrear with the instalments of the hire-purchase price.

A contract of guarantee made in respect of a credit agreement may also be unenforceable in two other situations. First, if the credit agreement in respect of which the contract is entered into fails to make the compulsory disclosures required by sections 4, 6 and 24 of the Hire-Purchase Act. Second, if upon request by the purchaser under that agreement for certain information about his indebtedness under the agreement, the supplier without reasonable cause fails to supply that information. Curiously, the guarantor is not entitled to ask for such information or to receive a copy of the credit agreement from the supplier or the purchaser. For that reason, it sounds ironical that under the Hire-Purchase Act enforcement of the contract of guarantee should depend on whether or not the credit agreement has made the disclosures mentioned above, and that where the purchaser commits a default under the credit agreement, the supplier should be allowed to proceed against the guarantor without being obliged to give him notice of the default.

Of course entitlement to a copy of the credit agreement is an important issue regardless of the form which the security agreement takes. It may happen that the person who furnishes the security is not the purchaser himself but a third party. Arguably the latter has a right to be apprised of the terms of the credit agreement as well

as those of the security agreement. And there is no better way of doing this than to require that the supplier under the credit agreement should send him a copy of both agreements within a certain time of their execution. For instance, under the English Consumer Credit Act the requirement is not only that every security provided in respect of a regulated consumer credit agreement should be in writing but also that the party who provides the security (52) should be supplied with a copy of the credit agreement together with any other document referred to in it.(53) Furthermore, the party providing the security is entitled to ask for and receive from the creditor, a copy of the security agreement and a statement signed by or on behalf of the credit giving, inter alia, the total sum paid by the debtor to the creditor under the credit agreement and the amounts and due dates of any payments which will later become payable under the agreement by the debtor to the creditor.(54) Should the creditor fail to comply, then while the default continues, he can not enforce the security and if the default continues for one month, he commits an offence.

The United States Uniform Commercial Code goes further. It entitles the party providing the security to receive from the creditor any surplus from the proceeds of the sale of the security and exempts him from liability for the debt or for any deficiency after the sale. Besides, the person providing the security is entitled to be notified of, and can object to, the creditor retaining the security in satisfaction of the debt.(55)

5.6 Assignment of the Credit Agreement

As shown in the introduction, in order to get finance for his

business the supplier of goods on credit may assign his credit agreements to a finance institution. The legal question which may arise where such an arrangement is made is how far any defences which the purchaser has under the assigned credit agreement can be raised against the assignee. That question may arise in a number of situations. For instance, where the credit agreement is induced by a misrepresentation on the part of the supplier or the goods supplied under the agreement are not of a merchantable quality contrary to section 11(2) of the Hire-Purchase Act, the purchaser under a credit agreement is entitled to raise these as defences to an action brought by the supplier to enforce the agreement. Similarly, where he is sued for instalments payable under the agreement, the purchaser is entitled to plead failure by the agreement to disclose the items prescribed by the Act in diminution of the purchase price payable.(56) The purchaser can also raise failure by the supplier to supply him with information relating to his indebtedness under the credit agreement against an action by the latter to enforce the agreement.(57)

The Hire-Purchase Act does not give a blanket answer to the question whether the purchaser can raise all these defences against the assignee. Section 7(1) states that a provision in the credit agreement will be of no effect if expressly or impliedly it relieves the supplier from liability for the act or defaults of any person acting on his behalf in connection with the formation or conclusion of the agreement. This provision is relevant where the assignment is in the form of a 'direct collection'. As already shown, under this arrangement the finance

institution collects instalments of the purchase price payable under the assigned credit agreement direct from the purchaser and legally the credit agreement is between it and the purchaser although all the negotiations leading to the conclusion of the agreement are carried by the dealer who assigns the agreement to the finance institution. Indeed it is the dealer, and not the institution, who will fix the cash price of the goods and receive the initial payment from the purchaser. Furthermore it is the dealer who will bear the responsibility of supplying the purchaser with a copy of the agreement as required by section 5(1) of the Hire-Purchase Act. For these reasons it has been argued by academics that the dealer who assigns credit agreements in this way should be regarded as a person acting on behalf of the financial institution to conclude the agreements. Therefore in accordance with section 7(1) of the Hire-Purchase Act, the institution should be liable for the defaults of the dealer while negotiating the agreement with the purchaser. Thus if the dealer makes any false claim about the goods or credit supplied under the agreement, the purchaser should raise that as a defence in any action by the finance institution to enforce its right under the assigned credit agreement.

But the problem is that section 7(1) is confined only to 'acts or defaults' in the formation of the credit agreement. Consequently, the purchaser can not use it if the defence which he wishes to raise, arises for instance, from the performance of the agreement itself, as where there is breach of any of the warranties or conditions implied into credit agreements by section 11. It could be argued that since, as

already said, where the direct method is used the supplier is the finance institution, and not the dealer with whom the purchaser actually deals in the conclusion of the agreement, then any defence arising from performance of the credit agreement can legitimately be raised against it. After all it will be the finance institution which will prepare the agreement in the first place. Thus if the agreement omits to make the compulsory disclosures, the institution should lose the right to re-possess the goods supplied under the agreement and to enforce any contract of guarantee or indemnity made in respect of the agreement if the purchaser defaults in the discharge of his obligations under the credit agreement.(59) Similarly, if there is a failure without reasonable cause to supply the purchaser with information about his indebtedness under the credit agreement, the financial institution should not be allowed to enforce the agreement against him as long as the default continues.(60)

The common law position on this matter is very much the same. The general rule is that the assignee of a 'contract right' (61) takes it subject to 'equities'.(62) What this means is that if the assigned contract is a credit agreement, the debtor is entitled to raise by way of defence to an action brought against him by the assignee, all claims arising out of that contract. Thus he can rescind the agreement on the ground that he was induced to enter into it by the fraud of the assignor.(63) Or in an action by the assignee to re-possess goods sold under the credit agreement, the purchaser can plead omission by the agreement to make the compulsory disclosures or failure without reasonable cause to supply him with information about his indebtedness

under the agreement, as valid defences against such an action.(64)

Where the assignee has a standing relationship with the assignor, as in the direct collection arrangement, under which the former can purchase credit agreements concluded by the assignor with his customers or the assignee plays an active role in setting the terms upon which these agreements are concluded, that will arguably provide more weight to the argument that the assignee should take the agreements subject to equities. In the United States case of Unico v Owen (65) the defendant and X company entered into a credit agreement whereby in return for \$819.72 payable by the defendant in 36 monthly instalments of \$22.77 each, the company undertook to deliver 24 record albums a year to him until 140 albums had been delivered. The company later assigned the agreement to the plaintiff. The defendant received 12 albums only although he continued to pay the monthly instalments for the next 12 months. When the plaintiff sued him for the balance of the purchase price, the defendant pleaded non-performance of the agreement by X company. The plaintiff argued that the defendant could not raise the defence because the plaintiff was a holder in due course of the promissory note given by the defendant in payment of the instalments of the purchase price of the record albums. Evidence showed that the plaintiff company was formed with the express aim of financing X company and, subject to some conditions, the plaintiff company agreed to lend X company up to 35% of the total amount of balances of credit agreements assigned to the plaintiff company. It was also shown that the plaintiff company not only had knowledge of the nature and manner of operation of

X company's business but also exercised extensive control over it. Besides, the plaintiff company had a large, if not decisive, hand in the fashioning and supply of the forms of contract used by X company. On that basis, it was held by the Supreme Court of New Jersey that the plaintiff company was not entitled to claim the status of holder in due course.

But the rule that a purchaser of the contract right embodied in a credit agreement should take it subject to equities may appear indefensible when applied to an innocent assignee of the agreement. Being ignorant of what may have gone on between the assignor and his customer and of how the assignor conducts his business, it might sound unfair to charge him with the assignor's defaults and breaches vis-avis the customer. Indeed it can be argued that just as a purchaser of a negotiable instrument for value and without knowledge of the defect in the transferor's title is entitled to holder in due course status so too an innocent assignee of a credit agreement should not take it subject to equities. After all the contract right in an assigned credit agreement is of the same nature as the monetary obligation in a negotiable instrument.

However on reflection it will be clear that this argument is not as forceful as it appears. In the first place, the similarity between the contract right in a credit agreement and the monetary obligation in a negotiable instrument is misplaced. First, whereas title to the monetary obligation is transferable by mere delivery of the negotiable instrument, title to the contract right can only be transferred by assignment of the credit agreement.⁽⁶⁶⁾ Second, because one of the

characteristics of a negotiable instrument is that the person liable for payment is under a duty to pay the holder for the time being of the instrument, it follows that upon transfer of the instrument it is not necessary that he should be notified by the new holder of the change of ownership. By contrast, in the case of an assigned contract, notice is necessary to perfect a statutory assignment, and is advisable in equitable assignments so as to prevent the debtor paying the debt to the original creditor.(67) Third, the assignee must furnish consideration in order to benefit from the assigned contract whereas a holder of a negotiable instrument can sue for payment without proof that he himself gave value for the transfer of the instrument to him. What is essential is that consideration should have been given at some time in the history of the negotiable instrument, though not necessarily by the holder claiming payment under it.(68) For these reasons, it would be inappropriate to let the assignment of credit agreements be governed by rules which govern negotiable instruments.

But apart from that, it would be naive to suppose that a person who purchases the contract right under a credit agreement will do so without enquiring about the validity of the agreement or its enforceability by the assignor. Almost in all cases, the assignee will take care to ascertain the exact nature and extent of that right knowing that as Anson puts it, 'he can not take more than the assignor has to give, or be exempt from the effect of transactions by which his assignor may have lessened or invalidated the rights assigned'.(69) Moreover, if circumstances surrounding the assignment of the agreement should have put the assignor on enquiry as to the possibility of the purchaser

raising certain defences against him, why should he benefit from the law if he chooses to close his eyes to such circumstances? In fact a financial institution which purchases a credit agreement will as a matter of business prudence take some steps to protect itself. These may include requiring the assignor of the agreement to execute a recourse agreement under which he undertakes to indemnify the financial institution for loss arising from the agreement.(70) On top of that, as already shown, the financial institution will usually not pay the assignor a sum representing the full selling value of the balances outstanding under the assigned agreements; usually it will retain a percentage of that as security for completion by the debtor of payments due under the agreement.(71) In other words, it is clear that as between the innocent purchaser and the innocent assignee, the latter will be better equipped to shoulder the risk of non-performance or inadequate performance of the assigned credit agreement and therefore it makes sense that he should be made to take the agreement subject to equities.

But that is not all. If as a matter of policy the assignee is made to take the assigned credit agreement subject to equities, that will help suppliers of goods under those agreements to improve their performance to customers. As an assignee, a finance institution will not accept to purchase a credit agreement from the supplier unless it has some assurance from him against defences which the purchaser under the agreement may have against him. Although such an assurance will be primarily in the form of a recourse agreement, the supplier will realise that the real solution to the problem is to give

satisfactory performance to his customers.(72)

It has been argued in this chapter that the law relating to security in Malawi leaves a lot to be desired. It is a medley of principles of law which grew at different time and in response to different social and commercial stimuli. Consequently its regulation is haphazard and incoherent. The Bills of Sale Act although avowedly aimed at regulating security of debts on personal property offers very little protection to the consumer of credit. Many of its provisions seem to be concerned with safeguarding the position of the creditor *and not* the debtor, and with the form rather than the overall fairness, of a bill of sale. As for the Bills of Exchange Act, it falls into this category by coincidence because it was never intended to govern security agreements. And the common law which governs mostly pledges, assignments and contracts of guarantee (73) suffers from the usual handicap that it leaves the economically dominant party to determine the terms on which a consumer agreement is to be concluded.

Of course the object of this chapter has not been to agitate for the reform of the law which governs security agreements (although such change is badly needed). Rather the aim was to highlight the inadequacies of the Hire-Purchase Act. It has been shown that the Act contains a number of provisions which affect the enforceability of security agreements made in respect of credit agreements. However the provisions fail not only to take into consideration the variety of forms which security agreements can take but also to deal with a number of situations whose occurrence may impair the enforceability of the credit

agreement and thus bring into question the tenability of the security agreement made in respect of that transaction. Once again, therefore, one can not avoid concluding that although the Hire-Purchase Act does depart from the general law of contract in order to grant more protection to the person who purchases goods on credit, the alternative which it creates falls short of what is expected by the ordinary consumer.

Footnotes

- 1 . The Hire-Purchase Act, section 2(1)
- 2 . Possessory rights which entitle him to use the goods and to bring actions of trespass, detinue or conversion wherever there is an undue interference with that possession,
- 3 . (1957) 2 West African LR 32, p. 34 in which the court relied on the English case of Whiteleys Ltd v Hilt [1918] 2 KB 808
- 4 . The Hire-Purchase Act, section 19(1)
- 5 . Ibid., section 19(3)
- 6 . Ibid., sections 4(2)(a), 6(3)(a) and 24(3)(a)
- 7 . For how much is to be paid as initial payment, see ibid., section 24(1) and the Schedule to the Act.
- 8 . Civil Appeal Case No. 8 of 1982 (Unreported)
- 9 . Ibid.
10. Modern Light Cars Ltd v Seals [1934] 1 KB 32
11. The Malawi Bills of Exchange Act, section 3(2)
12. Ibid., section 45(2)(a) and (b)
13. Ibid., section 46(1)
14. Ibid., sections 48 and 49
15. 'Indorsement' is the writing on a bill or promissory note of the name of the transferor and its delivery to the transferee.
16. The Malawi Bills of Exchange Act, section 92(1)
17. Of course where the breach is failure by the supplier to comply with section 8 of the Hire-Purchase Act, no security given in respect of money payable under the credit agreement can be enforced by any holder of it against the purchaser or any person who may have

provided it for the purchaser

18. The Hire-Purchase Act, section 19(1)
19. Ibid., section 13(2)(b)
20. J McLoughlin, Introduction to Negotiable Instruments, p. 29
21. The English Consumer Credit Act, section 123(1) and (3)
22. Ibid., section 125
23. The Hire-Purchase Act, section 8(2)(b)
24. Sheridan, Rights in Security, p. 117
25. McEntire v Crossely Bros Ltd [1895] AC 457
26. Legal Problems of Credit and Security, p. 2
27. Reeves v Capper (1838) 5 Bing. NC 136 and Flory v Denny (1852) 7 Exch. 581
28. The Malawi Bills of Sale Act, section 10
29. Ibid., section 14
30. Ibid., section 15
31. This seems to suggest that the duty is upon the mortgagor to keep the security in good repair.
32. Note the similarity between this and section 9 of the Hire-Purchase Act which was referred to earlier.
33. Cf section 14 of the Hire-Purchase Act where the period of grace 21 days
34. This is similar to the provisions under sections 19(4) and (5) and 23(2)(b) and (c) of the Hire-Purchase Act.
35. 350 F. 2d 445 (1965)
36. [1924] 1 Ch 136
37. (1886) 17 QBD 690, p. 697

38. Supra note 6
39. Blundell-Leigh v Attenborough [1921] 3 KB 235
40. Donald v Suckling (1866) LR 1 QB 585, p. 615
41. Re Lawford [1902] 2 KB 445
42. The Hire-Purchase Act, sections 17(2)(b) and 19(7)
43. The English Consumer Credit Act, section 114(1)
44. Ibid., section 116(1) and (2)
45. For the definition of 'fixed-sum' and 'running-account' credits, see ibid., section 10.
46. This seems to suggest that under this Act it is possible for the pledgee to foreclose.
47. See for instance, the Hire-Purchase Act sections 4(2)(b) and 6(3)(b)
48. Western Credit v Alberry [1964] 1 WLR 945
49. Goulston Discount Co Ltd v Clark [1967] 2 QB 493
50. The Statute of Frauds, section 4
51. (1957) 2 West African LR 251
52. This clearly takes into account the situation where security is furnished someone other than the debtor himself.
53. The English Consumer Credit Act, section 105(5)
54. By contrast under section 8 of the Hire-Purchase Act, only the debtor himself is entitled to such information.
55. The United States Uniform Commercial Code, section 9.112(b)
56. Supra note 6
57. The Hire-Purchase Act, section 8(2)(b)
58. For instance, AG Guest, The Law of Hire-Purchase, pp 365-7

59. Supra note 6
60. Supra note 55
61. The point to note here is that the assignment gives the assignee a right against the assignor personally, but not an independent right of action against the debtor- Cheshire and Fifoot, The Law of Contract, 9th ed., p. 494.
62. Anson's Law of Contract, 24th ed., pp 423-4
63. Graham v Johnson (1878) LR 8 Eq. 36
64. Supra notes 6 and 55
65. 232 A. 2d 405, p. 417 (1967)
66. For a discussion of assignments of credit agreements, see AG Guest op. cit., pp 677-8.
67. Supra note 62, p. 444
68. Ibid., p. 445
69. Ibid., p. 435
70. See for instance, Goulston Discount Co Ltd v Clark supra note 46
71. AG Guest, op. cit., p. 88
72. H Kripke, Chattel Paper as a Negotiable Specialty under the Uniform Commercial Code (1950) 50 Yale LJ 1209, p. 1221. See also Comment, A Case Study of the Impact of Consumer Legislation: The Elimination of Negotiability and the Cooling-Off Period (1969) 78 Yale LJ 618.

CHAPTER SIX

GENERAL ANALYSIS OF REGULATORY PROVISIONS

OF THE HIRE-PURCHASE ACT

In the last three chapters an attempt has been made to show how the Hire- Purchase Act regulates the quality of goods and credit supplied under a credit agreement and the security given in respect of that agreement. It has been shown that the regulation needs to be improved in many respects.

In this chapter it is intended to analyse individual provisions which underpin this regulation. The analysis will involve determining the legal implications of these provisions and their adequacy to ensure fair exchange in credit agreements. It is hoped that this will demonstrate not only that the Act makes a marked departure from the general law of contract but also that in spite of that, it does not go far enough to ensure that the person who obtains goods on credit gets a fair exchange from the agreement.

6.1 Legal Implications of the Provisions of the Act

It has been maintained all along that the Act aims at ensuring that the purchaser under a credit agreement gets a fair exchange by allowing him to resist enforcement of the entire agreement (including security furnished for it) or just one of its clauses, if the supplier under the agreement does certain unfair acts or inserts in the agreement certain unfair terms. To that extent, it can be said that the Act comprises a series of defences open to a purchaser who has been victimised (1) by an

unfair credit agreement. These defences can be divided roughly into three groups. First, those under which an act which would otherwise not be allowed by the Act is permissible if at least the purchaser consents to it or he has not been prejudiced by it. Second, those under which a term of the credit agreement which is inconsistent with the Act is enforceable after correction by the court or the supplier himself. And lastly, those under which certain acts or terms of the agreement are absolutely of no legal effect. In the following pages each one of these groups will be discussed in detail. However before that, there is one issue which needs to be examined. That is, whether there is any limitation on the purchaser's right to raise any of these defences.

Under section 25, as read together with section 24(1)(b) and the Schedule to the Act, the supplier can not bring an action for the return (2) of goods supplied under a credit agreement or for the recovery of a portion of the purchase price payable under it, 36 months after the execution of the agreement.(3) Similarly, the view under the general law of contract is that if breach by any one of the parties to a contract gives the other party the right to repudiate the contract, that right is not exercisable after a certain period of time or upon the occurrence of certain events. For instance, under the Malawi Sale of Goods Act the right to repudiate a contract for the sale of goods on the ground of breach of a condition of that contract by the seller is unavailable to the purchaser of the goods if the latter either waived performance of that condition by the seller or elects to treat the breach as breach of a warranty (4), or is forced to make the waiver because he has accepted the goods or the property in them has passed to him.(5) The idea behind

all this, as Anson once said, is that having affirmed the contract, the purchaser can not subsequently assert that he is discharged by the breach of condition.(6)

Now is it possible to use a similar argument with respect to the defences created by the Hire-Purchase Act ? In other words, would it be open to the supplier under a credit agreement to argue that the purchaser should not be allowed to resist enforcement of the agreement which fails to comply with section 4 of the Act, for instance, on the ground that he has done something which shows a clear intention on his part to proceed with the agreement despite the non-compliance ?

To answer that question it is perhaps important to underline the difference between the right to repudiate a contract for breach of one of its terms and the right to resist enforcement of a credit agreement under the Hire-Purchase Act. Once a contract has been repudiated all the primary obligations performable under it come to an end, bringing into effect the secondary obligation on the part of the party in breach to compensate the innocent party.(7) By contrast, where an agreement is unenforceable under the Act, that suspends performance of the primary obligations which arise under it but it does not necessarily bring them to an end nor does it give rise to the obligation to compensate the innocent party.(8) As will be shown shortly, the position seems to be that if the cause of the unenforceability is removed, the agreement can in some cases be enforced as a credit agreement and in others, as an unconditional contract for the sale of goods.(9)

Section 21 of the Act renders of no effect any waiver by the

purchaser of any right conferred by the Act. Arguably this does not mean that the purchaser can not choose not to pursue his rights.(10) Rather it means that once a credit agreement or any one of its clauses becomes unenforceable on the ground of non-compliance with the Act, it can not cease to be so by reason of any act on the part of the purchaser which shows that he is willing to proceed with the agreement as if it was not tainted. Thus unless the non-compliance is one which is correctible, the purchaser has unlimited freedom to resist enforcement of the credit agreement or the clause at any time during its subsistence.

1. Provisions under which an act which would otherwise not be allowed is enforceable if the Purchaser consents to it or is not prejudiced by it

- a) Section 11(3)

This provision states that the supplier can not rely on a clause in the credit agreement which purports to exclude or modify any warranty or condition relating to the quality (11) of goods supplied under the agreement 'unless he proves that, before the agreement was made, the clause was brought to the notice of the purchaser and its effect made clear to him'. The operation of the provision is clearly very limited. It does not apply to a clause by which the supplier may seek to limit the purchaser's remedies for the supplier's breach of these conditions and warranties, or the period within which the purchaser can bring an action for the breach. Similarly, it is of no application to any clause which excludes or limits liability by the supplier for any

misrepresentation which he may have made about the goods or credit supplied under the credit agreement. Equally unaffected is a clause in the agreement which purports to exclude the application of any provision of the Act to that agreement (12) or to exclude or limit the supplier's liability for damage or injury arising out of his breach of the credit agreement (13) or the duty imposed by Donoghue v Stevenson.(14) Of course why all these exception clauses are left out in preference for one which excludes or modifies the conditions and warranties applicable to credit agreements by virtue of section 11(2) is not clear. Clearly protection of the purchaser from abuse of all such clauses is just as important as his protection from the type of clause caught by the Act.

Nevertheless, there is no doubt that section 11(3) represents a departure from the general law of contract. As shown in Chapter 2, the position is that, subject to the rules of construction of exclusion clauses as re-stated in Photo Productions v Securicor (15), an exclusion clause will operate to protect the supplier if the purchaser has had reasonably sufficient notice of it or signs a document in which the clause is embodied. In other words, it does not matter that the purchaser has not actually seen the clause or understood its import. By contrast, here, in spite of the purchaser's signature of a credit agreement, the supplier can not rely on the clause unless he takes steps to acquaint the purchaser with not only its existence but also its effect. Of course where the liability sought to be excluded arises under what would otherwise amount to a false trade description under the Malawi Merchandise Marks Act, the supplier would have to go further. Section 17 of that Act requires that for such an exclusion clause to be

effective, it must be signed by or on behalf of the supplier and be delivered to and accepted by the purchaser at the time of concluding the agreement. Thus if the purchaser's attention is drawn to the clause and he does not accept it but nevertheless goes on with the agreement, the supplier may find it difficult to enforce the clause against him.

All this is only concerned with incorporation of the exclusion clause into the credit agreement; it does not affect the actual enforcement of the clause. Thus whether or not the clause actually operates to protect the supplier will have to be determined with reference to the contra proferentem rule (16), the effect of the misrepresentation rule (17) and of Photo Productions v Securicor (18), Mitchell v Finney Lock (19) and Ailsa Craig v Malvern Fishing. (20)

What this implies is that section 11(3) of the Hire-Purchase Act together with section 17 of the Merchandise Marks Act do not represent any substantial improvement of the purchaser's position at common law. To the extent that the clause is not ambiguous and its effect is not misrepresented by the supplier or any one who negotiates the agreement on his behalf, the matter will be governed by this trio of cases. But as it was argued in Chapter 2, these cases have not left the common law on this matter in a particularly satisfactory state. For a start, they involve raising the question as to when a contract may not be a contract at all.(21) And that is not a simple question to answer as evidenced by the massive literature which grew around the doctrine of fundamental breach. Secondly, they do not make it clear whether or not if the clause is clear and covers events which have brought it into operation, a court

can not nevertheless enforce the clause on the ground that it is unreasonable. In the Photo Productions case both Lord Wilberforce and Lord Diplock suggested that that can be done. However they neither stated it definitively nor did they clearly indicate which factors are to be considered in determining whether a clause is unreasonable or not.

By saying that the purchaser should be bound by an exclusion clause if he has actual knowledge of it, section 11(3) seems to make consensus between him and the supplier the basis for the operation of the clause. The idea is clearly that if the clause has been explained to the purchaser and he chooses to go on with the agreement, he must be taken to consent to the clause. But what is overlooked here is that merely to proceed with the agreement in such a case does not say anything about the purchaser's consent. There being no requirement that the explanation given should be thorough, it is possible that the purchaser will go on with the agreement even though he has not understood the supplier's explanation of the effect of the clause. Besides, even if the purchaser does understand the effect of the clause, he may proceed with the agreement not because he really agrees that the clause should be there but because he has no other choice to take what the supplier offers. On the other hand, it has been shown that section 17 of the Merchandise Marks Act requires that the purchaser must have actually accepted the clause for him to be bound by it. This seems to suggest that if he shows that he does not accept it, the supplier may not be allowed to enforce the clause against him. But the problem is that if in spite of his non-acceptance of the clause, he goes ahead with the agreement it

may not be easy to prove that he did not consent to the clause. In other words, either way, the purchaser's position is not as good as it appears.

b) The Provisos to sections 4 and 6
of the Hire-Purchase Act

Both sections 4 and 6 deal with compulsory disclosures which must be made in every credit agreement. If any credit agreement fails to comply with them, one result of that is that the purchaser will be liable to pay 75% only of the purchase price payable under that agreement and the supplier will lose title to the goods supplied under it.(22) What this means is that if the transaction was a hire-purchase agreement or a conditional sale agreement or an instalment sale agreement (23) the purchaser will get full title to the goods and the supplier's right to re-possess them for any breach of the agreement by the purchaser will dissipate. But it is not clear whether if the agreement is a simple hire agreement or in the case of the other agreements, the purchaser does not want full title to the goods, sections 4(2) and 6(3) will nevertheless operate to vest title to the goods in him. On the face of it, these two sub-sections seem to suggest that. But that would not be fair bearing in mind that the reason why a person will choose to obtain goods under a simple hire agreement is that he wants to use them for a limited period of time without in the meantime acquiring full title to them.

But there is another point which it is intended to highlight here. Even if sections 4 and 6 have not been complied with, a court may still enforce the credit agreement as if nothing happened. The provisos to

these two provisions state that:

"Provided that if, in any action arising out of the agreement, the court is satisfied that the purchaser would not, but for this subsection, have been prejudiced by the fact that the agreement does not comply with subsection (1), the court may, subject to such conditions that it thinks just and equitable to impose, order the parties to carry out the terms of the agreement as if the agreement had complied with subsection (1)".

This provision clearly gives the court power, as it were, to police compliance with sections 4 and 6. For by using the words 'in any action arising out of the agreement' it suggests that if, for instance, a dispute arose between the parties as to whether the purchase price payable under the agreement should be calculated before or after deducting the initial payment payable by virtue of section 24(1)(a) from the total cash price of the goods, the court could take the opportunity to determine whether or not sections 4(1) and 6(1) had been complied with by the supplier of the goods. But whereas it is clear that if there is non-compliance and the purchaser is not prejudiced by it, the court can enforce the agreement, it is less clear from the provisos whether or not if the court found that the purchaser is prejudiced, it could use this power to declare the agreement unenforceable by virtue of sections 4(3) and 6(3). Of course as a matter of common sense, since the court has the mandate to check whether or not sections 4(1) and 6(1) have been complied with, if it is allowed to act where the purchaser is found not to have been prejudiced by non-compliance with these provisions, it

should also be able to do so if he is prejudiced. However that is not possible to justify as a matter of law because these provisos seem to contemplate the situation where the non-compliance does not adversely affect the purchaser as the only instance where the court can make a ruling on the agreement at its own initiative.

In contrast, the English Consumer Credit Act does provide elaborate rules to deal with such a problem. Section 55 of the Act (which is not yet in force) provides that a regulated consumer credit agreement is not properly executed unless it discloses certain prescribed information. According to section 65(1) such an agreement can be enforced against the debtor only by a court order. And if it considers it just, the court can under section 127(1) dismiss an application for this order. Factors to which it must have regard in doing so are prejudice caused to any person by the non-disclosure, the degree of the creditor's culpability for the contravention and the powers conferred on the court by sections 127(2), 135 and 136. These provisions state, respectively, that if the court considers it just it may in the order

- a) reduce or discharge any sum payable by the debtor or any surety in order to compensate him for prejudice suffered as a result of the contravention;
- b) include provisions making the operation of any term of the order conditional on the doing of specified acts by any party to the application or suspending the operation of any term of the order;
- c) include such provision as it considers just for amending the credit agreement.

The second problem with these provisos is that it will not be possible to apply them with any measure of certainty and consistency. No guidance is given to show when the purchaser should be regarded as not having been prejudiced by non-compliance with disclosure requirements so as to justify the court to order the parties to carry out the agreement as if nothing happened. The question which is likely to arise is whether for the provisos to apply instead of sections 4(2) and 6(3), the purchaser must have suffered no adverse effect at all or whether some disadvantage, albeit slight, will be enough. Furthermore, it is unclear whether the prejudice, if any, should be wholly attributable to the failure to make the compulsory disclosures. For instance, if the rate of finance charges is not disclosed (25), the purchaser will not be able to do comparative shopping and therefore may end up paying a higher purchase price. Clearly, that would be a prejudice arising from the supplier's failure to disclose vital information. However some could argue that this is not a prejudice within the contemplation of the provisos because even where the supplier has made that kind of disclosure, that in itself does not guarantee that the purchaser involved will actually shop around. Thus it could be said that this situation should be treated as where no prejudice has been suffered and the parties be allowed to carry out the agreement. On the other hand, if the amount which the purchaser pays as a result of not being adequately informed about the finance charges is exceedingly high, it is conceivable that the temptation will be irresistible to hold that he has been prejudiced by the non-disclosure so that the agreement should be

unenforceable as a credit agreement.

What all this shows is that whether sections 4(2) and 6(3) on the one hand, or the two provisos on the other, should apply, ought not to have been left to be determined by simply asking whether or not the purchaser has been prejudiced. The fact of the matter is that courts applying these provisions will need something clearer than that to enforce the law more effectively. They will need to look at the extent of the prejudice suffered and in some cases even though the purchaser has been prejudiced, they may feel that the disadvantage caused does not warrant refusal to enforce the credit agreement. But the real danger is that because there are no guidelines for distinguishing between cases where the provisos should apply and those which should be covered by sections 4(2) and 6(3), courts may be inclined, out of their inherent desire to uphold contracts wherever possible, to disregard the distinction, order the parties to go on with the agreement and then impose conditions on the supplier which will mitigate any hardship which may have been caused to the purchaser by the non-compliance.(26) That could be defended on the ground that it might help courts to do justice as between the parties. However that justice would be achieved at the expense of deterrence of traders who might be tempted to contravene disclosure requirements, which arguably is the idea behind sections 4(2) and 6(3).

c) Section 17(2)(a)(ii)

Section 17(1) of the Hire-Purchase Act gives the purchaser the right

to terminate the credit agreement before it has run its full course. Once he has done so, in addition to any damages which he may be required to pay for failure to take reasonable care of the goods supplied under the agreement, sub-section 2(a)(i) requires him to pay the supplier compensation equivalent to the amount by which half of the total purchase price payable under the agreement exceeds the sum of all instalments of the purchase price paid before the date of the termination, and those instalments in arrear at that date. But subsection 2(a)(ii) suggests that the compensation may also be fixed by the credit agreement itself. Now if the amount so fixed is less than that payable by virtue of sub-section 2(a)(i), the purchaser must pay the former.

As this compensatory amount is a form of minimum payment (27), it may be asked whether where the lesser sum fixable by the agreement is payable but the actual loss suffered by the supplier for the premature termination of the agreement by the purchaser is much smaller than that sum, the latter can seek the protection of the law against penalties. The Act does not say anything on the matter. But it is difficult to see such a claim succeeding in the courts. The likely argument against it is that by enacting section 17(2), the Legislature should be taken to have intended to exclude the application of the common law rules on penalties.(28) On the other hand, as has been shown so far, the Hire-Purchase Act leaves many issues open and therefore it could be argued that the Legislature could not have intended to deprive the purchaser of any protection which the common law may offer in those areas. Perhaps the best way around this problem is to qualify

sub-section 2(a)(ii) so that the compensatory sum which the credit agreement fixes should only be payable if the court is satisfied that it is equal to the actual loss suffered by the supplier by reason of the termination of the agreement by the purchaser.

2. Provisions of the Hire-Purchase Act

under which inconsistency with the Act is correctible

Section 26(1) and (2) empowers the Minister to fix the maximum amount by which the purchase price payable under a credit agreement may exceed the cash price of the goods supplied under that agreement. Sub-section (4) then provides that a provision in the agreement in the agreement will be of no effect if it provides for the two prices to exceed each other by an amount which is in excess of that which the Minister may fix. But instead of making the clause absolutely unenforceable, the sub-section allows the court to enforce it only up to the extent that it complies with the amount fixed. It says:

"[T]he amount of each instalment payable under an agreement containing such provision shall be decreased accordingly".

The effect of this is clearly to give the court power to re-write the agreement for the parties, and thus represents a departure from the more traditional role of courts under the general law of contract.

A similar power is implicit in section 24(4). It will be recalled that section 24(1)(a) requires that before the purchaser can take possession of the goods supplied under a credit agreement, he must

pay either 20% or 33¹/₃% of their cash price to the supplier of the goods. This obligation can be discharged in cash or goods. Sub-section (4) then goes on to provide that inter alia 'no payment in goods shall, to the extent to which the amount thereof exceeds the normal market price for the goods, be deemed to be a payment for the purposes of subsection (1)(a)'. By allowing the court to accept a payment in goods only to the extent that the value which the purchaser places on them does not exceed their price on the open market, where the former exceeds the latter this provision will in effect allow the court to enforce a payment in part and reject the remainder.

But what is not clear is why this type of provision is confined to finance charges and initial payment. Section 7(1)(g) as read together with section 7(2) fixes the rate of interest chargeable under a credit agreement on an instalment in arrear. Similarly, section 15 fixes the rate at which rebates to which the purchaser is entitled if he accelerates re-payment of the purchase price is entitled. But curiously, if the supplier charges a rate of interest which is higher than that required by section 7(2) or pays the purchaser the rebate at a rate lower than that imposed by section 15, there is no provision in the Act which allows the court to lower or raise it, as the case may be, or indeed, as will be shown below, to refuse enforcement of the clause fixing such a rate or the entire credit agreement.(30)

Furthermore, since the Act clearly aims at preventing the charging of excessive rates, one wonders why courts are not given the power to

check the rate charged any time an action is brought under a credit agreement. It was noted earlier that the provisos to sections 4 and 6 in effect allow courts in any action arising under a credit agreement to determine whether or not the agreement made the compulsory disclosures prescribed by the Act. The same ought to apply to rates payable by the purchaser under the agreement.

3. Provisions of the Hire-Purchase Act
under which certain acts and clauses
are absolutely of no legal effect

The majority of the provisions of the Act fall under this category. They impose what for the sake of convenience may be called absolute prohibitions. If any clause in a credit agreement or any act done by the supplier with respect to the agreement is inconsistent with any one of them, it is void even if the purchaser has been slightly disadvantaged or has not been prejudiced at all by the non-compliance. Thus for instance, under section 21 no waiver by the purchaser of any right granted by the Act is of any effect or force. Similarly, a clause in a credit agreement will be of no effect if expressly or impliedly it either excludes or restricts the right of the purchaser to terminate the agreement under section 17(1) (31) or imposes on him for that termination, liability which is in excess of that imposed by the Act.(32) Other provisions are: a) section 8(2) which makes a credit agreement unenforceable if the supplier fails without reasonable cause to supply the purchaser with a copy of the agreement or information relating to the latter's indebtedness;

- b) section 11(1) which provides that the warranties that the goods supplied under a credit agreement will be free from any charge or encumbrance in favour of any third party and that the purchaser will enjoy quiet possession of them, and the condition that the supplier is or will not be precluded from passing ownership in the goods to the purchaser, will be implied in every credit agreement notwithstanding any agreement to the contrary;
- c) section 12 which gives the purchaser who is liable to the supplier in respect of more than one credit agreement to appropriate any payment which he makes, towards the satisfaction of sums due under the agreements in the proportion which those sums bear to each other;
- d) section 13 which places the supplier under an obligation to write on every negotiable instrument (except a non-post-dated cheque) given by the purchaser in respect of any liability under a credit agreement words which clearly show that the instrument has been drawn for that purpose;
- e) section 14 which states that if the supplier re-possesses goods supplied under a credit agreement for default by the purchaser to pay any instalment of the purchase price after the purchaser has paid 50% of that price, the purchaser has the inalienable right to redeem the goods within 21 days of the seizure by paying the arrears;
- f) section 15 which entitles the purchaser to accelerate re-payment of the purchase price and to receive a rebate in finance charges for that acceleration;
- g) section 16 which entitles the purchaser to ownership of goods supplied under a credit agreement after payment of an appropriate

amount of the purchase price and

- h) section 19 which outlines the procedure for re-possessing goods supplied under a credit agreement if the supplier rescinds the agreement after the purchaser has paid 50% of the purchase price.

Again, all these provisions represent a rejection of the idea that it is for the parties to a contract to fix the terms upon which to exchange performances. The provisions perform the task which the parties to the agreement would perform in a regime of freedom of contract. But some of them cover areas almost similar to those covered by provisions in the first two categories. For instance, if the purchaser accedes to a request by the supplier and promises not to insist upon performance of the agreement by the latter in accordance with certain provisions of the Act, i.e., if the purchaser waives (33) performance of those provisions, that is not juristically very different from letting (34) the supplier exclude liability which would otherwise have arisen from, say, breach by the supplier of conditions implied by section 11(2) of the Hire-Purchase Act.(35) Both involve an agreement by the purchaser not to pursue his rights and more often than not, both will be initiated by the supplier. For that reason one would have expected them to be subject to the same type of control. However, as already seen, a waiver is absolutely unenforceable (36) whereas subject to rules for the construction of exclusion clauses, a clause which seeks to exclude or modify implied conditions relating to the quality and fitness for any particular purpose of goods supplied under a credit agreement can be enforced so long as it is brought to the notice of the purchaser and its effect

made clear to him before or at the time of concluding the agreement.

Similarly, a provision in a credit agreement which seeks to exclude the right of the purchaser to terminate the agreement before its expiry performs the same task as a provision which excludes liability by the supplier for his breach of the implied conditions of quality and fitness for a particular purpose of the goods which he supplies. Yet the latter is enforceable under the Act while the former is absolutely unenforceable.(38) Or again, while a clause which fixes a rate of interest for an instalment of the purchase price which is in arrear which is in excess of that prescribed by the Act is unenforceable, a clause which provides for finance charge rates which are higher than those imposed by the Act can be enforced.(39)

All these inconsistencies have no justification. It may be that in the end ironing them out will not make much difference insofar as the protection of the purchaser is concerned.(40) Nevertheless their existence serves no purpose other than to reflect badly on the way the Act was conceived.

Waiver under 21 of the Hire Purchase Act
and terms of a Credit Agreement

It has already been shown that section 21 renders of no effect any 'waiver' by the purchaser of any right under the Hire-Purchase Act. Although the Act does not define the word, it is clear that essentially it involves a voluntary choice by one party to a contract not to insist

upon his legal rights.(41) A good example is where, under a contract for the sale of goods, there is breach of a condition by the seller and the latter, in consideration of a reduction in the price of the goods, gets the purchaser to give up enforcement of his rights with respect to the breach.(42)

It has been argued above that the effect of this provision is that once there has been contravention of the Act, no act or consent on the part of the purchaser can change that state of affairs. In other words, the purchaser could always challenge enforceability of the credit agreement even though his earlier conduct showed that he was prepared to excuse the contravention. Now apart from cases of non-compliance with the Act, the question of waiver may arise where there is breach of any term of the agreement which is not prescribed or disallowed by the Act. Since the purchaser's right with respect to such a breach would not be a 'right under the Act', the supplier could always get him to waive it without contravening the Hire-Purchase Act.(43) Consequently one wonders whether it might not be a good idea to extend the non-waiver under section 21 to cover rights of the purchaser arising under the common law.

Another question which may arise here is whether a dispute between the purchaser and the supplier with regard to the purchaser's rights under a credit agreement can be settled. For if there is such a settlement the supplier could argue that the purchaser 'waived' the right in question and therefore should not insist on its enforcement. Under section 1.107 of the United States Uniform Consumer Credit Code the general rule is that a debtor can not waive or agree to forego any

right or benefit granted to him by the Code. However the provision allows any claim which a debtor may have against a creditor to be settled by agreement if disputed in good faith. But a settlement in which the debtor waives or agrees to forego rights or benefits granted by the Code is invalid if the court finds the settlement to have been unconscionable when it was made. Factors to be considered when determining that fact are:

- i) the competence of the debtor to understand the implications of the settlement;
- ii) any deception or coercion practised on the debtor;
- iii) the nature and extent of legal advice received by the debtor and
- iv) the value of consideration offered by the creditor for the settlement.

6.2 Adequacy of Defences created by the Act

As said at the beginning, provisions of the Hire-Purchase Act can be seen as a series of contractual remedies which the purchaser under a credit agreement can use as a shield against any action brought by the supplier to enforce the agreement against him or any surety. The remedies could also be used offensively to challenge any any credit agreement which is oppressive and unfair. However the problem is that a number of these provisions do not show the consequence of non-compliance with them. One such provision is section 15 which it will be recalled fixes the rate at which rebates payable for accelerating payment of the purchase price are to be calculated; another is section 14 and the third one is section 19.(45) Similarly, under section 13 if the purchaser

draws a negotiable instrument in respect of any of his liability under a credit agreement and the supplier fails to write on the instrument such words as show that it has been issued in connection with the agreement, and on the agreement itself, words indicating that a negotiable instrument has been issued in connection with it, the supplier commits a crime punishable by a fine and in default of payment, by imprisonment for up to 30 days. However the Act does not go on to show what effect, if any, that failure by the supplier, will have on the agreement, in particular whether should the supplier be sent to prison, the purchaser would still be obliged to proceed with the agreement and to continue making payments due under it. Indeed there is no indication of what will be the effect of a clause in a credit agreement which is inconsistent with these provisions.

Of course the real issue in such cases will not be whether the supplier should be allowed to get away with the contravention of the Act but whether the entire agreement becomes unenforceable or just the offending clause in it. Alternatively, the question may be whether the court can make the purchaser waive the non-compliance if it finds that he has not been prejudiced by it, as the court is entitled to do in cases of non-compliance with compulsory disclosure provisions.⁽⁴⁶⁾ It should perhaps be observed that the position is very much the same even under the English Consumer Credit Act. For example, it ⁽⁴⁷⁾ gives the debtor a right to terminate a regulated hire-purchase or conditional sale agreement before the final payment due under it falls due, without stating what would be the effect of an agreement or provision which is

inconsistent with that. And section 170(1) makes it clear that breach of **any** requirement made otherwise than by any court by or under the Act can not incur any civil or criminal sanction except to the extent expressly provided by the Act. However, unlike under the Hire-Purchase Act, the English Consumer Credit Act does remove the uncertainty by providing that:

"A term contained in a regulated agreement or linked transaction (48), or in any other agreement relating to an actual or prospective regulated agreement or linked transaction, is void if, and to the extent that, it is inconsistent with a provision for the protection of the debtor or hirer or his relative or any surety contained in this Act or in any regulation made under this Act".(49)

Although the use of the words 'to the extent that' may cause some difficulty to interpret (50), the implication here is clearly that where any clause in the agreement contravenes any of the mentioned provision of the Act, it is the clause only, and not the entire agreement, which will be unenforceable.(51) Similarly, section 2.202 of the United States Uniform Consumer Credit Code fixes rates of finance charges payable in consumer credit sales (except those sales which are made pursuant to revolving accounts) and then further on the Code provides that if the consumer pays an excess charge, he has a right to a refund which may be made by reducing his indebtedness by the amount of the excess charge or be recovered from the person who made the excess charge or from an assignee of that person's rights who undertakes direct collection of

payments from or enforcement of rights against debtors arising from the debt.(52)

It is therefore submitted that a similar line ought to be adopted by the Hire-Purchase Act. Either each of these provisions should be extended to include words which show the effect of any clause in a credit agreement which is inconsistent with them or there should be a blanket clause similar to that contained in the English Consumer Credit Act quoted above to deal with the matter.

The second argument which can be raised against the defences created by the act is that the distinction between non-compliances which render the whole credit agreement unenforceable and those which make a clause of the agreement only unenforceable, does not seem to be based on clear policy. It has been stated that if a credit agreement fails to comply with compulsory disclosure provisions, it may be unenforceable unless the court finds that the purchaser was not prejudiced by the non-compliance, in which case it may order that, subject to some conditions, the parties should proceed with the agreement as if nothing happened. By contrast, if the agreement fails to disclose that at least 20% or 33 1/3% of the cash price of goods supplied under the agreement is payable by the purchaser in goods or cash before the purchaser can take possession of those goods or that the full purchase price is payable in a period not exceeding 24 months from the signing of the agreement, the credit agreement is absolutely unenforceable whether or not the purchaser has not been prejudiced by the failure to disclose.(53) Similarly, if the purchaser requests the supplier for either a copy of the credit agreement (54) or signed statement about the purchaser's

financial position under the agreement and the supplier without reasonable cause (55) fails to comply with the request, not only is the credit agreement absolutely unenforceable by anyone against the purchaser but also if the default continues for a period exceeding 30 days, the supplier commits a punishable crime.

But the question is why these cases are treated differently. Since in essence they are all concerned with disclosures, albeit at different stages in the life of the credit agreement, it seems reasonable that non-compliance with them should attract the same sanction. Of course what percentage of the cash price is to be paid as initial payment, the mode of its payment and the period within which the full purchase price is payable are all matters which are laid out in section 24 so that if the agreement fails to disclose them, the purchaser may still be able to know them. On the other hand, there is no way of knowing about the details which must be disclosed under sections 4 and 6. Consequently, it is arguable that non-compliance with these two provisions should attract a stiffer sanction than non-compliance with section 24. But the Act puts it the other way round. As shown above, the court can make the purchaser waive the remedy for non-compliance with sections 4 and 6 if he has not been prejudiced by it whereas no such qualification attaches to non-compliance with section 24.

Now this might be defended on the ground that as section 24 is a financial control provision, the sanction for non-compliance with it needs to be deterrent. But that becomes difficult to sustain when it is realised that non-compliance with other more important financial control

provisions does not render the whole credit agreement or indeed the offending clause, unenforceable. For instance, sub-section 4 of section 26 which allows the fixing of maximum finance charge rates provides that:

"A provision in an agreement shall be of no effect in so far as it provides for the payment of a purchase price exceeding the cash price by more than the appropriate amount fixed in terms of subsection (1) at the date of the agreement and the amount of each instalment payable under an agreement containing such a provision shall be decreased accordingly".

And the Act is silent as to what will happen if there is non-compliance with section 15 which fixes the rate at which rebates to be paid to the purchaser for accelerating re-payment of the purchase price are to be calculated.

Another provision is section 8. It is no doubt important that the purchaser should be apprised of his indebtedness under a credit agreement from time to time as the agreement continues to run. And this is the more so since unlike under sections 77 and 78 of the English Consumer Credit Act, the supplier is under no legal obligation at his own initiative to send the purchaser periodic statements of the purchaser's financial position under the agreement. As a result it makes sense that if the purchaser asks for the statement and the supplier deliberately refuses to supply it, the supplier should face a stiff sanction. But even then, it is difficult to justify the dissimilarity between that sanction and the one which may apply for non-compliance

with say, sections 7 and 26. That the purchaser should receive the financial statement is arguably as important (if not less) as that he should be protected from oppressive terms or exorbitant finance charges, which is what these two provisions do although non-compliance with them does not render the entire credit agreement unenforceable, as does non-compliance with section 8. It is true that the sanctions for non-compliance with section 8 apply only if the failure to comply is without reasonable cause whereas there is no need to prove fault on the part of the supplier for there to be contravention of the other two provisions. Nevertheless the fact remains that section 8 has the strongest deterrent sanction- non-enforceability of the credit agreement and a possible imprisonment of the supplier.

It is therefore submitted that non-compliance with disclosure and financial provisions of the Act (56) should render the whole agreement absolutely unenforceable as long as the contravention remains uncorrected.(57) And there may also need to be a right to bring an action for damages for the purchaser who suffers loss as a result of the non-compliance.(58) This would make the law consistent and provide more effective deterrence against non-compliance with important provisions of the Act.

Of course the objection which could be raised against this is that if the purchaser signs the agreement freely, why should the supplier be made worse off because it turns out that the agreement fails to comply with certain provisions of the Act? It could be argued that it is the purchaser's job in the first place to look out for such a possibility before he signs the agreement. The obvious answer to that is that in

practice, it is the supplier and not the purchaser, who is in control of the agreement from the beginning to the end. Besides, this argument is based on the assumption that the supplier can insert in a credit agreement clauses which are inconsistent with the Act or fail to comply with any provision of the Act unless the purchaser discovers that and objects to it. This may be correct if it is further assumed that there is no prohibition of failure to comply with the Act or of inserting clauses in a credit agreement which are inconsistent with the statute. But if such a prohibition is available, then the whole argument would lose its weight for in that case it would be of no consequence that the purchaser had failed to notice the non-compliance or inconsistency before the agreement.(59)

The third shortcoming of the Act is that it places too much reliance on contract action defences and too little emphasis on criminal sanctions, for the enforcement of its provisions. As indicated in the foregoing pages and the last three chapters, the Act does not give the purchaser a right of action for damages for non-compliance by the supplier with any of its provisions.(60) His remedy is merely to plead the non-compliance in any action for enforcement of the agreement. Only in four instances does non-compliance with a provision of the Act attract a criminal sanction. First, if the supplier fails to comply with section 5 which places him under a duty to send the purchaser a copy of the credit agreement as soon as it has been concluded. Second, if the purchaser requests him for either a copy of the agreement or a statement of the purchaser's indebtedness under the agreement and the supplier

without reasonable cause fails to comply with the request for 30 days after receiving notice of it.(61) Third, where the purchaser gives or draws a negotiable instrument in respect of any liability under the agreement and the supplier fails to write on it words such as show that it has been issued in connection with a credit agreement or to write at the top of the first page of the agreement words indicating that a negotiable instrument has been issued in connection with it.(62) The fourth instance is provided by section 10 which is not for the protection of the purchaser at all.

In all these instances, the supplier or any person who commits the contravention, is liable to a fine of £50 or in default of payment, to 30 days imprisonment. However there is no apparent reason why this sanction should attach only to non-compliance with these three provisions and not to disclosure and finance control provisions as well. The role of criminal sanctions in preventing unfair exchange is discussed in Chapter 7. Here it is merely intended to observe that this over-reliance on private initiative to enforce provisions of the Act is misplaced and represents a big flaw. It seems to be based on the assumption that purchasers know their rights and that self-interest will always impel them to enforce the rights. But nothing could be far from the truth. As Ross Cranston argues:

"A common way in which consumers take the initiative when they are dissatisfied is not by enforcing their rights through the legal system but by refusing to pay amounts which they do not believe are due. For example, they may

stop paying credit instalments on the ground that a product is defective.... [But] even if consumers know their rights there are reasons why they should not seek to enforce them. Some of the factors inhibiting consumers from upholding their legal rights are that they think the business involved will ignore them, ... or that they simply do not know how to enforce them.

As far as legal proceedings are concerned the courts can appear remote and forbidding to individual consumers. By contrast legal action is less daunting to business, particularly if they handle it as a matter of routine. Perhaps the most important factor in deterring consumers from legal action is the cost, including the opportunity cost of the time and effort. Many consumer problems involve a small amount and it is not worthwhile for consumers to pursue them."(63)

And the position is made even more unsatisfactory by the fact that as will be shown below, the Act only allows courts to enforce its provisions and not to police compliance with them.

Thus to strengthen the preventive aim of the Act, it seems appropriate that subject to what will be said in Chapter 7 about criminal responsibility, it should be made a criminal offence to fail to comply with disclosure and finance control provisions. It could also be a criminal offence to include a clause in a credit agreement which is inconsistent with any provision of the Act which is intended to protect the purchaser or any surety.(64) Of course the mere presence of such a

prohibition may not make much difference but it would nevertheless be a step in the right direction.

Lastly, it seems that sections 4, 6, 8 and 24 impose a sanction only where there is failure on the part of the supplier to disclose the prescribed pieces of information. Nothing is said about the supplier who complies with these provisions but the information which he provides is false or misleading. No doubt the purchaser needs to be protected from that kind of conduct. And the way to provide that protection is to have a provision in the Act along the lines of the United States Uniform Consumer Credit Code which provides that a person commits a criminal offence if he knowingly gives false or inaccurate information pursuant to any provision of the Code on disclosure and advertising.(66)

6.3 Judicial Powers under the Hire-Purchase Act

Apart from dealing with problems which may arise under any credit agreement, the Act gives courts a number of powers. First, to determine in any action brought under any credit agreement if there has been non-compliance with sections 4 and 6 and whether or not the purchaser has been prejudiced by the non-compliance. If the purchaser has not been prejudiced, the court can order the parties to carry out the agreement subject to such conditions as it may think equitable to impose on them.(67) Second, to refuse to enforce any credit agreement which does not comply with sections 4, 6, 8 and 24 (68) and any contract of security (69) made in respect of such an agreement. Third, to refuse to give legal effect to any provision in the agreement or to any act by the

supplier which is inconsistent with sections 7, 11(1) and (3), 21, 24 and 26(4). Fourth, to make an order for attachment of goods supplied under a credit agreement, and to vary or discharge the order, under section 10(4) and (8), respectively. Fifth, perhaps (70) to supervise the re-possession and sale of the goods where the supplier terminates the agreement after the purchaser has paid 50% or more of the purchase price under the agreement.(71) Sixth, where the purchaser terminates the agreement under section 17, to determine which of the amounts stipulated by sub-section 2 of that provision is the lesser and (quaere) to order payment by the purchaser of that lesser amount.

Besides, in any action by the supplier for the return of the goods, section 20 gives courts the following powers:

- a) to make an order for the return of the goods to the supplier subject to re-payment by him of so much of the purchase price received by him, as the court deems fit;
- b) to make an order for the return to the supplier of part of the goods and, where the agreement involved is an instalment sale agreement, for retention by the purchaser of the remainder or where it is a hire-purchase agreement, for transfer to the purchaser of the supplier's title to that remainder of the goods;
- c) where the court makes the order in (b) above, to make a further order (72) requiring
 1. re-payment by the supplier of so much of the purchase price received by him or
 2. payment by the purchaser of so much of the unpaid balance of the

- purchase price as the court may deem just;
- d) to make an order (73) for the goods to be sold by public auction by a person appointed by the court or if the parties so agree, by private treaty;(74)
 - e) where any negotiable instrument has been given or drawn by the purchaser in respect of any instalment of the purchase price payable under the agreement, having made any order under section 20, the court may also order that the supplier should cancel the instrument or return it to the purchaser or indemnify the purchaser against any liability on the part of the latter in respect of such instrument and
 - f) upon application by the supplier, to make such orders as the court may deem just for the protection of the goods against damage or depreciation, pending conclusion of the action for their return to the supplier.

In an action under section 20 the court also has power to determine if the purchaser failed to take reasonable care of the goods, and to fix the amount of damages payable for that breach of duty.

Again it is clear that the Act provides these elaborate rules in the interest of fairness between parties to a credit agreement. But these provisions are not without blemish. Firstly, although the word 'court' is used throughout (75), no definition is provided for it and that may cause some procedural difficulties. Section 19(1) provides that where a credit agreement is lawfully rescinded by the supplier after the purchaser has paid 50% of the purchase price under the agreement, the supplier can not by himself re-possess the goods supplied under the

agreement but must apply to a magistrate who will appoint a person to sell them. It is not clear whether it should be understood from this that the 'court' referred to by the Act in section 20 is the magistrate's court, and not the High Court or any of the traditional courts which dispense justice in Malawi. It is very possible that the specific use of the word 'magistrate' in section 19(1), instead of the word 'court', was intended to foreclose such an interpretation. It may have been intended to mean a magistrate in chambers, and not, sitting as a court. And that seems to be supported by sub-section 6 of the same provision which states that once the goods have been sold by the person appointed under sub-section 1 and there is a dispute as to the amount payable to the purchaser or supplier out of the proceeds of the sale,

"the person selling such goods shall deposit the amount in dispute with a magistrate, who shall retain such amount pending action brought by either party to the agreement against the other..."

But even if the word were used interchangeably with the expression 'magistrate's court', that would still leave the problem unsolved because there is more than one grade of magistrate's court in Malawi so that it would still have to be determined as to which grade was intended.

Secondly, conspicuous by its absence is a provision creating a general power to police compliance with the Act. It is not contemplated that judges and magistrates should roam the streets of Malawi to see who was not complying with the Hire-Purchase Act (it is suggested in Chapter

Chapter 7 that that task should be left to specially appointed inspectors); rather the point is that it has already been shown that in any action brought under a credit agreement, the court has power to check if sections 4 and 6 have been complied with. That provision could be extended to allow the court to check if there is any non-compliance with the Act at all or if there is any clause in the agreement which is inconsistent with any provision of the Act. This extension would also need an accompanying provision which gives the court guidance as to what to do where there is non-compliance or inconsistency with the Act. Alternatively, the power could be in the form of a provision which allows the court in any action brought under a credit agreement or at the instance of the purchaser, to re-open the transaction if it has reason to believe that the bargain was extortionate or unconscionable. The implications of this second alternative were explored in Chapter 2 and so will not be discussed here. However it must be mentioned that such a power would differ from the first in that it would allow the court to consider not only whether there has been any non-compliance with the Act but also whether the bargaining process which led to the conclusion of the agreement was tainted with any vitiating factors.

Thirdly, there is no procedure to guide the court where the agreement is rescinded by the purchaser for breach by the supplier of any condition of the credit agreement or for misrepresentation or fraud. Both sections 19 and 20 which lay down the rules enumerated above proceed on the basis that it is the supplier who seeks to terminate or rescind the agreement. But it is also possible for matters covered by

those rules to arise where the rescission is by the purchaser. Consequently, the two provisions should be extended so that the procedure laid down there applies regardless of who seeks rescission of the credit agreement.

Fourthly, it is also appropriate to give the court power, pending the conclusion of any action under a credit agreement or while any non-compliance with the Act which does not render the whole agreement unenforceable remains uncorrected, to release the purchaser from his obligation under the agreement or to make any order for the protection of any security given in respect of the agreement. It has been shown that under section 20, pending the determination of any action for the return of goods supplied under the agreement, the court can make an order for the protection of the goods. There is no reason why such a power should not also be available for the benefit of the purchaser. And finally, in appropriate cases, for instance, where the purchaser is not prejudiced by the supplier's non-compliance with disclosure provisions, the court could be allowed, if it considers it just and equitable, to order re-scheduling of payment of the purchase price so that the purchaser is given more time within which to make the whole payment or some instalments of it.

It has been shown in this chapter that although the Hire-Purchase Act does depart from the general law of contract in many respects in order to protect the purchaser under a credit agreement against unfair exchange, the main remedy which it provides for non-compliance by the supplier with its provisions is contractual in nature. Either the entire agreement or just the offending clause, is unenforceable

by the supplier. But the problem is that a remedy in this form can be defeated if the purchaser simply fails to challenge enforceability of the agreement or clause.

The position is made even more unsatisfactory by several other factors. First, the purchaser has no right to bring an action for damages, except probably under the common law, if the supplier fails to comply with any provision of the Act or inserts any clause in a credit agreement which contravenes those provisions. Second, there is a host of other 'defensive' provisions in the Act with respect to which it is unclear as to what will be the consequence if the supplier fails to comply with them. And third, generally there is no adequate deterrence for those who may be inclined to wilful contravention of the Act. Thus it is doubtful that the Act can prevent unfair exchange in credit agreements in an effective way.

Footnotes

- 1 . Of course as will be shown shortly, some of the provisions of the Act will apply even where the purchaser has not been prejudiced at all.
- 2 . The Act does not show whether or not the goods then become the property of the purchaser.
- 3 . Quaere: can the supplier bring any other action, apart from the excepted two, after the expiry of that period ?
- 4 . The Malawi Sale of Goods act, section 13(1)
- 5 . Ibid., section 13(3) as read together with sections 20, 35 and 36
- 6 . Anson's Law of Contract, 24th ed., p. 135
- 7 . Berger v Gill & Dufus [1984] 2 WLR 95, p. 99
- 8 Of course that is unsatisfactory; a better view is that non-compliance with the Act should give the purchaser the right to bring a civil action.
- 9 . See the Hire-Purchase Act, sections 4, 6, 8 and 26(4)
10. The point is that in practice purchasers will always fail to pursue their rights under the Act either out of lack knowledge that a right has accrued or because the cost of pursuing it outweighs the financial outcome of the action.
11. This includes the fitness of the goods for any particular purpose.
12. There Act does not prohibit contracting out of its provisions. Cf section 173(1) of the English Consumer Credit Act.
13. Cf section 2 of the English Unfair Contract Terms Act

14. [1932] AC 562
15. [1980] 1 All ER 556
16. See Ashington Piggeries v Hill [1971] 1 All ER 847 and White v Blackmore [1972] 3 All ER 158
17. Curtis v Chemical Cleaning & Dyeing [1951] 1 All ER 631
18. Supra note 15
19. [1983] 3 WLR 163
20. [1983] 1 All ER 101
21. Whincup recently observed:

"Since as we know there is no rule of law against fundamental breach it follows that a sufficiently clear and comprehensive exclusion clause could indeed defeat the whole apparent purpose of a contract and yet be upheld by the courts. The only proviso is that the effect of the clause must not be to nullify the contract completely".

Product Liability Law, p. 77

22. The Hire-Purchase Act, sections 4(2) and 6(3)
23. Ibid., section 2(1) for definition of these agreements
24. It should be recalled that the view of the author on this matter is that the purchase price should be calculated on the total cash price less the initial payment. See Chapter 4
25. And it should be recalled here that the rates to be fixed by the Minister under section 26(1) are maxima so that the supplier is free to impose any rate below that ceiling.
26. The point here is that courts have the right under the provisos to

- impose some conditions which they think just and equitable in the circumstances of the each case. Now since the Act will not really help them to distinguish agreements which are to enforced from those which are unenforceable, the courts may feel that it is easier to enforce an agreement and then impose some conditions on the supplier to mitigate any hardship which the purchaser may have suffered as a result of the former's failure to comply with sections 4(1) and 6(1).
27. See Chapter 2 for discussion of minimum payment clauses.
 28. The point here would be that it is inconceivable that the Legislature could have intended inconsistent bodies of law to apply to the same matter otherwise than through gross oversight.
 29. See the English Hire-Purchase Act, 1965 section 28(1) and (2).
 30. And it should be noted here that this point is not covered by section 20 which enumerates powers of the court where the supplier bring an action for the return of goods supplied under a credit agreement.
 31. The Hire-Purchase act, section 7(1)(b)
 32. Ibid., section 7(1)(c) as read together with section 17(2)
 33. See Cheshire and Fifoot, The Law of Contract, 9th ed., pp 537-540 and Treitel, The Law of Contract, 4th ed., pp 75-80.
 34. The word 'letting' is used advisedly because the supplier can not rely on an exclusion clause of this sort unless its existence has clearly been brought to the purchaser's notice.
 35. Of course it is recognised that to be enforceable, a waiver will need to be supported by fresh consideration- Combe v Combe [1951] 2 KB 215, p. 200.

36. The Hire-Purchase Act, section 21
37. Ibid., section 11(3)
38. Ibid., section 7(1)(b)
39. Ibid., section 26(4)
40. The point here is that protection in the form of a right to bring an action in contract or to resist enforcement of a contract is not worth much to the purchaser.
41. See supra note 33
42. See supra note 6
43. Long v Lloyd [1958] 1 WLR 753
44. Farnworth Finance Facilities v Attryde [1970] 1 WLR 1053
45. See also the Hire-Purchase Act, sections 11(1), 12 and 16
46. See the provisos to sections 4 and 6 discussed earlier
47. The English Consumer Credit Act, section 99(1)
48. For the definition of 'linked transaction', see ibid., section 19(1).
49. Ibid., section 173(1)
50. See George Mitchell Ltd v Finney Lock [1983] 3 WLR 163, pp 170-1 where Lord Bridge discusses, without conclusion, almost similar words in section 55(4) of the English Sale of Goods Act, 1979.
51. RM Goode, The Consumer Credit Act: A Students' Guide, para. 1091
52. The United States Uniform Consumer Credit Code, section 5.202(3)
53. The Hire-Purchase Act, section 24(1), (2) and (3)
54. The purchaser has a similar right under section 5 of the Hire-Purchase Act
55. This is the only provision under the Act where there has to be an

element of 'fault' on the part of the supplier for the agreement to be unenforceable.

56. That is, sections 7, 11(1) and (3), 15, 17, 21, 24(1) and 26 of the Hire-Purchase Act.
57. This suggestion should be read together with the suggestion about the availability of criminal sanctions made below.
58. The right to bring this action should also be available even in the case where only a clause of the agreement is unenforceable.
59. See section 18(2) of the Malawi Weights and Measures Act
60. Cf the United States Uniform Consumer Credit Code, section 5.203 which gives the debtor a right of action if the creditor fails to comply with disclosure provisions of the Code.
61. The Hire-Purchase Act, section 8(2)
62. Ibid., section 13(2) and (4)
63. Consumers and the Law, 1st ed., pp 79-80
64. As do sections 5.301 and 5.302 of the United States Uniform Consumer Credit Code.
65. This point is discussed in more detail in Chapter 7
66. See section 5.302 of the United States Uniform Consumer Credit Code.
67. The Hire-Purchase Act, provisos to sections 4 and 6
68. It must be recalled here that where there is non-compliance with sections 4, 6 and 24 the credit agreement may nevertheless be enforced as an unconditional contract for the sale of goods. Only in the case of non-compliance with section 8 is the credit agreement absolutely unenforceable by the supplier or his assignee.

69. Of course as argued in Chapter 5, it seems that only where there is non-compliance with section 8 that security in the form of negotiable instrument will be unenforceable.
70. The word 'perhaps' is used here because the situation is rather unclear.
71. The Hire-Purchase Act, section 19(1) and (6)
72. Section 20(2) provides that the court can not make this further order unless the purchaser satisfies it that the order will be carried out forthwith. But it is unclear as to what 'forthwith' means- whether it means as soon as the order is made by the court or at any time thereafter which the court may fix.
73. Section 20(4) requires that this order must state:
- a) the total amount found by the court to be payable under the credit agreement;
 - b) the total amount fixed by the court as damages, if any, for failure by the purchaser to take reasonable care of the goods;
 - c) the total amount of payments found to have been made under the credit agreement
 - d) the party by whom the costs incidental to the sale are to be borne and
 - e) any directions given by the court as to advertisement and the place, date and method of the sale of the goods.
74. Unfortunately the Act does not define the expression 'private treaty' used here.
75. Cf the English Consumer Credit Act, section 189.

CHAPTER SEVENCRIMINAL LAW AND FAIR EXCHANGE

So far this thesis has concentrated on showing that the Hire-Purchase Act seeks to prevent unfair exchange in credit agreements largely by making the agreement itself or some of its terms unenforceable if the supplier does certain acts. It has been argued that this is not adequate and that to be more effective, it needs to be supplemented by criminal sanctions. As Lord Diplock once said

"Consumer protection ... is achieved only if the occurrence of the prohibited acts or omissions is prevented. It is the deterrent effect of the penal provisions which protects the consumer from the loss he would sustain if the offence were committed". (1)

This Chapter will be looking at the criminal law model in more detail by examining a number of criminal statutes which apply to the supply of goods. The object is partly to show the extent of criminal law involvement in consumer protection in Malawi and partly to demonstrate how the model could be adopted to re-enforce compliance with the standards of fair exchange created by the Hire-Purchase Act. But before that, there are some general points which need to be made.

7.I General Observations about the use
of Criminal Sanctions to ensure
Fair Exchange in consumer contracts

First, the criminal law has so far not been widely used in Malawi to

prevent unfair exchange in consumer contracts. Generally, criminal sanctions are imposed only for false description of goods, for sale of goods so described and for charging certain prices for certain goods.

One explanation for this attitude could be the fact that the standard of what is a fair exchange in any given situation is rather elusive. On the other hand, in criminal statutes there is nothing more important than certainty and precision in the definition of the act or omission sought to be prohibited. But this argument loses its persuasiveness when applied to credit agreements. As shown in the preceding chapters, a number of practices and results which the Hire-Purchase Act seeks to prevent are as clearly defined as they can be. And an example which can be cited here is section 7(1) which provides that the rate of interest charged by the supplier for an instalment of the purchase price which is in arrear should not exceed 15.69% or 17.54% per annum. Therefore, it can be argued that unfair exchange in these agreements can be prohibited by imposing criminal sanctions on any supplier who contravenes standards laid down by the law.

Perhaps the real cause of this reluctance to impose criminal sanctions in this area is the existence of what may be called the 'double standard' attitude towards crime within certain sections of society. Whereas it is easily accepted that wrongs such as theft, assault etc., should be penalised by criminal sanctions, there is absence of universal acceptance that consumer offences should be treated in the same way. In the words of Terence Ison,

"Law enforcement is obviously easier when aimed at conduct recognised throughout the community as criminal. For example, complaints to the police of violence are treated seriously, and the police often receive public support in the apprehension and prosecution of offenders. But there is a different attitude to crime committed in the course of business. Indeed there is a reluctance to recognise and prosecute white-collar crime at all. During 1971, for example, there were 104,424 cases reported to the police of consumers taking out of shops goods for which they have not paid (i.e. shoplifting). There were no comparable statistics of consumer complaints to the police about goods and services that people had paid for but never received. Any failure of a business to supply goods that have been paid for, or any other default of a trader, is generally classified by the police as a civil matter".(2)

This social attitude is probably caused by lack of conviction in the moral justification of treating these wrongs as crime.(3) Most consumer offences are wrongs merely because the law says so; they do not necessarily involve inherent moral delinquency.(4) Once a trader commits the prohibited act or omission, he is penalised regardless of the absence of criminal intent on his part. Besides, there seems to be no demarcation between wrongful conduct and mere inefficiency.(5) For instance, a firm may produce tinned food which contains noxious substances due to a momentary lapse by its screening process. But unless

the firm can establish that it took reasonable care to prevent such an occurrence, this may pass under the law as a case of criminal conduct and not simply one of inefficiency.

It is possible that this apparent inability by the law in its operation to draw clear distinctions between the hard-core recalcitrant and the less occasional offender who needs to be prodded into compliance may encourage the feeling that criminal sanctions should not be widely available or be stringently enforced in contract-like situations. But while this sentiment is understandable, it is submitted that it overlooks a number of things. To begin with, that the not-morally guilty or indeed the innocent will occasionally be penalised is the price which society must pay if it is to prevent certain forms of undesirable conduct. Consequently, unless it can be proved empirically that the tendency towards indiscriminate penalisation is higher under consumer offences, there is no justification for the reluctance which characterises attitude towards these offences.

Besides, although these offences are strict liability offences, it is not correct that every violation of the relevant law will result in the imposition of a penalty. First of all, statutes creating the offences contain certain defences which excuse certain contraventions. Secondly, generally, enforcement officers do exercise some (non-legal) discretion as to when to prosecute.⁽⁶⁾ Their assumption is that normally advice or a word of warning is sufficient when dealing with the majority of businesses. Prosecution is regarded as superfluous if a business will voluntarily introduce genuine safeguards to avoid future wrongdoing.⁽⁷⁾ And in England this has been given judicial expression at the highest

level.

In the case of Smedleys Ltd v Breed the appellants were prosecuted under the Foods and Drugs Act of 1955 for selling a tin of peas which contained a caterpillar. The appellants had installed a screening system to exclude foreign bodies from their product and the system was not found to be faulty in any way. The presence of the caterpillar was attributed to human failure in the course of visual inspection of the peas and it was calculated that the chances of it happening again were 874,999 to 1-3,499,999 to 1. In the House of Lords the decision to convict the appellants of the offence was upheld. However Viscount Dilhorne was not convinced that the decision to bring charges against the appellants was justified. He said:

"In these circumstances what useful purpose was served by the prosecution of the appellants ? Why, despite the full disclosure made by the appellants was one instituted ? It may have been the view that, in every case where an offence was known or suspected, it was the duty of a food and drugs authority to institute a prosecution, that if the evidence sufficed a prosecution should automatically be started.

In 1951 the question was raised whether it was not a basic principle of the rule of law that the operation of the law is automatic when an offence is known or suspected. The then Attorney General, Sir Hartley Shawcross, said: 'It has never been the rule of this country- I hope it never will be- that criminal offences must automatically be the subject of prosecution'. He pointed out that the Attorney-General and

the Director of Public Prosecutions only intervene to direct a prosecution when they consider it in the public interest to do so

Does a different rule apply in relation to prosecutions by food and drugs authorities under the Foods and Drugs Act ? In deciding whether or not to prosecute are they not to have regard to the general interests of consumers ? I do not find anything in the Act imposing on them the duty to prosecute automatically whenever an offence is known or suspected and I can not believe that they should not consider whether the general interests of consumers were likely to be affected when deciding whether or not to institute proceedings". (8)

Furthermore, even if a prosecution is brought and a conviction secured, there is restraint on the part of the courts to impose heavy penalties. The tendency is to impose low fines and no jail sentence although the statute may provide for one. (9) Arguably, all these factors mitigate the harshness of the non-requirement of moral fault.

Another reason why there may be some reluctance to impose criminal sanctions to ensure fair exchange in consumer contracts is to avoid what may be considered as duplication of penalties. Because as shown in earlier chapters, courts have developed means of dealing with unfair transactions, in some cases they may feel that those measures are adequate and that there is no need to apply further penalties in the form of criminal sanctions. This is exemplified by the attitude which has sometimes characterised attitude towards the Trade Descriptions Act

1968. According to Graham Stephenson,

" A number of the provisions in the Act are complex and certainly some of the case law over the last 12 years has hardly assisted in the clarification of the scope and policy of the legislation. Indeed ... a number of cases have provoked no small amount of controversy. One of the reasons for this may well be the confusing overlap between liability under the Act, and the civil liability for breach of contract and misrepresentation. To some extent the existence of a potential civil liability has tended to make the Divisional Court somewhat reluctant in cases of doubt, to impose criminal liability". (10)

But although the reasoning behind this attitude may have some emotional appeal, it misses the whole point about criminal sanctions. These sanctions are imposed not to be as an alternative to civil remedies but because they are considered to be more suitable to prevent things going wrong than civil law. Indeed it is not uncommon to provide in these criminal statutes that a contract for the supply of goods will not be void or unenforceable merely because the supplier contravened any provision of the legislation.(11) Thus it becomes irresistible to conclude that the real source of the attitude is the double-standard attitude towards crime described earlier.

The second observation is that, as shown by the discussion in these preceding pages, where it is decided to impose criminal sanctions, the general tendency has been to make the offences strict liability offences. The statutes concerned do not often state that offences

created under them are of strict liability. However if they omit to show the requirement of proving a guilty state of mind as a prerequisite of conviction, courts take that to mean that mere proof of the actus reus suffices for the offence to be established. For instance in Copperfields Cold Storage Co v R the appellants sold minced meat to one of their customers. When the meat was delivered the customer noticed that it had a bad smell and refused to accept it as being unwholesome. The appellants were charged with and convicted of contravening a provision in the laws of Northern Rhodesia whose wording was identical to that of section 106 of the Malawi Public Health Act which prohibits any person to sell or expose for sale, or bring into the country or into any market, or have in his possession without any reasonable excuse any food for man in a tainted, adulterated, diseased or unwholesome state. Upholding the conviction Evans AJ of the High Court of the then Northern Rhodesia said:

" ... the Act ... provided in the most mandatory manner that no person shall sell unwholesome meat ...

I have no hesitation at all in finding that there is no burden of proof upon the prosecution to prove that unwholesome meat was sold without reasonable excuse, mens rea [being no] essential ingredient of the offence". (12)

Whether or not strict liability ought to be retained as part of the criminal law model is still a matter of controversy.(13) But one reason often given for its imposition is that some of these offences would be remediable under the civil law without the need to prove any guilty mental state on the part of the culprit. Consequently it is argued that

the position should not be different merely because the offence is created by a criminal statute. Another argument is that imposition of strict liability will induce those at whom the law is aimed to adopt even higher standards in their conduct. (14) But more than that, it is a formula which accords to the protection of the public overriding importance. For by excluding the requirement of proving mens rea the idea is clearly that it is more important that these offences should be penalised than that it should be proved that the offender had a guilty intent when the offence was committed. The point here is that if proof of mens rea were insisted upon, many offenders would go unpunished. (15) Of course to ensure that only the blameworthy are penalised, there is provision of a number of defences which in effect screen out the blameless. (16)

The third observation relates to the operation of criminal sanctions. The fact that, as mentioned earlier, their aim is deterrence suggests two things. First, that the act or omission which it is sought to prohibit will be sufficiently defined to allow those at whom the prohibition is aimed to stay within the law, if they are so minded. Second, that those at whom the prohibition is aimed will be able to stay within the law without necessarily having to abstain from the broad area of activity comprising the prohibited act or omission. The point here is that deterrence involves influencing behaviour before what would ex post facto be regarded as an offence is committed. This is done by attaching imprisonment or fine or both to the offence, which provides last minute pressure on the target of the law to stay within the law. Clearly, the belief here is that the target will be able to understand

what is prohibited before the offence is committed.

Furthermore, the choice of deterrence as a means of controlling conduct shows a desire to deal with that conduct without adversely affecting participation in the broad area of activity comprising that conduct. Thus in the present case, by imposing the sanctions which will be discussed below, Parliament should be understood to aim not at driving traders out of business or limiting their numbers but at preventing engagement in the acts or omissions which are prohibited. This suggests not only that those acts and omissions should be adequately defined but also that penalties to be imposed for engagement in them should be properly balanced to ensure that they have the desired effect. (17)

In practice that implies a number of things. First, screening out trivialities. As indicated earlier, enforcement officers exercise some (self-given) discretion when it comes to deciding when to prosecute (18) and will, as a matter of course, not prosecute for petty contraventions of the law. But while not explicitly countenancing this, law sometimes discreetly supports the policy by providing less stringent penalties for this sort of contravention. Second, even within the hard-core of undesirable conduct there are cases where the accused may be allowed to escape conviction on the ground that he could not have avoided falling foul of the law because either the cost of doing so would have been enormous or the alleged offence was not his act. (21) Third, deterrence also suggests that the graver the offence committed, the harsher the penalty for it should be. But as will be seen, this is not generally the case under consumer criminal statutes in Malawi.

The stress laid on the importance of clear isolation of the act or omission sought to be prohibited does not mean that criminal sanctions should not be used where that act or omission is incapable of being specifically defined. The fact is that despite the problem of definition, the conduct involved may have such grave consequences that society has no choice but to seek some form of control through such sanctions. What the discussion above shows is that because of the vagueness which is bound to surround that sort of prohibition, caution is needed when formulating the law. If those at whom the law is aimed can not identify in time just what may trigger the sanctions, compliance with the law will in effect be a matter of chance. Now because of the possibility that they may make a wrong guess as to what would be penalised, it is possible that, if the penalty is sufficiently heavy, some individuals will seek to abstain from the broad area of activity which might put them in the position where they have to make that difficult guess. (19) Again that would be undesirable because as already said, the aim of imposing these sanctions is to influence conduct specifically and not to limit the number of people engaging in business. How to avoid that while at the same time prevent the unfair conduct, is considered in Chapter 8.

The discussion which follows immediately will be concerned with statutes which specifically define the prohibited act or omission. These statutes are: the Merchandise Marks Act, the Weights and Measures Act, the Malawi Bureau of Standards Act and the Control of Goods Act. And as already said, they do not approach the problem of unfair exchange in the

manner of the Hire-Purchase Act. Generally, their concern is with false or misleading descriptions of goods and overcharging. Thus they make it an offence to apply such descriptions to goods, to import or sell goods so described and to charge certain prices for certain goods. In the following pages it is intended to deal with each of these offences separately. But it should be noted that just like the Hire-Purchase Act, these pieces of legislation are of wide application and are not confined to consumer transactions only.

7.2 Unfair Conduct Prohibited by Statute

i) Making False Claims about Goods

a) The Merchandise Marks Act

Section 5(1) of the Merchandise Marks Act of Malawi prohibits applying any false trade description to goods. The expression 'apply to' is defined by section 2 of the Act as

"to emboss, impress, engrave, etch or print upon, weave, or otherwise work into or annex or affix to".

Under section 3(1) a person applies a trade description to goods if he

- a) embosses, impresses, etc. it on the goods themselves or
- b) embosses, impresses, etc. on any covering, label, reel or any other thing in or attached to which the goods are sold or
- c) places, encloses or annexes the goods which are sold in, with or to any covering, label, reel or any other thing on which a trade description has been printed, embossed etc. or

d) uses a trade description in any manner so as to be likely to lead to the belief that the goods in connection with which it is used are designated or described by that trade description.

Similarly, if a trade description appears in any commercial communication and any person requests or offers goods by reference to that description, goods delivered pursuant to that offer or request will be deemed to be goods in connection with which the trade description is used. (20)

It would appear therefore that generally for any claim made about goods to be caught by the Act, it must be physically attached to the goods. Where the description appears in an advertisement or other sales promotion literature, it can not amount to a trade description unless somebody does purchase goods in reliance on it.(21) But on the face of it, use of a description in the contractual document itself or in the pre-contractual exchange between the purchaser and the supplier seems to be covered by paragraph (d). However the fact that for the paragraph to apply the description must be used in such a way that it is 'likely to lead to the belief that goods in connection with which the description is used are designated or described by that trade description' does not fit very well with that conclusion. The words suggest that the claim must be likely to lead to the belief that the goods to which they refer are designated or described by that description in the trade(s) connected with those goods. Clearly this qualification is curious because one would have thought that as it relates to the effect of the words employed in the trade description involved, it should go to the definition of the expression 'trade description' and not of the word

'apply' as is the case here.

Section 2 defines 'trade description' as 'any description, statement or other indication, direct or indirect' as to

- a) the number, quantity, measure, gauge or weight of any goods or
- b) the standard of quality of any goods, according to a classification commonly used or recognised in the trade or
- c) the name of the manufacturer, producer, assembler or mixer of any goods or
- d) the place or country in which any goods were manufactured, made, produced, assembled or mixed or
- e) the fitness for purpose, strength, performance or behaviour of any goods or
- g) the material of which any goods are composed or
- h) the fact of any goods being the subject of an existing patent, privilege or copyright.

Besides, any figure, word or mark which according to the custom of the trade is commonly taken to be an indication of any of the fore-going matters will be a trade description within the meaning of the Act. (22)

And what is prohibited under section 5(1) is to apply

"a trade description which is false in a material respect as regards the goods to which it is applied and includes every alteration of a trade description whether by way of addition, effacement or otherwise, where that alteration makes the description false or misleading in a material respect...."(23)

One notable thing about this provision is in the use of the words

'false' and 'misleading'. It shows that generally a trade description is prohibited if it is false. Only where the trade description is altered can there be prosecution on the ground that it is misleading. Normally the position is that if an assertion conveys a misleading impression it will be held to be false. But this provision seems to be against that view. It suggests that an assertion may be misleading without necessarily being false. Thus in the absence of an alteration, a trade description which is literally accurate but which, because of ambiguity, is likely to mislead, will not be a false trade description whose application to goods is prohibited by section 5(1). On the other hand, if the description has been altered it will be a false trade description within the meaning of the Act whether or not the alteration renders it inaccurate or merely gives it a meaning which is misleading. It is submitted that this unnecessarily limits the scope of section 5(1). There is no reason why a trade description which has not been altered but is nevertheless misleading should not be the subject of prosecution under the Act when an altered trade description which is misleading is.

The second point is the similarity between a trade description and what would be an actionable misrepresentation at common law.(24) As shown in Chapter 3, such a representation must be material in that it must be capable of affecting the judgement of a reasonable man in deciding whether, or on what terms, to enter into the contract without making such enquiries as he would otherwise make.(25) That also seems to be the implication of the requirement here that for a trade description to be the subject of prosecution under the Act, it must be false to a material respect.

But the similarity ends there. Whereas generally only a false representation of fact is actionable at common law, section 5(1) as just seen, prohibits statements of fact as well as any 'description or indication' of the eight items enumerated above. Of course whether the inclusion of the word 'indication' makes that much of a difference is unclear at first sight. The word is not defined by the Act but under English law it has been held to mean 'stating as a fact' and not merely 'suggesting'.⁽²⁶⁾ Arguably that view is out of place here. If the word were to have the meaning of 'stating as a fact', that would render the definition of trade description superfluous. The fact that the Act defines this expression as meaning 'any description, statement or other indication, direct or indirect' strongly suggests that a mere suggestion could amount to a trade description. Thus a trader could be prosecuted for making a claim which would not amount to an actionable misrepresentation at common law.

There are other points to be noted. First, to the extent that trade description as defined by the Act covers matters relating to the quality of goods, their performance and their their fitness for any purpose, contravention of section 5(1) is likely to coincide with breach of contract that would be actionable under section 16 of the Malawi Sale of Goods Act. But this coincidence is limited because in matters of quality for section 5(1) to apply, the claim must have stated, described or indicated the standard of quality of the goods involved according to a classification commonly used or recognised in the trade associated with the goods.⁽²⁷⁾

Clearly this qualification was inserted to provide a yardstick whereby quality should be measured for the purposes of this Act. The problem however is that there may be no classification of quality in the trade involved. Besides, even if a classification is available, a claim may not accord with it and yet be materially false or misleading.(28) This is illustrated by the case of Roche v Tyler(29) where the defendant was charged with the offence of exposing for sale goods to which a false trade description had been attached. The goods were undershirts which were described as 'flannel' but which contained only from 3% to 5% wool. Despite evidence of a trade custom of describing as flannel goods consisting of a mixture of wool and cotton, the court thought that the great majority of the ordinary public would understand 'flannel' to refer to material consisting substantially of wool, and on that basis the defendant was convicted. In other words, limiting the application of section 5(1) to a quality description which is in accordance with a classification commonly used in the trade associated with the goods deprives the provision of real protective value to the consumer.(30)

A further source of divergence between the Act and contract law is that the definition of the word 'apply' suggests that for a claim to amount to a false trade description at least it must be written or (arguably) pictorial. Thus oral claims which, as shown in Chapter 3 are actionable in contract, can not give rise to prosecution under section 5(1). It is possible to justify this distinction on the ground that either an oral false trade description would be difficult to prove(31)

or that to make oral misdescriptions the subject of prosecution would be to put a very powerful weapon in the hands of a disappointed shopper in that he might threaten the shopkeeper with prosecution for the slightest deviation from an accurate statement.(32) These arguments are no doubt sensible. However they can not suggest that traders should be free to make oral claims about goods without the threat of criminal sanctions. On the contrary, they suggest that caution should be exercised in formulating the law. Certainly it does not make sense that if a trader makes a claim about goods in a catalogue on which a consumer relies to purchase the goods, the trader should be subject to criminal prosecution whereas if the claim is in a radio broadcast or other forms of oral communication, no such penalty should attach.

Furthermore, the scope of section 5(1) is narrow because it does not cover claims about after-services. For instance, if a manufacturer accompanies his goods with a guarantee that if they turn out to be defective within a certain period he is ready to repair them at a certain charge or without any charge at all, he can not be charged under section 5(1) if in fact he possesses no facilities for such services and he can not offer them. Indeed a supplier of goods on credit would not be guilty of contravening this provision if he made any claim about rates of finance charges which he offers which was false.(33)

Finally, the definition of trade description does not include claims relating to terms upon which any trader offers or supplies his goods. Thus for instance, if a supplier of goods under a credit agreement

claims that if half of the purchase price payable under the agreement is paid by a certain date, the purchaser will earn a rebate in finance charges which exceeds the minimum percentage fixed by section 15 of the Hire-Purchase Act, that claim would fall outside the ambit of section 5(1) even if it was false.(34)

ii) The Weights and Measures Act

Just like the Merchandise Marks Act, the Weights and Measures Act makes it an offence to make a false claim about goods in certain circumstances. Section 24 prohibits making by any means whatsoever, directly or indirectly

"a false, incorrect or untrue declaration or statement as to the weight, length, gauge, width, area, capacity, volume or number of any article in connexion with its purchase, sale, weighing or measurement".

The first point to note is that it is not so much the effect of the claim on anyone that is important here but the fact that it is false when made. Thus once it is accepted that the claim was in the form of an affirmation or statement, it will be immaterial that it was not false to a material degree.(35) Moreover, the claim will not be caught by this provision if it is misleading but otherwise factually correct.

Secondly, for a claim to fall under section 24, it must have been made in connection with the purchase, sale(36), weighing or measurement of the goods concerned. This suggests that the claim must have been made in relation to a contract or in the course of business. Thus if, for instance, a carrier who is shipping barges were asked by a curious

by-stander as to what the capacity of each one was and he gave an incorrect figure, that could not be a contravention of section 24. However if the barges were in a showroom and the figure was given in response to an enquiry by a customer in the course of negotiations for the hire of one of the barges(37), that would be an offence. Similarly, if a consumer picks 6 apples from a super-market shelf and tells a fellow shopper that they are four only, no offence would be committed under section 24. On the other hand, if he makes the same representation to the shop attendant at the point of paying for the fruits, he will certainly have made a false statement as to the number of the apples in connection with their purchase and could be convicted of contravening section 24.

Thirdly, it seems to be unimportant how the statement or affirmation is made. It could be oral or written or refer to the goods without being physically attached to them. What is important is that when made, it should be false.

Defences

There are two defences which can be raised to a charge of applying a false trade description under the Merchandise Marks Act. First, section 5(2) provides that it is a sufficient defence to that charge if the accused satisfies the court that he acted without intent to defraud. The word 'defraud' is not defined by the Act but it is thought that it is used here synonymously with the expression 'commit fraud'. In other words, what the provision is really saying is that the accused must prove that he did not intend to commit fraud by applying the false trade description. This means that if the trader shows that he knew or

believed on reasonable grounds that the trade description was not false, the conclusion that he did not intend to defraud and therefore that he can not be convicted under section 5(1), would be irresistible. Similarly, if he proves that he did not believe that the trade description was true and that he applied it to the goods by accident or mistake or somebody else applied it without his knowledge, the charge under section 5(1) would be difficult to sustain. But it also means that in both cases he would escape conviction even if it was clear that the commission of the offence arose out of failure on his part to exercise reasonable care in either establishing the veracity of the trade description or preventing its application to the goods involved. As shown by Derry v Peek(37) which was discussed in Chapter 3, however foolish a person may have been in believing that certain facts were correct, he can not be guilty of fraud if that belief was honestly held.

Clearly this is unsatisfactory. For by excusing the trader even where his offence could have been avoided by taking reasonable precautions or exercising due diligence, this provision goes against the reasoning used to justify the way in which these offences are framed. As said earlier, the offences are strict liability offences because it is believed that this will make those at whom the law is aimed to adopt even higher standards of conduct. But that argument is difficult to maintain if traders who apply false trade descriptions to goods are allowed to escape conviction for the offence even where they have failed to take ordinary precautions which a reasonable trader would have taken in similar circumstances.

But that is not all. Where a false trade description has been applied to goods, it is possible that the accused will be a firm and not an individual. The question therefore will be to what extent the firm can be held accountable for the failure or intentions of its employees. Or to put it in another way, where the accused is a firm and it seeks to rely on the defence created by section 5(2), is it necessary for it to escape responsibility to prove that the work force together with the firm's entire management acted without intent to defraud or will it suffice if it is shown that the management at least acted without that intent? The Act does not give clear answer to that.

By contrast, section 31(1) of the Weights and Measures Act provides that:

"Whenever any manager, agent or employee of any person (hereinafter referred to as the principal) does or omits to do any act which would be an offence under this Act for such principal to do or omit to do, then unless it is proved that all reasonable steps were taken by the principal to prevent any act or omission of the kind in question, the principal shall be presumed himself to have done or omitted to do that act and be liable to be convicted and sentenced in respect thereof".

And sub-section 3 adds that the manager, agent or employee may be convicted in addition to the principal. Clearly, the act or omission must have been done on behalf of the principal and in the course of the agent's, manager's or employee's employment. For it can not be

reasonably expected that a firm will take reasonable steps to prevent contraventions of the law by its employees while they are acting on a frolic of their own. But supposing that the firm has taken reasonable steps to prevent commission of the offence by its employees but the offence is nevertheless committed by an employee who has been following the procedure entailed by those steps, on whom will responsibility for the offence lie ? The position is not clear although it is apprehended that the employee may be convicted of the offence.(39)

That also seems to be the position under the English Trade Descriptions Act where the firm can raise the defence of 'the act or default of another person' created by section 24(1) of that Act even if the offence is committed by one of its employees. In Birkenhead Co-operative v Roberts(40) where butchers were convicted of the offence of applying a false trade description to goods contrary to section 1(1) of the Trade Descriptions Act because one of their employees, a Mrs Smith, affixed to lamb of New Zealand origin the description 'For roasting English' and they sought to rely on the defence of mistake created by section 24(1) of the Act, it was held by Fisher J. that 'mistake' as used in that provision means mistake by the person charged of the offence(in this case, the butchers themselves), and not any other person so that as in this case the mistake had been committed by Mrs Smith, the butchers could not rely on the defence. However he thought they could rely on the alternative defence of 'the act or default of another person' so long as they could prove that they took all reasonable precautions and exercised all due diligence to prevent commission of the offence by that other person.

But the question is where to draw the line between what is to be regarded as the act of the firm, and the act of another person. For a firm acts through its employees and agents. There is no provision on this matter in the Trade Descriptions Act but the view taken by the House of Lords is that only acts of the 'directing mind and will' of the firm can be attributed to the firm itself. In Tesco Supermarkets Ltd v Nattrass where the false trade description was applied by a shop assistant because of failure by the local manager of the shop to check the trade description in accordance with procedure laid down by management of the company to which that shop belonged, it was held by the House of Lords that the company was entitled to rely on the defence of 'the act or default of another person'. It was their lordships' view that the company could not be held responsible for the offence because not only had it devised an incontrovertible system to prevent commission of that sort of offence by its work force but also, and more important, the local manager whose fault had given rise to the commission of the offence could not be identified with the company. Amplifying this point Lord Morris said:

"He did not function as the directing mind or will of the company. His duties as the manager of one store did not involve managing the company. He was one who was being directed. He was one who was being employed but he was not a delegate to whom the company passed on its responsibilities. He had certain duties which were the result of the taking by the company of all reasonable precautions and of exercising

by the company of all due diligence".(41)

Arguably, as the facts of this case stood, to hold otherwise would be to say that a firm could almost never escape criminal responsibility for the acts of those through whom it acts.(42) But supposing that instead of failing to check the trade description before it was applied, the local manager had checked it in accordance with procedure laid down by his management and the offence had nevertheless been committed, would that have made any difference? Perhaps not. As long as the court found that the company had taken all reasonable precautions and exercised due diligence, it is difficult to see how else it could have denied the company reliance on the defence of 'the act or default of another person'. In other words the effect of the Tesco case is that a firm may be allowed to shift responsibility for the application of false trade descriptions to goods to its employee even if it is clear that he did not deviate from the procedure laid down by management to deal with matter unless it can be shown that the procedure itself fell short of what the law would consider to be compatible with the taking of reasonable precautions and exercise of due diligence on the part of the firm.

Clearly that is not fair. Firstly, the employee will not have personally benefited from the offence whereas the firm may make a big profit from it. Consequently if it was convicted and fined, it would only be disgorging unfairly acquired profit. Secondly, courts sometimes do readily accept that a firm has taken reasonable precautions and exercised due diligence.(43)

It is true that if the firm's defence succeeds and the employee is charged with the offence instead, there will be nothing to stop him from relying on defences which would be available to the firm itself, such as accident, mistake etc. But the difficulty will be for him to show that he took reasonable precautions to avoid committing the offence. What amounts to taking reasonable precautions and exercising due diligence will be discussed a little later. Now suffice it to say that Fisher J. referred to the problem mentioned here when in his judgement in the case of Birkenhead Co-operative Society v Roberts(44) he said:

"Counsel for the appellant has urged that in this case what Mrs Smith did was innocent and could not constitute an offence under the Act.... But it seems to me first of all far from obvious that Mrs Smith's action in applying this wrong label would have been held to be innocent if she had been prosecuted(as she can under section 23)... It would seem to me that plainly she did apply a false trade description and that even if she were able to say that it was a mistake on her part, it would be difficult for her to satisfy the justices that she took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by herself".(45)

It is submitted that although the employee may prove that he exercised due diligence, he might almost not be able to do so with respect to reasonable precautions. The fact is that being a person who works under the instruction and supervision of somebody else, in practice he can not

take any precautions other than those which are compatible with his employment. Now if those precautions are not reasonable, it would be unfair that he should bear the blame. On the other hand if they are reasonable, it would not be unfair to blame him for failure on his part to exercise due diligence to give the precautions a chance. In other words, it is requiring too much of an employee to say that where a firm successfully shifts responsibility for the application of a false trade description to him, to escape conviction he should satisfy the court that not only did he exercise due diligence in carrying out his duties but also that he took reasonable precautions to avoid committing the offence of which he is charged. Once he has established that he exercised due due diligence, that is really how far he should be required to go.

Second, section 5(3) of the Merchandise Marks Act provides that it is a defence to a charge of applying a false trade description to goods for the accused to prove that:

- a) in the ordinary course of his business he was employed on behalf of other persons to apply trade descriptions to goods and
- b) in the case which is the subject of the charge, he was so employed by another person and was not interested in the goods by way of profit or commission dependent on the sale of the goods and
- c) he took all reasonable precautions against committing the offence and
- d) at the time of committing the offence he had no reason to suspect the genuineness of the trade description and

e) on request by an inspector, police officer or customs officer, he gave the inspector or officer, as the case may be, all the information in his power with respect to the persons on whose behalf the trade description was applied.

Apparently this provision was inserted into the Act for the benefit of such persons as printers and advertisers who from time to time are engaged by traders in goods to apply trade descriptions to goods. But curiously, it does not seem to distinguish between such a person who only applies the trade description and another who formulates the trade description and applies it as well. Such a distinction ought to be made. If the accused formulated the trade description himself, insofar as responsibility for its accuracy is concerned, it can not certainly make any difference that he was not the owner of the goods to which he subsequently applied the trade description or that he was not interested in the goods by way of profit or commission.

Besides, it seems strange that once the accused has shown that he took reasonable precautions against committing the offence, he should be required also to prove that at the time the offence was committed, he had no reason to suspect the genuineness of the trade description. One would have thought that if a person does what a reasonable person would have done in similar circumstances (which is essentially what taking reasonable precautions is all about), that is all that can be expected of him. In other words, for present purposes once the accused shows that he took all reasonable precautions against committing the offence, whatever he may have thought about the genuineness of the trade description should be considered immaterial. Of course there is nothing

wrong with putting these two elements in the alternative. But to require that they be proved cumulatively amounts to unnecessary superfluity.

However where the accused merely applies a trade description formulated by someone else, it is fair that once he has shown that his employment was that of applying trade descriptions to other persons' goods and that he received the trade description in question in that behalf, he should escape conviction by proving that when applying the trade description he had no reason to suspect that it was not correct. This is the line of section 25 of the Trade Descriptions Act which provides that:

"In proceedings for an offence under this Act committed by the publication of an advertisement it shall be a defence for the person charged to prove that he is a person whose business it is to publish or arrange for publication of advertisements and that he received the advertisement for publication in the ordinary course of business and did not know and had no reason to suspect that its publication would amount to an offence under this Act".

As for the offence under section 24 of the Weights and Measures Act, it is a sufficient defence

"if the accused proves that [the] deficiency was due to a bona fide mistake or an accident, evaporation or drainage, or other causes beyond his control, and in spite of all reasonable precautions being taken by him to prevent the occurrence of such deficiency, or was due to the action of

some person over whom he had no control".(45)

The implication of this provision is clearly that if the accused chooses to rely on the defence of mistake or accident or causes beyond his control, he must show that he took reasonable precautions against such an occurrence. On the other hand, if his defence is that the offence was the action of another person, he must also show that he had no control over that person for, as shown above, under this Act a principal may be convicted for offences committed by his agent, manager or employee unless he proves that he took reasonable steps to prevent commission of the offence by any one of these persons.

It is perhaps worthwhile here to draw attention to the similarity between this provision and section 24 of the English Trade Descriptions Act. As may have emerged from the preceding pages, the latter provision allows a person charged with an offence under the Act to escape conviction for it by showing that

- a) the commission of the offence was due to a mistake or to reliance on information supplied to him or to the act or default of another person, an accident or some other cause beyond his control and
- b) he took all reasonable precautions and exercised all due diligence to avoid commission of such an offence by himself or any other person under his control.

Now what are 'reasonable precautions' and 'due diligence' are questions of fact which will depend on the circumstances of each case.(46) But in the case of a firm with employees this will mean laying down a proper system to prevent commission of offences by the employees and selecting and training some of the employees to supervise

the system and to ensure that it is observed right to the bottom of the hierarchy of the business.(47) Merely to issue instructions to the employees forbidding them to commit these offences will not suffice.(48) And in appropriate cases to avail itself of this defence, the firm will need to show that it carried out tests or random sampling to determine whether or not the goods comply with trade descriptions applied to them(49) or that it sought expert assistance to check the information on which the trade descriptions were based.(50)

In the case of Sherrat v Gerald's The American Jewellers Ltd the defendants sold to a purchaser a watch which had been displayed in their shop window with a ticket which read 'Diver's Watch'. The watch was engraved 'waterproof'. When the purchaser put it in a bowl of water it filled with water and an hour later stopped. The defendants were charged with supplying a watch to which false trade descriptions had been applied contrary to section 1(1)(b) of the Trade Descriptions Act. Evidence showed that the watch was not in fact waterproof at the time of sale and that the defendants relied on the fact that the watch, together with others of its kind, was supplied to them as waterproof by certain jewellers with whom they had had dealings for some time and took no precautions or steps to confirm whether or not the descriptions applied to the watches were accurate. They also relied on the fact that no previous trouble had been experienced with any watch bought from these jewellers. It was held that although the defendants had reasonably relied on the reputation and experience of their suppliers, they had failed to show that they had taken reasonable precautions, if there were any at all, within the meaning of section 24(1) of the Trade

Descriptions Act. It was the view of Lord Parker that the elementary precaution which could have prevented the offence was to dip the watch in a bowl of water as the purchaser did. And when asked by counsel for the defendants whether he was laying it down as a general rule that sellers were to test every watch in that way or some other way, his lordship could only answer that he would deal with that when the case arose. (51)

However his reasoning was supported ten years later in the case of Garret v Boots the Chemists Ltd where the defendants were convicted of an offence relating to the sale of pencils containing excessive lead contrary not to the Trade Descriptions Act but to regulations made under the Consumer Protection Act of 1961. They contended that they should be excused because they had taken all reasonable precautions to avoid commission of the offence by obtaining assurances from their suppliers that the pencils would comply with the mentioned regulations. Commenting on that Lord Lane LC said:

"Of course I scarcely need to say that every case will vary in its facts; what might be reasonable for a large retailer might not be reasonable for the village shop. But here dealing with a concern the size of Boots, it seems to me that one of the obvious precautions to be taken was a random sample, whether statistically controlled or not. One does not know whether the random sample would have in fact produced detection of the errant pencils. It might have, it might have not. But to say that it was not a precaution which should reasonably have been taken does not seem to me

to accord with good sense".(52)

c) Importing Falsely described Goods

Some goods may originate outside Malawi with false trade descriptions already applied to them. Consequently it will not be possible to use the prohibition under section 5(1) of the Merchandise Marks Act with respect to such cases. Even prohibition of the sale of such goods(which will be discussed below) will not be an effective way to deal with the problem. Thus section 9(a) of the Merchandise Marks Act prohibits importing into Malawi any goods to which a false trade description is applied.

The word 'import' is not defined by the Act nor is any qualification made to its ordinary meaning so that it would seem that a person may be guilty of an offence under section 9(a) even though the goods involved were intended for his personal use.(53) Moreover the Act does not provide any defence for this offence. That in effect means that the importer could be held responsible for importing into the country goods to which a false trade description is applied even though he was not to blame for the importation or there was nothing he could have done to prevent it. For instance, if he orders goods X and by mistake or otherwise, his supplier sends goods Y to which a false trade description is applied, as long as the goods go into Malawi, the importer could be prosecuted for contravening section 9(a) of the Merchandise Marks Act.

That is curious. The importer is more or less in the same position as a person who sells goods to which a false trade description is

applied. But as will be shown below, the latter can escape conviction for the offence of selling such goods by relying on defences created by section 6(2) of the Act. It is submitted that a similar defence should be available to the importer. In other words, subject to what will be said below, if he shows that he did not import the goods for the purposes of trade or commerce or that he did not know or could not, with due diligence have known, that the trade description had been applied to the goods or that it was false, that should suffice to enable him escape conviction of the offence of importing goods to which a false trade description.

d) Supplying Falsely described Goods

i) The Merchandise Marks Act

Section 6(1) of the Merchandise Marks Act prohibits selling goods to which any false trade description is applied. The Act defines the word 'sell' as including 'to expose for sale or have in possession for the purpose of sale or for the purpose of trade or commerce'.(54) This means that if a person actually supplies for valuable consideration goods to which a false trade description is applied, he will have contravened section 6(1). But even in the absence of such a contract, he could still be charged with 'selling' the goods if they are in his warehouse or are merely displayed in his shop. The crucial factor in both cases will be the fact that he has the goods in his possession for the purposes of

trade or commerce.(55) And the use of the expression 'for the purposes of' here suggests that a person will not be liable under section 6(1) simply because it is part of his job to accept possession of other people's goods for safe custody or for conveyance. For instance, a transporter who ships goods will have as a bailee, possession of the goods being shipped, but he would fall outside the scope of this provision since the possession would be 'in the course of trade' and not 'for the purposes of trade.'(56)

ii) The Weights and Measures Act

Under section 24(b) of this Act, any person who by any means whatsoever, whether directly or indirectly, sells or causes to be sold anything by weight or measure short of the quantity demanded or represented by the seller commits an offence. The commonest offence under this provision is where the seller weighs or measures the goods according to the demand of the purchaser. However the provision also includes the situation where the weighing or measurement has be done by someone other than the seller but it is labelled on the goods when the seller takes possession of them or offers them to a potential purchaser. Either way, if the quantity is less or shorter than what the labelling on the goods shows, or what the seller represents it to be, there may be an offence under section 24(b).

It should be pointed out that there could be an offence under this provision even where no goods are actually supplied to anyone.

Section 2 of the Act defines 'sell' as including to offer, advertise, expose, keep, have in possession, or prepare for sale and to exchange or dispose of for valuable consideration. Besides, a person could be convicted under section 24(b) for merely 'causing' another to sell such goods.

iii) The Malawi Bureau of Standards Act

Another 'selling' offence is created by section 21 of this Act. Sub-section (1) of that provision empowers the Minister to declare the standard specification for any goods or for the manufacture, production, processing or treatment of any goods as the compulsory specification for those goods, or for their manufacture, processing or treatment. Section 2 defines 'specification' as a description of any goods by reference to such characteristics as their nature, quality, strength, purity, composition, quantity, dimensions, weight, grade, durability, origin, age or to the material or substance from or with which those goods may be manufactured, processed, produced or treated or to the manner in which that may be done.

Now once the standard specification has been declared, no person is allowed except with the permission of the Malawi Bureau of Standards Board, to sell goods to which it relates unless they comply with that specification or have been manufactured, produced, processed or treated in accordance with it. Similarly, section 20(8) prohibits any person in connection with the sale of any goods to

"make reference, directly or indirectly, to the Bureau or the Board or a specification framed, or adopted, or which he pretends has been framed or adopted, by the Board, in or under circumstances calculated to convey the impression that such [goods comply] with a specification framed or adopted by the Board for the manufacture, production, processing or treatment thereof, or has under this section, declared a mark to be a standard mark in respect of a specification framed or adopted by it for the commodity in question or for the manufacture, production, processing or treatment thereof and such person is in possession of a permit... authorising him to apply such standardization mark to [those goods]".

Besides, except with the permission of the Board, it is an offence to sell any goods under a description in which the word 'standard' is used in a manner which may create the impression that the goods or the manufacture, production, processing or treatment of those goods complies with any standard specification framed or adopted by the Malawi Bureau of Standards Board.(57) And under this Act the meaning of the word 'sell' includes to offer or expose for sale, or export for or in pursuance of a sale, or have in possession for any purpose of sale or export or for the purpose of trade or manufacture.(58)

Defences

Section 6(2) of the Merchandise Marks Act provides that it is a

defence to the charge of selling goods to which a false trade description is applied to prove that:

- a) having taken all reasonable precautions against committing the offence,
 - 1) at the time of the sale the accused had no reason to suspect the genuineness of the trade and
 - 2) on request by an inspector, police officer or customs officer, he gave the inspector or officer, as the case may be, all information in his power with respect to the person(s) from whom he obtained the goods or
- b) he had otherwise acted innocently.

The first part of the provision makes the seller's defence almost similar to that under section 5(3) for the person who applies the false trade description. Arguably, that is unnecessarily harsh on the seller. One who applies the false trade description ought to incur a greater responsibility than the person who deals in goods already carrying that description. For the latter, it is either he knew that the trade description had been applied to the goods and that it was false or he could, with due diligence, have done so. Certainly he can not be expected to test the veracity of every description applied to goods in which he deals(59), let alone to find out what has been said about them in any advertisement or other forms of business communication.(60) Thus once he has shown that he did not know and that he could not, with due diligence, have known that the description was false or that it had been applied to the goods, that is really how far he should be expected to go. By contrast, where a person decides to apply a trade description to

goods, it is not unreasonable to require him to do all that is reasonable to ensure that it is correct or that it does not convey a misleading impression.

The analogy to that is section 24(3) of the Trade Descriptions Act. It provides that it is a defence to the charge of supplying or offering to supply goods to which a false trade description is applied to prove that the accused did not know, and could not with due diligence have ascertained, that the goods did not conform to the description or that the description had been applied to the goods.

Predictably, in most cases where the seller is accused of supplying goods to which a false trade description is applied, he will seek to argue that he did not know that the description was false or that it had been applied to the goods in question. Therefore the task of the court in each case will be to determine whether, bearing in mind all the circumstances of the case, there was more that the accused could have done to ascertain that fact. In Lewis v Maloney (61) F bought a 3-year old motor car on behalf of the defendant, a motor car dealer, while the latter was on holiday. The mileage shown on the car's odometer was 26,000 but F was told that a new odometer had been fitted in place of the old one and that the car had travelled about 80,000 miles. Within a day of the defendant's return, F also went on holiday without telling the defendant that the mileage was false. After inspecting the car and driving it for a short distance, the defendant was satisfied that its condition was consistent with a mileage of 26,000 and accordingly he displayed the car for sale without a disclaimer(66) as to the mileage.

He was later charged with offering to supply in the course of trade or business a car to which a false trade description was applied contrary to section 1(1)(b) of the Trade Descriptions Act. He contended that he was entitled to rely on the defence under section 24(3) of the Act in that he did not know and could not with reasonable diligence have ascertained that the car did not conform to the description that it had travelled 26,000 miles only. It was held that since it was unlikely that a 3-year old car could have travelled 26,000 miles only and the defendant had neither made enquiries nor issued a disclaimer about the mileage, no reasonable bench could have reached the conclusion that the defendant had established the defence under section 24(3).

Similarly, in LBC Richmond-Upon-Thames v Motor Sales (Hounslow) Ltd(63) the defendant car dealer was charged with supplying in the course of business a car to which a false trade description was applied. The mileage indicator of the car registered 17,000 miles whereas it had previously shown that the car had been driven at least 36,000 miles. The defendant who had purchased the car from another dealer, had not inspected the indicator nor made any inquiries from the sellers or previous owners appearing in the log book. Indeed he did not rely on it registering 17,000 miles on purchase. It was held that although it was probable that the defendant did not know that the indicator reading was false, he did not show that with due diligence he could not have ascertained the falsity. Consequently he was not allowed to rely on the defence created by section 24(3) of the Trade Descriptions Act.

Besides, section 6(2) of the Merchandise Marks Act is curious in

that a seller who shows that he took reasonable precautions against committing the offence is required to prove in addition to that, that he had no reason to suspect the genuineness of the trade description in question. As already said above when discussing section 5(3) of this Act, one would have expected that once the accused shows that he took those precautions, then he has established the ultimate standard of conduct which law would expect from him so that to require that he should also prove that he did not have cause to suspect the correctness of the trade description is unnecessary superfluity.

The second part of the defence is less burdensome than the first. Its implication seems to be that if, for instance, the seller believed that the trade description was correct, he would be allowed to escape conviction because he would have acted innocently by selling goods bearing that description. Obviously the question which must be asked here is whether a seller should be allowed to disavow the offence by using this second part of the defence created by section 6(2) even if due diligence on his part would have prevented commission of the offence? Arguably the answer must be given in the negative. These offences are strict liability offences because, as said in the introduction to this chapter, it is believed that that will induce traders to adopt higher standards of conducting their business. Therefore to allow a seller to escape conviction for any one of these offences where due diligence on his part would have prevented the offence defeats that objective.

Under the Weights and Measures Act, if a person is charged with an offence under section 24(b) of selling goods whose quantity is less

than that represented by the seller or the labelling on the goods and he chooses to rely on the defences of mistake or accident or other causes beyond his control, he must also show that he took reasonable precautions to avoid commission of the offence. Similarly, it is an adequate defence to a charge of contravening sections 20(8) and 21(7) of the Malawi Bureau of Standards Act to prove, among other things, that the seller took all reasonable precautions against committing the offence. This requirement is less objectionable here because descriptions caught by these two Acts will be homogeneous so that a seller who wishes to take reasonable precautions to avoid contravening them will have a task which is less burdensome than taking similar steps to avoid contravening section 6 of the Merchandise Marks Act. For instance, taking reasonable precautions to avoid violating the two provisions of the Malawi Bureau of Standards Act may involve mere enquiry from the Malawi Bureau of Standards Board whether or not any standard specification has been adopted or framed by them in respect of any goods. Similarly, where a seller sells goods by weight or measure and he does the weighing or measurement himself, to require that he should take reasonable precautions to avoid giving his customers short weight or measure does not impose an objectionable burden on him. And if he sells goods which are already measured or weighed, to require that he should random weigh or measure them to determine whether or not the labelling on them relating to their quantity is accurate, is not to expect the impossible.

Use of Disclaimers by Sellers

Section 17 of the Merchandise Marks Act shows that a seller of goods to which a trade description is applied can disclaim responsibility for its correctness. It states that a person who sells such goods warrants that the trade description is not false

"unless the contrary is expressed in writing signed by the seller or on his behalf and delivered at the time of the sale and accepted by the purchaser".

This provision is concerned with civil liability but it may be asked whether it should not be available in criminal cases.

Under the English Trade Descriptions Act there is no provision which allows the use of disclaimers to avoid commission of the offence under section 1 of the Act. Indeed the Director General of Fair Trading in his review of the Act thought that there was no need for such a provision.(64) However courts have been willing to accept the use of such a device. The reasoning is that although it can be argued that a person who applies a false trade description to goods should not be allowed to escape conviction for the offence by simultaneously disclaiming the accuracy of the description, it is equally objectionable that a trader who inadvertently misdescribes goods and the description is not erasible, should not be allowed to put things right by issuing either a fresh trade description or a disclaimer of the accuracy of the incorrect description.(65) Indeed there is justice in allowing a person who deals in goods already carrying trade descriptions to disclaim the accuracy of those descriptions wherever he is in doubt about them.

Of course it must be pointed out from the outset that the effect of a disclaimer is not to bail the accused from an offence; rather it is to prevent the offence from being committed in the first place. Thus one must read the disclaimer and the trade description together and see what their combined effect is.

Almost all the cases decided under section 1 of the Trade Descriptions Act in which the issue of disclaimer has arisen have involved falsification of odometer readings to make them record low mileage. As one author has said,

"There is a lot of additional money to be made if a car is sold with a low mileage rather than with a high one".(66)

It is well established that the mileage reading on an odometer is a trade description within the meaning of the Trade Descriptions Act.(67) Now since such a trade description can not be erased once it has been applied, a trader who seeks to avoid contravening section 1 of the Act in respect of it can only do so by disclaiming the accuracy of the reading. But problems have arisen in the judicial interpretation and application of this device.

First, in spite of what has just been said, there are suggestions in some cases that a disclaimer serves as a defence against an offence under section 1. It has been shown that in the case of Lewis v Maloney(68) the fact that the accused dealer did not disclaim the accuracy of the odometer reading was partly used by the court to deny him reliance on the defence created by section 24(3) of the Trade Descriptions Act. Similarly, in Simmons v Potter Lord Widgery CJ said:

"It seems to ... that when one comes to ask what sort of reasonable precautions [under section 24(1)] can be taken by a car seller in order to avoid the commission of this kind of offence [i.e. contravention of section 1(1)(b) of the Trade Descriptions Act] the reasonable precaution of publishing a disclaimer is almost too obvious to need mention".(69)

In the more recent case of Terence George Edwin Cook v Howells Garage Ltd Donaldson LJ was prepared to concede that issuing a disclaimer is not a defence at all in that if a disclaimer is made no offence is committed because a false trade description is not applied.(70) However he found it difficult to conceive that in the absence of that precaution being taken, it was possible to rely on the defence in section 24(1) of the Trade Descriptions Act. It is this sort of statement which creates confusion here. For it is difficult to see how the disclaimer can not be a defence against an offence under section 1 and at the same time its use be vital for successful reliance on section 24(1). Or to put it in another way, if a disclaimer neutralises the would-have-been false trade description or contradicts the message in it(71), as Donaldson LJ suggests in the case above, there can be no place for the defence in section 24(1) thereafter(72) so that that the disclaimer could be relevant for the application of this provision is out of question.

Lord Widgery's view in Simmons v Potter has so far not been questioned by other judges. Only in the Northern Ireland case of Department of Commerce v Elliot does it seem to have received a

knock. In that case the accused was charged with supplying a motor vehicle to which a false trade description had been applied, namely, the odometer reading which gave an inaccurate record of the mileage of the vehicle. He had purchased the vehicle from a car dealer and had inspected it and found no reason to doubt the accuracy of the odometer reading. The case was dismissed and on appeal by the prosecution, it was argued that he had not taken all reasonable precautions and exercised all due diligence in that he had failed to disclaim the accuracy of the odometer reading. Upholding the decision of the earlier court Lord Lowry LCJ said:

"We have been urged, ..., to adopt the view that the respondent's defence under section 24(1)(b) must fail because he made no disclaimer of the accuracy of the odometer reading on the sale [of the vehicle to the purchaser]. The view expressed in Simmons v Potter was a value judgement on a question of fact and for us to accept the prosecution's argument in the present case would amount to recognising a rule of law that a tribunal of fact can not anywhere at any time find proved a defence under section 24(1)(b) in this type of case unless a disclaimer of accuracy has been made. This I refuse to do".(73)

It is clear that his lordship does not adopt the view which is being canvassed here. However by holding in effect that the absence of a disclaimer does not mean that failure of the defence created by section 24(1)(b) is a matter of course, he took some steam out of the view expressed by Lord Widgery in Simmons v Potter.

The second problem which has arisen here relates to the application of the disclaimer which would prevent commission of the offence by the accused. Briefly, two irreconcilable views are discernible from the cases. First, where an odometer reading is falsified, the false trade description is applied at the moment when the odometer is turned back with the intention that that should be the reading visible when the vehicle is subsequently displayed for sale.(74) Taken generally, this suggests that it is impossible to disclaim the truth of a trade description after it has been applied once and for all.(75) By implication, the disclaimer of a such a description will be effective if applied before the trade description. Second, even if the disclaimer is applied before the application of the trade description, it should not be allowed to succeed if to do so would be to enable a person to disclaim his own deliberate fraud.(76) In a way this view seems to suggest that a person should be allowed to rely on a disclaimer if the trade description whose truth it is sought to disclaim was applied innocently. Of these two views, the first is easier to justify because it accords with the function of a disclaimer. The second view is clearly based on the idea that a disclaimer operates as a defence to an offence from which the person using the disclaimer wishes to escape. But as already indicated, that is incorrect. The fact is that the function of a disclaimer is to prevent the offence being committed in the first place by neutralising what would have been a false trade description or by contradicting its message. Now if the disclaimer manages to do that, it can not possibly matter to the consumer (or to anybody else) that

the trade description whose truth is disclaimed was applied deliberately or otherwise. After all, no offence of 'applying' is committed if a trade description is applied but the description is neither false nor misleading.

And this leads to the third problem which surrounds the law of disclaimers. That is, the form and content which a disclaimer should have in order to be considered effective. As hinted earlier, when a person issues a disclaimer of the accuracy of any trade description, he is in effect saying, 'I am not making any representation at all'.⁽⁷⁷⁾ Thus it was held by Lord Widgery CJ in Norman v Bennett⁽⁷⁸⁾ that for a disclaimer to be effective in law, it should neutralise the trade description or contradict the message contained in it. He then added:

"To be effective [the] disclaimer must be as bold, precise and compelling as the trade description itself and must be as effectively brought to the notice of any person to whom the goods may be supplied. In other words, the disclaimer must equal the trade description in the extent to which it is likely to get home to anyone interested in receiving the goods". (My emphasis)

In other words, unlike in contract law where a purchaser may be bound by an exemption clause even though he did not see it at the time of concluding the contract, here the disclaimer must be brought to his notice in order to be considered effective. Besides, as Cooke J held in LBC Hackney v Measureworth Ltd a disclaimer in small print in the contractual document will not suffice.⁽⁷⁹⁾ Similarly, it would seem that

a general disclaimer affixed to any part of the trader's premises disclaiming the accuracy of trade descriptions applied to goods sold on those premises will not be sufficient.(80)

As for the content required to prevent commission of the offence, no precise guidelines are available. However as shown all along, the general view seems to be that the disclaimer should neutralise the trade description or contradict the message in it.(81) Thus a statement to the effect that 'suppliers are not answerable for the mileage shown on the vehicle's mileometer' has been held not to constitute an effective disclaimer of a false trade description.(82) By the same token, the words 'may be incorrect' referring to mileage recording have not been allowed as a disclaimer of the accuracy of the odometer reading.(83) The idea here seems to be to prevent the trader from influencing potential purchasers to rely on false trade descriptions and then escape conviction for that offence through a 'thinly veiled' disclaimer. For that reason it has been suggested that at least in cases of odometer readings, nothing short of a total obliteration of the mileage reading should be accepted as a sufficient disclaimer.(84) The argument is that if there is obliteration, there can not be any fraud on the purchaser of which the trader could take advantage by a disclaimer.(85) And as noted earlier, Cooke J was of the same view in the Measureworth Ltd case. He thought that as the 21,000-mile reading on the odometer was not obscured by the disclaimer sticker, the disclaimer was not adequate.

An alternative way in which this obliteration could be effected is

to wind back the odometer to zero. Speaking about it in Lill Holdings v White Lord Widgery said that this would not mislead anyone because when they see that the recorded mileage is nought, they will realise that something must have been done to the odometer and thus be put on enquiry.(86) But it could be argued that both obliteration and zeroing might amount to application of false trade description.(87) For in that case, the position would be as if the trader was saying that the vehicle had not covered the mileage which it had in fact covered. And that might mislead a potential buyer about the age and history of the car as much as if the odometer had been 'clocked'. Moreover, as this suggestion relates only to odometer readings, it still leaves the question with respect to the generality of trade descriptions unanswered. As said earlier, although some such trade descriptions can be erased or obliterated, there are others which are not that easy to get rid of.

When all this has been said, it is perhaps fair to say that the law of disclaimers is still in the melting pot. No case involving a disclaimer has yet reached the House of Lords and until that happens, it is unwise to state anything conclusively on this matter. However it can be said that the development of this law will be a lot smoother if certain points are properly understood. First, a disclaimer prevents, but does not excuse, an offence. As shown, failure to make this distinction has created problems in deciding whether or not reliance on a disclaimer should be allowed. Second, because a disclaimer prevents the offence from being committed in the first place, the question whether or not reliance on a disclaimer should be allowed ought not to be affected by the fact that the trade description whose accuracy it is

sought to disclaim was applied deliberately. On the other hand, the issue should be whether or not the disclaimer succeeded in preventing commission of the offence. This in turn involves asking two further questions: whether or not the disclaimer was made at the right time and whether or not it managed to neutralise the trade description involved or to contradict the message contained in it.

7.3 Control of the Cash Price Control

Of certain Goods

This control should be distinguished from control of statements relating to prices. As already shown above, in Malawi such statements are free from the control of criminal statutes which prohibit false and misleading statements about goods. On the other hand, the Malawi Control of Goods Act does set up a machinery for regulating prices which can be charged for certain goods.

As the title shows, the general object of this Act is to give the Minister power to regulate the distribution and sale of goods in Malawi. However section 3(1) of the Act specifically allows him to make regulations for controlling the wholesale and retail prices of any goods sold in Malawi. And by virtue of paragraph 6(1) of the regulations made under this provision, he can

- a) fix a minimum price, a maximum price or a specified price for the sale of any goods by any person(s);
- b) prohibit any person(s) from raising the price of any goods sold by him or them above the price ordinarily charged by him or them on a specified date or during a specified period for similar goods sold under similar conditions regarding delivery or payment.

The price so ordered may

- 1) be fixed irrespective of the cost to the seller of the goods or
- 2) be a price less a specified discount or plus a specified premium or
- 3) not exceed the cost(88) to the seller of the goods plus a stated sum or a stated percentage of that cost or
- 4) not exceed the price ordinarily charged for such goods on a specified date or during a specified period plus a stated sum or a stated percentage of that price, or less a stated sum or a stated percentage of that price.

Paragraph 3 of the Control of Goods(Display of Prices) Order provides that a dealer who offers goods for sale must display the prices at which the goods are so offered 'by placing the prices on the premises on which he carries on business in figures clearly legible to intending purchasers viewing the goods'. Here 'dealer' means one who carries on the business of selling goods by retail or by wholesale on any premises.(89)

Furthermore, no person who purchases any controlled goods from a dealer in those goods is allowed to resell the goods or part of them to another dealer, manufacturer or to any other person at a price in excess of the price at which the dealer would have been permitted to sell the goods.(90) Similarly, it is an offence to sell controlled goods and as an inducement to the sale, to give or promise any person any consideration in money or otherwise in addition to the price which that person is permitted to charge for those goods.(91) And it is also prohibited to sell any controlled goods to any person on condition that he purchases or acquires from the seller or any other person any goods in addition to

the controlled goods.(92)

Defences

It is a sufficient defence to a charge under the Control of Goods Act for the accused to prove that he took reasonable steps to avoid committing the offence. Where the trader is a firm and the offence is committed by its agent, manager or servant, the firm may be convicted of the offence unless it satisfies the court that it took reasonable precautions to prevent the act or omission involved.(93) The Act also provides that in this second case, the fact that the firm issued instructions forbidding its agent, manager or servant the act or omission in question will not by itself be accepted as sufficient proof that it took all reasonable steps to prevent that act or omission.(94) The implication of this defence has already been discussed and therefore nothing more will be said about it here. But it should be noted that apart from penalties which may be imposed for contravention of any provision of the Control of Goods Act, paragraph 14 of the Control of Goods(Price Control) Regulations provides that:

"If any person has received in respect of the sale by him of any controlled goods a price in excess of the price permissible for such goods... the Minister may, irrespective of any action which may have been taken or which may be taken against such person..., order him to refund to the purchaser, or, if the identity or whereabouts of the purchaser can not readily be ascertained, to pay into the

Consolidated Fund, a sum not exceeding twice the amount by which the price at which he sold the goods exceeds the controlled price".

To facilitate proof of the identity of, and price charged for, any controlled goods in subsequent legal proceedings, the Minister may order that the seller should give to the purchaser of the goods at the time of sale or within a reasonable period thereafter, an invoice or memorandum, giving particulars of the goods, which the Minister may specify.(95) The seller may also be required to keep a copy of the invoice or memorandum as long as the Minister may provide.(96) However to date no order relating to the refund or invoice seems to have been issued despite the fact that the Price Control Regulations are already in operation in respect of some goods.

There can be no doubt that from the consumer's point of view, control of prices is a very important aspect of consumer protection. Although measures to ensure product quality and safety are also important, any step which has the effect of reducing his shopping bill is even more important. However the provisions which have just been mentioned may not have that effect for a number of reasons.

For one thing, although the Control of Goods Act is drawn to apply right across the board, those entrusted with its administration will be selective with respect to the goods to which it should apply. The reason is that a wholesale application of the provisions would be too expensive and unmanageable. Now unless there is adequate representation of the consumer in the body entrusted with administration of the Act, the goods whose prices may be selected for regulation may not reflect consumer

preferences. And here it should be mentioned that paragraph 3(4) of the Control of Goods(Price Control) Regulations establishes the Price Control Board whose functions are inter alia, to make recommendations on any matter relating to prices of goods as may require attention and to receive complaints on any price fixed under the Act. But whereas sellers who are dissatisfied with any such price can make representations to the Board, consumers do not have that right. Besides, to date, only the following goods have their prices fixed under these price control regulations: hoes, matches, meat, medicines, petrol and sugar.

Secondly, in the light of the current inflation price control laws can not benefit consumers significantly. They may manage to control the amount by which prices rise at any one time but they can not stop the price rise altogether. And if wages are not in line with the upward trend in prices, the control is unlikely to have any visible effect on consumer bills. Indeed it can be argued that management of consumer prices has an air of artificiality about it(which may not be possible to sustain for a long time) if the entire economy is not geared towards easing inflation.

Thirdly, generally price monitoring requires a lot of vigilance on the part of the policing body. Unfortunately that is not a characteristic possessed by most government bodies. Most of them are usually lethargic and heavily weighed down by bureaucracy. In a world where traders are itching to raise prices this is likely to mean that it is the business fraternity, and not the government, which will determine price levels from time to time. In other words, it will be more usual for businesses to propose price increases and for the government to

accept those increases, and not vice versa. And in the absence of adequate consumer representation in the Price Control Board, it is difficult to see the consumer emerging as the beneficiary of this business-government bargaining.

7.4 Validity of the Contract induced by Prohibited Conduct

A question which may be asked is whether a trader's conviction for any of the offences discussed here should affect the enforceability of any consumer contract in relation to which the offence may have been committed. There is no blanket answer to this question. Under the Weights and Measures Act if a person sells goods by weight or measure but he uses other than the standard weight or measure, that is not only an offence but also, the contract of sale is void.(97) And section 17 of the Merchandise Marks Act provides that any person who sells goods to which a trade description is applied will be deemed to warrant that the trade description is not false unless he disclaims accuracy of the description at the time of the sale. What this means is that generally a false trade description will constitute both a crime and a breach of contract.

By contrast, section 35 of the English Trade Descriptions Act provides that a contract for the supply of goods will not be void or unenforceable by reason only of a contravention of any provision of the Act. And in his review of the Act, the Director General of Fair Trading was of the opinion that the provision should not be changed.(98) He also did not share the view that contravention of the Act should

automatically give rise to a right of civil action.(99) Of course under the English Criminal Courts Act, courts have power to award compensation to the consumer for commission by the supplier of a consumer criminal offence.

The main arguments in favour of a provision along the lines of section 17 of the Malawi Merchandise Marks Act are that it will strengthen the criminal standards imposed by the Act and (because enforcement of these statutes is entrusted to public officers) ensure that consumers readily obtain compensation for non-compliance by any trader with those standards.(100) But the second argument misses one important point about the operation of this legal regime. As stated in the introduction to this chapter, not every contravention of these statutes which comes to the attention of the enforcement officers results in a prosecution of the offender. The officer involved may think that the offence only deserves a word of caution. Now if he adopts that attitude with respect to the criminal offence, it is doubtful that he might treat the civil action consequent upon that offence any differently. Thus in the end the system may be an obstacle rather than a source of help for consumers. Another problem with linking the civil action to the criminal offence is that consumers are unlikely to obtain compensation for any loss they may have suffered until the criminal proceedings are over. Not only will that delay the compensation but also in cases where the criminal charge is dismissed that may have an adverse effect on the civil action(although legally the outcome of one should not influence the outcome of the other). In other words, although the

argument that contravention of these provisions should automatically give rise to a civil action or should affect enforceability of the contract with respect to which the offence may have been committed sounds all right on paper, it is unlikely to mean much to the consumer in practice. It is therefore better that the two issues be separated but that enforcement officers be allowed to make available their evidence to the consumer for any civil action which he may wish to bring on the facts of the criminal offence.

7.5 Enforcement of Criminal Standards of Fair exchange

a) Policing

One of the notable features of the statutes discussed here is that, unlike the Hire-Purchase Act, they are not content with creating standards; they also appoint officers to be responsible for enforcing those standards. For instance, enforcement of the Merchandise Marks Act is entrusted to police officers, customs officers and any inspector who may be appointed by the Minister under section 19(1) of the Act. Similarly, the Minister has power to appoint inspectors for the purposes of the Malawi Bureau of Standards Act(101) and regulations relating to prices made under section 3 of the Control of Goods Act.(102)

These officers are granted limited powers to police compliance with the statutes. Under section 19(2) of the Merchandise Marks Act such an officer can, during business hours, enter any premises where he believes

goods for sale are kept and take samples of the goods for examination, inspection or for any other purpose relating to the Act.(103) Where the officer is not a police officer but a mere inspector, he has to produce a certificate of his appointment as inspector before he makes the entry.(104) Besides, he has to give a receipt to the owner of the goods for any sample taken and disclose to him the statute pursuant to which the sample is taken.(105) Once it has served its purpose, the sample has to be returned to the premises where it was removed. And finally, it is an offence for any person to obstruct any officer in the exercise of his duties(106) or to impersonate any such officer.(107)

The appointment of these officers is in line with the object of these statutes. It signifies a shift of the burden of consumer protection from individual consumers to the public. For not only can the officers investigate the possibility of a violation of the law but also if they obtain enough evidence, it is within their powers to bring charges against the trader involved. Besides, the granting to them of powers of entry underlines the emphasis which this legal regime places on preventing things from going wrong rather than the wait-till-the-harm-is-done approach of the civil law.

Yet in spite of that, it is possible that in practice things do not actually work like that. No statistics are available about how the system is working in Malawi. But one thing is clear and that is that the policing is centralised to a very large extent. With the exception of police officers who are resident in many places throughout the country, the other enforcement officers have to commute from the headquarters of the Ministry of Trade and Industry and the Malawi Bureau of Standards.

This means that for a good part of the year, the Police Force bears the brunt of the burden of enforcing the law. But bearing in mind that consumer offences are not generally regarded as constituting a serious threat to civil order, it is unlikely that policing compliance with these statutes will receive adequate resources from the Police. Besides, police officers are empowered to enforce the Merchandise Marks Act only. What all this does, therefore, is to leave the task of activating the legal process in the hands of consumers and traders who may feel that those traders who contravene the law are engaging in unfair competition.

Of course it is fair to say that even if the system was re-organised so that more resident enforcement officers were available, that would not change the situation dramatically.(108) The bulk of the task to set the enforcement machinery in motion would still have to be borne by consumers themselves. Dearth of resources would mean that whole areas would still remain uncovered by any officer. Besides, some offences can only be discovered by actual use of the goods involved by the consumer. Moreover, the language of these statutes is permissive; it empowers these officers to enforce the law without necessarily putting them under a positive duty to do so.(109) And that is more likely to encourage a sit-back-and-wait attitude rather than a disposition to take active steps to ensure that the law is working.(110) Finally, insofar as the Merchandise Marks Act is concerned, the existence of three separately controlled groups of officers entrusted with the responsibility of enforcing it is not conducive to effective policing. Unless proper co-ordination is established between these groups, no work may be done

because each group will be sitting back in the hope that the other will do it. And that is likely to be so bearing in mind that there is no positive duty on these officers to enforce the law.

But once the enforcement officers have taken cognisance of a violation of the law (either through their own initiative or through complaint by a consumer), what further step they will take will depend on which side of the ideological divide the officer involved is. One view is that the role of enforcement officers is that of deterrence of future violations and the other is that it is to encourage compliance with the positive obligations imposed by the law.

At first sight it is difficult to see any real distinction between these two views because a step taken to encourage compliance with the law in essence involves preventing future non-compliance with that law. However in practice they represent divergent strategies of law enforcement. According to Reiss, the principal objective of compliance law enforcement is to secure conformity with the law by resorting to means that induce conformity without necessarily detecting, processing and penalising offenders. On the other hand, deterrence law enforcement aims at securing conformity with the law by detecting violations, determining who is responsible for the violation and penalising the violator to inhibit future contraventions by the offender and others who might be inclined to follow his way if he was not punished.(111) In other words, having detected a violation of the law and apprehended the offender, a compliance-based system seeks correction whereas a system based on deterrence will seek punishment of the offender to prevent

future violations.(112) Thus under deterrence-based systems success will be gauged in terms of numbers of violations detected and offenders punished whereas compliance-based systems will calculate success in terms of numbers of those who comply with the law.

Although it is difficult in practice to imagine neat division along these ideological lines, a study carried out in the United Kingdom shows the existence within the ranks of consumer agencies of a strong opinion preferring proffering of advice and a word of caution to prosecution of the offender. In the words of the researcher:

"The assumption of consumer agencies is that normally advice or a warning is sufficient when dealing with the majority of businesses. Prosecution is regarded as superfluous if a business will voluntarily introduce genuine safeguards to avoid future wrongdoing. The exercise of discretion is utilitarian and the crucial question is whether a course of action ensures future obedience to law.... The argument is that law enforcement involves the prevention of crime, and advice or caution can achieve this in most cases. In this view, the number of prosecutions is not the primary standard for evaluating an agency, and its success is better judged by their absence. Prosecution is an admission of defeat, for other means must have failed in preventing malpractices".(113)

According to him, prosecution-minded agencies are in the minority and may conduct some five times as many prosecutions per a year as other comparable agencies. Their view is that offences should be more

regularly detected and prosecuted. They attack the view that prosecution is an indication of failure and refer to the prevailing policy as one of avoiding responsibility and usurpation of the power of courts. They also argue that resentment may result among businesses if some offenders escape prosecution through the exercise of discretion by enforcement officers. It is also their argument that prosecution demonstrates to the public that they are being protected by the enforcement of the consumer law.(114)

Undoubtedly each side has got a point. However neither extreme on its own is conducive to a proper working of this legal regime. Excessive reliance on the compliance approach is likely to create a feeling among the general public that nothing is being done to protect them, it being common sometimes to equate protection with apprehension and punishment of offenders. Besides, it denies courts opportunities for developing and expounding the law. For although the clarity of any law will not necessarily depend on the frequency and amount of litigation brought under it, some cases at least need to be brought for the scope of the law to be explored.

But over-zealous in prosecution is not good either. If, for instance, individuals are prosecuted even for minor violations, that may be seen as a waste of resources and may serve to bring the law into disrepute, especially if those penalised are generally regarded as law-abiding. The cause of consumer protection may further be hampered by the fact that courts are not likely to deal with cases as fast as they are brought; some delays are to be expected. Now unless in the meantime the enforcement officers can obtain an injunction to prevent the

offender from carrying on with the challenged trade practice, they may live to learn that a word of caution or advice is more effective than prosecuting the offender. In other words, what is required is an attitude which blends these two extremes. Thus while every effort should be made to encourage compliance with the positive obligations imposed by the law without resorting to sanctions, in appropriate cases prosecutions should also be brought without any sense of guilt.

Now although it is not easy to draw the line between cases where one course of action would be more appropriate than the other, factors can be given which should influence the decision whether or not to prosecute the offender. These factors include the trader's past record, the gravity of the offence and its effects, the feasibility of his changing his ways without the intervention of any penalty and how widespread the trade practice involved is. For if a trader has no previous record of violations and the contravention in question is not serious both in nature and effect, a word of advice or caution may not be out of order especially if he shows willingness to change. But if the offence is serious, that justifies prosecution even if it is the first to be committed by him. Similarly, even if a malpractice does not constitute a serious violation of the law, it should still be the subject of prosecution if it is widespread. In both cases the point is not so much that a caution or advice would not do the job as that the decision to prosecute would accord with the general expectation of the public.

But apart from the way in which the law should be enforced, there is another point which needs to be made here. Enforcement officers

themselves need to be re-organised. Instead of leaving it to each statute considered here to determine who is to police compliance with it and what powers he is to have, it is submitted that a common pool of consumer enforcement officers should be created. Although there may have to be division of responsibilities along the lines of the statutes, the officers would all be working under one organisation and supervision. That would release police officers and custom officers from enforcing consumer law and leave them to concentrate on their more usual tasks. The biggest advantage of this would be to remove the uncertainty about the enforcement of the Merchandise Marks Act. Furthermore, the arrangement would facilitate training of the officers and unify the enforcement procedures and strategies. That in turn could result in a reduction of the cost of law enforcement. Besides, it could make the task of keeping records of contraventions and complaints easier and improve communication with the consuming public. Moreover, such an organisation could make evaluation of the impact of law and its enforcement procedures, a lot easier.

b) Penalties

Once an offence has been proved the court has two choices of penalties to impose: a fine and in default of payment, imprisonment or a fine and imprisonment. The maximum amount of the fine and the period of imprisonment are fixed, it being left to the court to lower it in accordance with the gravity of each offence. A distinction is made, however, between a first conviction and any subsequent conviction-the former attracting a heavier sentence than the latter. For instance,

under the Merchandise Marks Act, a first conviction attracts a fine of £100 and imprisonment for one year whereas the penalty for a second or any subsequent conviction is £200 and imprisonment for two years.(115) And the position is the same under the Control of Goods Act except that the terms of the prison sentences are six months and one year, respectively.(116)

Apart from these penalties there is also provision for confiscation of the goods involved in the commission of the offence.(117) Section 24(1) of the Merchandise Marks Act states that upon conviction for an offence under the Act, the judge or magistrate presiding at the trial may, in addition to passing sentence, declare goods in respect of which the offence was committed to be forfeited unless their owner or any person interested in them shows cause to the contrary. Thereafter the forfeited goods vest in the government and may be sold, destroyed or appropriated to it.(118)

Forfeiture is employed regularly in criminal cases and there is nothing to suggest that it is not used with similar regularity in consumer offences. However it is rare for a court to impose the maximum sentence prescribed by the statute for any offence. Similarly, it is not common for courts to impose a prison sentence in these offences; more common is to impose a fine. And that brings into question the argument that prosecution of recalcitrant traders has a deterrent effect on those convicted as well as others who might be inclined to break the law. As Cranston says, because businesses are prone to calculate the utility of a course of action, they may be slow to change unlawful behaviour unless the tangible and symbolic gains of doing so by far outweigh the

loss.(119) Thus if the financial benefit from a trade malpractice outweighs any possible loss resulting from involvement in it, the trader is likely to opt for the malpractice unless he is prevented from doing so by other reasons such as a sense of social responsibility. It is for this reason that civil law is a weak instrument of consumer protection. As businesses know that few consumers manage to bring civil actions and that not all the actions succeed, they will find the economic disincentive attached to predatory practices not wholly prohibitive.

But the position is very much the same in respect of the criminal law. As indicated above, the present arrangement in Malawi provides a very low number of enforcement officers. What this means is that on the whole the probability that a trader who contravenes the law will be apprehended is very low. Besides, even if he is apprehended, there is a chance that he may just get away with a mere caution. Furthermore, should he be prosecuted, he might be charged a fine which may not make any significant dent on returns from the offence. For example, it has been observed that the average fine per offence imposed during the first six years of the Trade Descriptions Act in England was £76 although the maximum then was £400 per offence.(120) No wonder one author has described the administration of these criminal penalties as being 'little more than a reasonable license fee' for traders to engage in the prohibited trade practices.(121)

Now it is sometimes thought that this problem could be solved by raising the ceiling of these fines. But what does not seem to be realised is that for there to be any real change at all, these penalties must at least be able to play the role of forcing the offending trader

to disgorge profits acquired or likely to be earned from his offence. And at the moment, that is not the object for which criminal fines are imposed; they seem to be used more to inflict economic punishment(although even that is doubtful) than to extract illegal profits.(122) Thus although no doubt there is an argument for raising the maximum level of fines imposable for these offences, there is also need to examine the effect which any particular fine is likely to have on the offender. And that requires taking into consideration the profits which the offender stands to gain from the offence and the seriousness of the offence in terms both of the economic loss which it inflicted or threatened to inflict on consumers generally, and of the gravity of the conduct involved.(123) In considering the first factor, the court would have to take into account(124)

- a) the size of the offender's business;
- b) the dominance of its position in the market for the goods involved;
- c) the extent and intensity of the challenged conduct;
- d) the offender's financial standing and his ability to pay any fine which may be imposed and
- e) the proportion of the challenged conduct to the offender's overall activity during the period in which the offence was committed.

Criminal Sanctions under the Hire-Purchase Act

The Act imposes criminal sanctions to ensure fair exchange in credit agreements only in two instances. First, where the purchaser asks the supplier for either a copy of the agreement or a signed statement showing the former's financial account under the agreement

and without reasonable cause, the supplier fails to comply with the request.(125) Second, where the purchaser gives the supplier a negotiable instrument in respect of any liability under the credit agreement and the latter fails to write on the instrument or on the agreement, that the instrument has been given for that purpose.(126) In other words, it is not a criminal offence to fail to comply with compulsory disclosure or financial provisions of the Act or to supply false or misleading information while complying with the disclosure provisions or to contravene any provision of the Act for the protection of the purchaser. And even in the two cases where criminal sanctions are available, there is no uniformity as regards the mens rea which should be proved to establish the offences. The first seems to require proof of fault on the part of the supplier while the second has the hallmarks of a strict liability offence. Furthermore, the supplier has no defence to these offences so that he may be convicted of them even where he could not have avoided contravening the law. Besides, the Act does not provide for policing compliance with its provisions, including sections 8 and 13 which create the two criminal offences mentioned above.

By contrast, section 167(2) of the English Consumer Credit Act provides that it is an offence to contravene regulations made under the Act relating to inter alia,

- 1) information which must be disclosed in advertisements which indicate that the advertiser is willing to supply credit or to enter into a regulated credit agreement with any consumer(127);
- 2) information which must be disclosed to the debtor before a regulated credit agreement is made(128) and

3) the form and content of quotations which give to prospective customers information about the terms on which a credit supplier is prepared to do business.(129)

It is also an offence for the supplier of consumer goods to supply such goods to a consumer which contain a statement or to furnish the consumer pursuant to a consumer transaction with a statement

a) about the consumer's rights against the supplier in relation to the goods or

b) which sets out or describes or limits those rights without there being in close proximity to that statement another statement which clear and conspicuous, to the effect that the first statement does no affect the consumer's statutory rights.(130)

However it is a defence to any of these offences to prove that

i) the alleged act or omission was due to a mistake or to reliance on information supplied to the accused or to an act or omission by another person, or to an accident or some other cause beyond the accused's control and

ii) that the accused took all reasonable precautions and exercised due diligence to avoid the alleged act or omission by himself or any person under his control.(131)

And to ensure compliance with these criminal law standards and other standards created by the Act, section 161 places a number of authorities under a duty to enforce the Act and all regulations made under it.

It is therefore submitted that apart from reforms to the criminal statutes relating to statements about goods which have been proposed above, there is need to provide that subject to the defences of

mistake, accident, reasonable precaution, etc, it should be a strict criminal offence to fail to comply with disclosure and financial provisions of the Hire-Purchase Act or to supply information pursuant to those provisions, which is false or misleading or to contravene sections 7, 8, 13 and 21 of the Act. And to be in line with the other statutes discussed above, the powers of the enforcement officers who police compliance with those statutes should be extended to include policing compliance with the Hire-Purchase Act generally, and with the criminal standards suggested here, in particular.

Footnotes

1. Tesco Supermarkets Ltd v Natrass [1971] 2 All ER 127, p.151
2. Credit Marketing and Consumer Protection (hereinafter referred to as 'Credit Marketing'), p.355
3. Ibid., pp 355-7 for a discussion of the reasons why there is a general reluctance to impose criminal sanctions in this area.
4. See Sherras v De Rutzen [1895] 1 QB 918, p. 922 Per Wright J.
5. Credit Marketing, supra note 2, p. 377
6. Miles Smith and Anthony Pearson, The Value of Strict Liability [1969] Crim. LR 5, p.14
7. R Cranston, Regulating Business: Law and Consumer Agencies (hereinafter referred to as 'Regulating Business'), p. 99
8. [1974] 2 All ER 21, pp 32-3
9. J Gribetz and FP Grad, Housing Code Enforcement: Sanctions and Remedies (1966) 66 Col. LR 1254, p. 1277
10. The Criminal Law and Consumer Protection, p.2
11. See sections 35 and 26 of the Trade Descriptions Act and the Fair Trading Act, respectively.
12. (1953) Law Reports of Northern Rhodesia 248, pp 259-60, 261
13. See C Howard, Strict Responsibility, passim
14. Sweet v Parsley [1970] AC 132, p. 163
15. W Friedman, Law in a Changing Society, 2nd ed., p. 203
16. Tesco Supermarkets Ltd v Natrass, supra note 1, p. 131 Per Lord Reid
17. The Cost of Accidents, pp 126-7

18. Regulating Business, supra note 7, p. 113
19. The Cost of Accidents, supra note 17, p. 124
20. Section 3(2) of the Merchandise Marks Act
21. It is unclear whether it is necessary for the seller to know about the trade description for him to be deemed to have committed the offence in such a case. Perhaps the fact that the offence is one of strict liability makes that knowledge irrelevant.
22. The Merchandise Marks Act, Section 5(4).
23. Ibid., section 2 which gives the definition of 'false trade description'
24. In fact under section 53 of the Australian Trade Practices Act, it is prohibited to make false representations about the standard, quality, etc of goods and services.
25. GH, Treitel, The Law of Contract, 4th ed., p.219
26. Jenkins v Lombard North Ltd [1984] 1 All ER 828, p.835 Per Robert Goff LJ
27. See section 2 of the Merchandise Marks Act
28. A good example is Grenfell v EB Meynowitz Ltd [1936] 2 All ER 1313
29. [1917] VLR 665. See also JA Booth & Co Pty Ltd v Fraser (1953) 52 AR (NSW) 566 where a bedroom suite was advertised as having 'magnificent Italian walnut doors' when in fact the doors were made with an Italian veneer and the accused contended that his claim was correct in the light of the common understanding in his trade. The court rejected the argument on the ground that in considering prosecution brought in respect of misleading advertising, the advertisement must be viewed from the point of view of the public

- likely to read the advertisement and to be influenced by its terms.
30. The Molony Committee Report (1962) Cmnd 1781, para. 587
 31. Cotter, *The Case Against Oral Trade Descriptions* [1972] 122 NLJ 755
 32. The Molony Committee Report, supra note 33, para.659
 33. This would also not be an offence under the Malawi Hire-Purchase Act.
 34. Similarly, this would also not be an offence under the Malawi Hire-Purchase Act.
 35. Cf section 2 of the Merchandise Marks Act
 36. See section 2 of the Weights and Measures Act for the definition of the word 'sell'.
 37. This is what happened in Howard Marine & Dredging Co Ltd v Ogden [1978] 2 All ER 1134
 38. [1886-90] All ER Rep 1
 39. Section 31(2) of the Weights and Measures Act provides that the employee who does or omits to do any which would be an offence under the Act to do or omit to do will be liable to be convicted in respect of the offence as if he were the principal.
 40. [1970] 3 All ER 391 ,p.393
 41. [1971] 2 All ER 127,p.140
 42. For a general discussion of the criminal liability of corporations, see: LH Leigh, Liability of Corporations in English law.
 43. See, for instance, Nattrass v Timson Shops Ltd [1973] Crim LR 197 and McGuire v Sittingbourne Co-operative Society Ltd, The Times, 3rd February, 1976; (1976) 120 Sol. J 197
 44. Supra note 43, p.393

45. Section 32(2) of the Weights and Measures Act
46. For a discussion of these expressions, see: G Stephenson, In Statutory Defence of Traders [1981] NLJ 783 and RG Lawson, Reasonable Precautions and All Due Diligence [1983] JP 486.
47. Tesco Supermarkets Ltd v Natrass, supra note 1
48. See the proviso to section 5(2) of the Control of Goods Act
49. Garret v Boots the Chemists Ltd, infra note 52
50. Atchinson v Reith and Anderson Ltd [1974] SLT 282 and Sutton LB v Perry Sanger & Co Ltd [1971] 135 JP 239
51. [1970] 68 LGR 256, p.260
52. 88 The Monthly Review 238, p.239
53. Cf section 13 of the Merchandise Marks Act which provides that the Minister may prohibit the importation for sale of any goods unless they comply with certain labelling requirements laid down by that provision.
54. Ibid., section 2
55. The importance of this lies in the fact that as will be shown below, those empowered to enforce the law can enter upon any premises to determine whether or not the law is being violated there.
56. Section 2 of the Weights and Measures Act defines the word 'trade' as including 'any contract, bargain, sale, dealing and generally any transaction for valuable consideration.
57. The Malawi Bureau of Standards Act, Section 28(1)(e)
58. Ibid., section 2
59. Cf Sherrat v Gerald's the American Jewellers, supra note 51
60. It will be recalled that this is essentially the position under the

law of negligence where a seller of goods is not under a general duty to test goods in which he deals to determine whether or not they contain any defect which may cause damage to the person or property of the ultimate consumer or user of those goods.

61. [1977] Crim. LR 436
62. The issue of disclaimer is discussed below.
63. [1971] RTR 116
64. Review of the Trade Descriptions Act 1968: A Report of the Director General of Fair Trading (hereinafter referred to as 'Review of the Trade Descriptions Act), 1976, Cmnd 6628, para.166
65. Ibid., para. 163
66. RJ Bragg, More Mileage in Disclaimers (1982) 2 Legal Studies 172
67. Tarleton Engineering Co v Natrass [1973] 1 WLR 1216
68. Supra note 61
69. [1975] RTR 347, p.352
70. (1981) The Monthly Review, p.49
71. Infra note 78
72. Wandsworth LBC v Bentley [1980] RTR 429, p.433
73. [1981] NLR 10, p.17
74. [1979] Crim. LR 122
75. EL Newsome, Clocks, Crooks and the Rolling Lie (1979) 143 JP 588, p.589.
76. LBC Hackney v Measureworth Ltd (1981) 89 The Monthly Review 67, p.69
77. Supra note 74
78. [1974] 3 All ER 351, p.354

79. Supra note 76
80. Zawadzki v Sleigh [1975] RTR 113
81. Supra note 78
82. R v Hammerton [1976] 3 All ER 758
83. Supra note 74. See also Corfield v Starr [1981] RTR 380
84. Supra note 75
85. EL Newsome, Trade Descriptions Motorcade (1983) 145 JP 437-8
86. [1979] RTR 120, p.123
87. The Criminal Law and Consumer Protection, supra note 13, p.52
88. Para. 6(2) of the Control of Goods (Determination of Cost) Order which shows how the cost of certain controlled goods may be determined.
89. Para. 2 of the Control of Goods (Display of Price) Order
90. Para. 8(a) and (b) of the Control of Goods (Price Control) Regulations
91. Ibid., para. 11
92. Ibid., para. 12
93. Section 5(2) of the Control of Goods Act
94. Proviso to section 5(2) of the Control of Goods Act
95. Para. 10(a) of the Control of Goods (Price Control) Regulations
96. Ibid., para 10(b)
97. Section 18 of the Weights and Measures Act
98. Review of the Trade Descriptions Act, supra note 66 ,para. 249
99. Ibid., para. 251
100. R Cranston, Consumers and the Law, 1st ed., pp 273-4
101. Section 24(1) of the Malawi Bureau of Standards Act

102. Para. 3(1) of the Control of Goods (Price Control) Regulations
103. See also section 24(1)(a), (b) and (c) of the Malawi Bureau of Standards Act.
104. The Merchandise Marks Act, section 19(2). See also para. 3(3) of the Control of Goods (Price Control) Regulations and the Malawi Bureau of Standards, section 25(3).
105. The Merchandise Marks Act, section 19(3).
106. Ibid., section 19(5).
107. The Malawi Bureau of Standards Act, section 29(1)(c).
108. For a full discussion of this, see: Regulating Business, supra note 7, pp 50-57.
109. See the observations of the Molony Committee, supra note 30, para. 607
110. Cf section 26 of the English Trade Descriptions Act.
111. Consequences of Compliance and Deterrence Models of Law Enforcement for the Exercise of Police Discretion, (1984) 47 Law and Cont. Problems 82, p. 91
112. Ibid., p. 96
113. Regulating Business, supra note 7, p. 99
114. Ibid., p. 100
115. Section 23 of the Merchandise Marks Act.
116. Section 6 of the Control of Goods Act.
117. Section 29(2) of the Malawi Bureau of Standards Act.
118. Section 24(4) of the Merchandise Marks Act.
119. Regulating Business, supra note 7, p. 140.
120. Ibid., p. 142.

121. Comment, Increasing Community Control over Corporate Crime- A Problem in the Law of Sanctions, (1966) 71 Yale LJ 280, p. 287.
122. *Ibid.*, p. 294.
123. AJ Duggan, Criminal Sanctions for Misleading Advertising: The Penalty of Fine and Related Matters, (1976) 50 ALJ 625, p. 628.
124. *Ibid.*, p. 632.
125. The Hire-Purchase Act, section 8(2).
126. *Ibid.*, section 13.
127. The English Consumer Credit Act, section 44.
128. *Ibid.*, section 55.
129. *Ibid.*, section 52.
130. The Consumer Transactions (Restrictions on Statements) Order 1976/1813
131. The English Consumer Credit Act, section 168(1)

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CHAPTER 8ADMINISTRATIVE CONTROL OF UNFAIR EXCHANGE

One point which emerges from the discussion in Chapter 7 is that the present consumer criminal law regime in Malawi will not have the desired deterrent effect on traders who engage in consumer malpractices. That weakness derives partly from the distorting effect which the enforcement machinery, including courts and inspectors appointed to enforce compliance with the law, introduces into the system and partly from the way in which the law was conceived. But even if courts at least do adopt a more positive attitude and impose sentences in consumer offences which accord with the object of consumer protection, the case by case approach of judicial control can not ensure general compliance by traders with the law or allow systematic evaluation of how the system is working.

In other jurisdictions the answer to that problem has been found in regulating the trade using administrative control. The expression 'administrative control' has been used here instead of the more familiar 'licensing system', for a reason. Strictly speaking this sort of control involves more than the granting of licences; it also involves supervision of the regulated trade, performance of routine administrative work arising under the regulating statute, adjudication of cases and investigation of non-compliance with the statute. Consequently it is felt that the words 'administrative control' are more expressive of what actually happens than the expression 'licensing system'.

As will be shown below, Parliament in Malawi has already employed

administrative control to regulate business. And from that experience it is possible to say that the importance of this type of regulation lies in the fact that it can be made to achieve the best of a number of worlds. It can use trial-type methods of adjudication, use special expertise in the adjudication process, make policy in politically contentious areas and achieve compliance with the law by those regulated without the risk of alienating them from those entrusted with law-enforcement. But in spite of the familiarity of administrative control, there are a number of unsettled issues about its form, operation and its mode of regulation. And it is with these problems that this chapter is largely concerned.

8.1 The Mechanics of Administrative Control

The way in which this control works is that Parliament sets up a licensing authority with power to issue licences to persons intending to carry out business in the regulated trade, to create standards to be satisfied in order to get a licence and to co-ordinate the system. No person is allowed to carry on the designated business unless he has applied for and obtained a licence from the licencing authority. The granting of the licence is not a matter of course; it depends on whether or not the applicant has satisfied the authority about his fitness to be licensed according to the standards already referred to. Besides meeting these standards, the applicant may be required to supply the licencing authority with certain information relating to the applicant's business. The power to decide whether or not to grant a licence may vest in the licencing authority or a government Minister. In the former case, the

Minister is given the power to review the authority's decision at the instance of an aggrieved applicant for licence. Although Malawi statutes, as will be shown below, make the Minister's decision final in either case, it is argued that an appeal can be lodged against that decision to a court of law on a point of law.

Apart from the Minister's power to fix finance charges which can be charged in credit agreements (1), there is no general administrative control of the consumer credit industry in Malawi. However there is an example of this basic form of administrative control under the Second-Hand and Scrap Metal Dealers Act. The object of this Act is not consumer protection but nevertheless its study gives an insight into how the system might operate if used as a tool for the protection of consumers. It should perhaps be mentioned here that although the word 'licensing' has so far been used in connection with this regulation, its use will now be restricted. The word 'registration' will be used more frequently. Some authors have distinguished these words.(2) But under Malawi statutes which will be discussed in this chapter, 'registration' is used interchangeably with the word 'licence' as used under the English Consumer Credit Act. And it is for that reason that the former will be used more widely here.

8.2 Administrative Control

under the Second-Hand and Scrap Metal Dealers Act

Section 4(1) of the Act provides that no person can carry on the business of a second-hand or scrap metal dealer unless he is registered as such under the Act. Contravention of that provision is an offence

punishable by a fine of £500 and imprisonment for 1 year.(3) Section 3(1) creates a registering authority who, subject to the directions of the Minister, is responsible for the general administration of the Act. Application for registration or for its renewal must be made in the prescribed form to the registering authority at whose discretion the application can be granted or refused.(4) And except with the consent of the Minister, the registering authority can not register any person unless he is satisfied that that person

1. is a resident of Malawi
2. has not been convicted of an offence under the Act and sentenced for it to a fine of £10 or more or to imprisonment without the option of a fine
3. has not been convicted of any offence under any fiscal or revenue law
4. has not been convicted of any offence involving fraud or dishonesty
5. has not within 6 years last past, been convicted of an offence under any written law and sentenced for it to a term of imprisonment without the option of a fine.(5)

But the Act provides that this provision does not limit the registering authority's general discretion to refuse to register any person under the Act.(6)

Under section 7(1) every registered dealer must keep a bound book (the dealing book) on his premises in which to record particulars of every transaction in second-hand or scrap metal into which he enters. Particulars to be entered into the dealing book include the description of every article received or purchased by him, the name and residential

address of the person from whom the article was received or purchased, the date and hour of each transaction, the price of the article and other particulars which may be prescribed from time to time. The dealer may be required by any police officer to produce this book and failure to do so is an offence. Besides, it is an offence to fail to enter into the book the particulars just enumerated. It is also an offence to knowingly make a false entry into the book or to give a registered dealer false particulars about any person's name or address.(7)

After a dealer has been registered under the Act, the registering authority can, with the approval of the Minister, revoke the dealer's registration. But that power can not be exercised unless

- a) the registered dealer fails or refuses to comply with any term or condition upon which he was registered or
- b) the authority is of the opinion that by reason of any structural alterations the premises in which the registered dealer carries on his business as such have become unsuitable for the business or
- c) the registered dealer has been convicted of an offence which would have rendered him unfit to be registered in the first place or
- d) the registering authority is of the opinion that the dealer has failed to make entries or has made misleading or inaccurate entries in the dealing book which he is supposed to keep on his premises under the Act.(8)

Once the registering authority has made the decision, but before he carries it out, he must inform the dealer in writing that he intends to revoke his registration as of a date not less than 1 month or more than 3 months from the date of the notice.(9) The dealer who receives such

notice has the right within 7 days of receiving it, to appeal in writing to the Minister against the decision of the registering authority. Whatever decision the Minister reaches on appeal is final and is not subject to review by any court of law.(10)

Besides, courts have power to order cancellation of any registration granted under the Act. Section 18(1) provides that if any registered dealer is convicted of an offence under the Act or under any fiscal or revenue law or of an offence involving fraud or dishonesty the presiding court may, in addition to any penalty it is allowed to impose, order cancellation of his registration either at its own initiative or upon request by the prosecution. Once such an order is made, a certified copy of it must be sent to the registering authority who will strike the dealer's name from the register as soon as the order becomes final.(11)

It is perhaps worthwhile to make a few observations about these provisions; more will be said as the chapter develops. First, if this model were applied to suppliers of goods on credit, there would be need to add that on top of the requirements for registration which have been given, the supplier should satisfy the registering authority that he has not involved in any reasonably serious unfair practice against his customers or in breaches of any duty owed to them by virtue of any statute, contract or principle of law.

Second, there may also be need to provide that as a pre-condition for registration, the trader should supply the registering authority information relating to the trader's business. That is already the case under the Insurance Act of Malawi. The Act provides that once an insurer has been registered, he must notify the registering authority in writing

of the situation of his principal office in Malawi and the name of his principal officer in that country. If the insurer changes the address of the office or appoints a new principal officer, he must give notice in writing to the authority within 21 days of the change or appointment. The insurer must also inform the registering authority in writing of the name and address of every person entitled to act on his behalf.(12) Furthermore, section 17 provides that within 6 months of the end of each financial year, the registered insurer must prepare and submit to the authority in prescribed forms inter alia

- a) a certificate by an actuary approved by the authority as to the solvency of the insurer and
- b) a balance sheet showing the financial position of the insurer's insurance business at the close of that year and
- c) a profit and loss account in respect of insurance business carried on by the insurer in that year and
- d) a revenue account in respect of life insurance business, if any, carried on by the insurer in that year.

Besides, if he is a life insurer, he must cause an investigation to be made into his financial position by an actuary approved by the registering authority.(13)

Now although it is not proposed here that suppliers of goods on credit should also be required to supply information of a similar nature, it is felt that the registering authority should be apprised of how such traders carry out their business. And the way to achieve this is at least to require that the traders should supply to him copies of credit agreements and security agreements entered into over a period

which the authority may prescribe. The registering authority should also be left to prescribe from time to time other pieces of information which traders should supply to him to enable him perform his functions.

Third, it was seen that under the Second-Hand and Scrap Metal Dealers Act a trader can appeal against a decision to revoke his registration but he does not have a similar right with respect to refusal to register him or to renew his registration. Now while it is not intended to challenge the wisdom of that, it is felt that where the registering authority is not satisfied with an application for registration or for its renewal, he must at least allow the applicant to make representations on the causes of that dissatisfaction. As will be shown below, under the Automotive Trades Registration and Fair Practices Act, the trader is allowed legal representation or to be present in person when the registering authority under that Act considers his application for registration or for its renewal. Besides, he is allowed to make representations at the hearing and to adduce evidence or produce documents in support of his application. And under the English Consumer Credit Act, if the licensing authority is not satisfied with an application for a licence, he must notify the applicant that he is minded to turn down the application or to grant it in terms which are different from those applied for.⁽¹⁴⁾ The notice must give the licensing authority's reasons for so deciding and invite the applicant to submit to the authority representations in support of the challenged application. The MRT, as the notice is called ⁽¹⁵⁾, is not a decision to refuse a licence but a means of eliciting more evidence on any matter which raises serious doubts in the authority's mind as to the

applicant's fitness for registration.(16)

From what has been said so far, it is possible to see that this basic form of administrative control has a number of advantages. It ensures not only that only those who meet standards prescribed by Parliament are allowed to enter the designated trade but also that those standards are adhered to by the traders in the actual running of the business. Besides, the fact that the control is exercised by one body ensures uniformity in the standards themselves and in their enforcement.(17) Moreover, the requirement that traders supply to the registering authority information relating to their business gives the authority valuable access to the way in which the regulated trade operates. It also gives him insight into the character and identity of participants in that trade and their activities. Thus it makes evaluation of the system relatively easy. Furthermore, the nature of the regulation itself allows a proper balance to be struck between dealing with unacceptable business practices and encouragement of traders to carry on business in that trade. And finally, by granting the registering authority wide discretion in the performance of his functions (18) and drawing the standards to be applied in deciding whether or not any person is to be allowed to carry on business, in wide terms, it is made possible for the authority to take action against a trader for engaging in unacceptable practices which are not prohibited under any law.(19)

8.3 The Extent of the Control

But one major weakness in this basic form of administrative control

lies in the fact that where the registering authority is satisfied that a registered trader has failed to meet the conditions for his registration, and the authority decides to take action against him, the authority has virtually one option: to keep the trader out of business temporarily or permanently. It is arguable that this deprives this form of regulation of the deterrent effect which it is said to have on business malpractices. For because of the extent of the effect which such a sanction may have on the recalcitrant trader and his workforce, it is foreseeable that the registering authority will impose it very sparingly. In other words, there will be cases where that sanction ought to be imposed but the authority will not impose it. Consequently, it has been suggested that the authority should have power to impose a number of sanctions ranging from reprimand, fines to suspension or revocation of the registration.(20)

But perhaps the real issue here is not one of what sanctions the registering authority should be allowed to impose but of what form this administrative control should take. Should its regulation be merely through the threat of withdrawing from a recalcitrant trader the right to carry on business or should the control be wider, and how much wider? The administrative control with which this discussion has been concerned so far has been referred to as 'basic' all along because it is based on co-operation between the registering authority, courts of law and primary law enforcers appointed to police compliance with the law. The courts bear the responsibility not only of settling disputes between those regulated and their customers but also, together with the primary law enforcers, they administer criminal sanctions against any trader who

contravenes standards of fairness prescribed by Parliament for the protection of those customers. And the administrative control administered by the registering authority is intended to increase pressure on traders to comply with these standards of fairness in their conduct of business. Now if the authority's powers are increased so that he can impose the suggested sanctions, the difficulty will be how to justify the power of courts and primary law enforcers to administer almost the same type of sanctions in the same area.

To understand this problem, we can look at the set up under the United States Uniform Consumer Credit Code. Where a creditor fails to comply with certain provisions of the Code, the debtor is granted civil remedies against him. For instance, if the creditor violates section 3.511 which regulates the length of intervals within which re-payments of the debt by the debtor are to be made under a regulated loan agreement and the maximum size of each instalment, the debtor is not obliged to pay finance charges payable under that agreement and can recover from the creditor or his assignee, an amount not exceeding three times the amount of finance charges payable under the agreement.(21) Furthermore, it is a criminal offence to demand finance charges which are in excess of the rates permitted under the Code or to violate disclosure provisions of the Code. And determination of matters caught by these provisions is a function of the courts.(22)

But parallel to that judicial control, the Code creates a registering authority called the Administrator, who wields considerable power, including the discharging of quasi-judicial functions. He can examine the conduct of business and records of every person licensed

(23) under the Code (24). Similarly, where he has probable cause to believe that any person has engaged in an act which is subject to action by the Administrator, he can investigate that person's business to determine whether or not the act has been committed.(25) And for this purpose, he can administer oaths, subpoena witnesses and compel them to adduce evidence or produce anything which is relevant to the investigation.(26) If the act is proved, the Administrator can order the trader to cease and desist from that conduct (27) or require the trader to give him a written assurance that he will not engage in that conduct in future.(28) And all this is in addition to the Administrator's power to suspend or revoke the trader's licence (29) and to bring a civil action to restrain any trader from violating the Code or from engaging in unconscionable and fraudulent practices in the course of his business (30) or to claim refunds on behalf of debtors who have been made to pay finance charges which are in excess of maximum rates set by the Code or to recover a civil penalty against a creditor for wilfully violating the Code.(31)

This set up is similar to the mode of control under the Second-Hand and Scrap Metal Dealers Act. In both cases administrative control and judicial control are supposed to complement each other. Of course the major difference is in the extent of the registering authority's powers. Under the Code he is in a position to deter traders from unfair practices without adversely affecting participation in the regulated trade.

Now that model can be contrasted with the position under the Automotive Trades Registration and Fair Practices Act. Here the

regulation involves performance by the registering authority of functions performed by his counterpart under the basic administrative control as well as those ordinarily performed by courts of law. The authority can not impose fines or prison sentences but he can caution a recalcitrant trader, suspend or cancel his registration or order him to compensate any one of his customers who is dissatisfied with the trader's performance of the contract between them.

The Automotive Trades Registration and Fair Practices Act was passed by the Malawi Parliament to provide for the registration of persons who are engaged for profit or reward in automotive trade (32) business and for the protection of the general public in that country from unfair or unconscionable practices by such persons.(33) The Act creates a registering authority called the Automotive Trades Registration Board (34) (hereinafter referred to as the 'Board') which comprises 7 permanent members drawn from the Price Control Board established under the Control of Goods Act, the ruling Malawi Congress Party and the Plant and Vehicles Hire Organisation.(35) The functions of the Board are

- 1) to advise the Minister on matters relating to
 - a) the maintenance and improvement of the services, facilities and workmanship offered to the public by commercial garages in Malawi;
 - b) such matters concerning the automotive trade as the Board deems fit and
 - c) any question concerning the trade which is submitted to the Board

by the Minister for its opinion and advice;

- 2) to keep and maintain a register of commercial garages and their proprietors in Malawi and
- 3) to hear complaints against commercial garage proprietors and to make recommendations to the Minister on those complaints.(36)

And just like in the basic form of administrative control, it is an offence to carry on the business of a commercial garage without being registered as a registered garage proprietor and without the premises on which the business is carried on being registered as a garage.(37) It should perhaps be added here that an applicant for registration under the Act is entitled to attend in person or to be represented by a lawyer at the hearing where his application is considered. He is also entitled to be heard and to adduce evidence in respect of any matter relevant to the application.(38) However the decision whether or not to grant the application lies not with the Board but with the Minister. The function of the Board in this respect is to consider the application in the light of the evidence produced by the applicant and then to send the application together with the Board's recommendation(s) on it to the Minister.(39)

The Board also has power to investigate the business conduct of any trader registered under the Act. Section 29(1) provides that the Minister may at any time direct the Board to investigate the business activities of or any specific act done by the trader in the course of his automotive business. Besides, the Board has power to initiate such an investigation if it believes that

1. in the course of his automotive trade business, the trader engages in

practices which are dishonest, fraudulent or unconscionable or

2. in spite of being cautioned under section 24(1)(b) of the Act, the trader has knowingly continued to commit acts similar to those which gave rise to the caution or
3. the trader has wilfully failed to compensate a complainant contrary to a decision of the Minister under section 24(1)(b) or
4. in spite of the suspension of his registration pursuant to a decision of the Minister under section 24(1)(c) or (d), the trader has engaged in automotive trade business contrary to the terms and conditions of the suspension or
5. the trader has been convicted of an offence which renders him unfit to continue in business as a registered garage proprietor.

Again, the trader is entitled to attend the hearing of the case against him and to adduce evidence on any matter under investigation.(40) However it is unclear whether or not he can be legally represented at such a hearing. But after considering the evidence and representations made at the hearing, the Board must send a report to the Minister on the case, together with any documents which may have been produced, and the board's recommendation as to whether the trader's registration should or should not be cancelled.(41) And whatever decision the Minister reaches on the matter is final and can not be appealed against to or be questioned by any court. Besides, the Minister can not be required to give any reasons for the decision.(42)

On top of this, there are judicial functions to be performed. Sections 23(1) provides that any person who has had any work done on a motor vehicle or any new accessory or device attached to any motor

vehicle or engine or to any part of that vehicle or engine at any registered garage can lodge a written complaint with the Board against the registered proprietor of that garage within 90 days of the work being done or of receipt of the statement of charges for the work, whichever comes first, if

- a) he is dissatisfied with the workmanship or the manner in which the work was done or
- b) the work done was unnecessary or
- c) replacement parts fitted to the motor vehicle or engine or part were of inferior quality or not reasonably suitable for the purpose for which they were fitted or were second-hand parts fitted without his knowledge or consent or
- d) parts unrelated to the work were removed from the motor vehicle or engine or part without his knowledge and consent and were replaced by part of inferior quality or
- e) when re-delivered to him, the vehicle or engine or part was unfit for immediate use and no warning was given to him about it or
- f) the statement of time attributed to the work and charged for was false or the charges demanded were unreasonably high or
- g) the garage failed to comply with section 33 of the Act which imposes certain duties on a garage proprietor who in the course of repairing a motor vehicle or engine or part removes or causes any part of the machine to be replaced.(43)

If the Board believes that there is anything in the complaint which needs investigation, it will fix a date and place for a hearing and inform the complainant and the defendant accordingly, otherwise once the

Board has scrutinised the complaint, it will just forward the case to the Minister together with the Board's recommendations on it, for his decision. But where a hearing is fixed, the notice to the defendant must specify any matter in the complaint which the Board wishes to investigate at the hearing.(44) As in the case of other investigations under the Act, the defendant trader is entitled to attend the hearing in person and to adduce evidence on any matter under scrutiny.(45) Besides, the Board can summon witnesses to give evidence on oath or to produce documents (46) and the Secretary of the Board or any person acting on his behalf is empowered to administer the oath.(47)

Once the proceedings are completed the Board must consider the evidence adduced and 'without undue delay' submit a report on the case to the Minister together with any documents which may have been produced at the hearing, and the Board's recommendations on the case.(48) The Minister has a number of options in such a case. Section 24(1) provides that in the light of the Board's recommendations and such other matters as he may consider relevant, the Minister may decide that

1. the complaint be dismissed or
2. the trader should compensate the complainant in a stated sum and additionally, be cautioned or in the event of his failure to pay the compensation within a stated time, his registration in respect of the garage involved be suspended or cancelled or
3. the trader's registration in respect of the garage be suspended for a specified period of time and upon such terms and conditions as the Minister may deem fit or
4. the registration of the trader in respect of that garage or all

garages registered under his name be cancelled.

And just as in all case where the Minister has to decide a matter under the Act, his decision is final and can not be questioned by any court of law nor can he be required to give his reasons for the decision.(49)

Besides, the Act gives the Minister absolute discretion at any time to direct the Board to cancel the registration of any trader in respect of any registered garage.(50) But he can also at his discretion either direct the reinstatement of any trader in respect of all or any garage(s) for which his registration was cancelled or lift the suspension of any trader under the Act.(51) And it is perhaps worthy noting here that cancellation or suspension under the Act may be general to apply to all garages for which a trader is registered or it may be particular and be confined to one or more of those garages specified in the Minister's order.(52)

Now insofar as dispute-settlement is concerned, this model creates duplicity. A consumer of automotive trade services who is dissatisfied with those services has the right under common law to sue the garage involved in contract or tort for damages. Since there is nothing in the Automotive Trades Registration and Fair Practices Act to remove this right from him, the consumer can either proceed under the Act or avail himself of his common law right. Of course whether or not he can take advantage of both systems at the same time, is unclear but that is a question which is beyond the scope of this work. Equally, it is not easy to determine conclusively whether this duplicity is justifiable. However there are two points about this form of administrative control which are too clear to be ignored.

First, it adopts the trial-type procedure in the decision of cases. Thus as shown, attendance either in person or through counsel is allowed; so too presentation of evidence, summoning of witnesses and administration of oath. But that this procedure is unsuitable here is demonstrated by the fact the power to decide cases under the Act lies not with the Board which has the benefit of seeing the parties and their demeanour but with the Minister who has absolute discretion as to what decision he should reach in any case before him.(53) Thus, whatever the real object of the Act is, this makes the control set up under it a mere adjunct of the government's policy-making machinery. And in a way that casts doubt on the wisdom of the duplicity created by the Act. For although the arrangement will make it easier for the government to execute its policy for that trade, it is clear that that will be achieved at the expense of smoother regulation. The fact that each case that has to be considered must pass through two stages of scrutiny before it is decided, must be time-consuming to say the least. And here it has to be borne in mind that the Minister concerned will have a lot of claims on his time, of which cases arising under the Automotive Trades Registration and Fair Practices Act may not be the most important. It is perhaps in recognition of this fact that at the moment, the Act does not apply to the whole country but is confined to a few Local Government areas.(54)

Second, there is the problem of standards to be applied in settling consumer complaints. The Act grants the consumer a 'right of action' if the quality of the workmanship of the garage is bad or if the work which

it did was unnecessary or was done negligently or if parts fitted to the machine which was brought for repair were of inferior quality or were not reasonably suitable for the purpose for which they were fitted to the machine or the charges demanded by the garage for the work were unreasonably high. These standards are not defined by the Act and although some of them are defined by case-law, it is difficult to see how that will help bearing in mind the membership of the Board and the fact that this is supposed to be administrative, and not judicial, control.(55).

Thus although this type of administrative control looks glamorous, it is very flawed. Of course even the basic form of administrative control does create the problem of justifying the co-existence of judicial control in the same area. For it could be argued that if the registering authority has power to cancel or suspend a trader's registration and the whole administrative control can be set up in such a way that the authority can deal with unfair business practices without at the same time scaring traders away from that trade, what is the need for a criminal law regime to apply in the same area. As shown above, under section 18(1) of the Second-Hand and Scrap Metal Dealers Act if a registered dealer is convicted of inter alia, an offence involving fraud or dishonesty, in addition to any penalty which the court can impose, it has power to order the dealer's registration under the Act to be cancelled. The question here is why such a case should go to court in the first place; why it should not be dealt with exclusively under the administrative control set up by the Act? In other words, why should courts not be confined to solution of private disputes and let

deterrence of unfair practices be left to administrative control ?

There are two answers which can be given here. First, as far as Malawi is concerned, it has been shown that under the statutes where administrative control of business is already in operation, the powers given to the registering authority generally do not justify the exclusion of judicial control from the regulatory process. Except under the Automotive Trades Registration and Fair Practices Act, his only sanction is to cancel the registration of the trader found to have engaged in unacceptable conduct. He does not have the power to issue cease and desist orders or to require him to give the registering authority a written assurance that he will not engage in that conduct again. Second, even if such powers are available, it is always felt that they must be backed by criminal sanctions in the form of fines and prison sentences. However whereas society is prepared to allow the other sanctions to be administered by administrative agencies, it feels that only courts of law should mete out criminal justice. This, it is argued, explains why both in England and the United States where the licensing authority has wider powers than his counterpart under Malawi statutes, courts are still allotted a very influential role in the deterrence of unacceptable conduct. It also partly explains why even the administrative control set up under the Malawi Automotive Trades Registration and Fair Practices Act does not include administration of criminal sanctions.(56) But whether this way of perceiving justice is still tenable, is a question which goes beyond the scope of this thesis.

8.4 Decision of Cases: The role of Policy and Justice

Now although the question of policy is not essentially in issue in this work, it is a trite observation that the government has or should have a policy for trade and commerce. It is also a trite observation that in areas where ordinary consumers are involved and the government does take steps to ensure their protection, those steps will be part of the policy. For that reason, if the consumer credit industry in Malawi were to be regulated through administrative control, one question which will have to be answered is whether and to what extent the registering authority should partake of the task of articulating and developing overall government policy for that industry. And in essence that involves asking as to who should have the power to decide cases coming before the authority, on what grounds should appeals from the authority's decisions be allowed or the power of review of its decisions be exercisable and who should have the power to make the review or to hear the appeals. The point here is that the performance of these functions perforce involves articulation of policy. Consequently, it will raise arguments about the legal and political legitimacy of delegation by the government of its power to formulate policy and of how to ensure that the long-term development of that policy takes due consideration of the requirement in decision-making of consistency and fairness. Clearly these are questions for a treatise on administrative law. Nevertheless general observations can be made on how they have been answered in some of the statutes already mentioned in this chapter.

Under the Insurance Act of Malawi overall control of the administrative regulation created by that Act rests with the Minister who has power to 'make regulations prescribing anything which under the Act is to be prescribed and generally for the better carrying out of the objects and purposes of the Act'.(57) The decision to grant or reject an application for registration or to cancel registration already granted is left to the registering authority. However the Minister has the power to review such decisions. Thus if for the reasons given in the Act, the registering authority decides to reject an application for registration or to cancel registration already granted, he must notify the applicant or registered insurer in writing that he proposes to do so and give reasons for the decision.(58) The applicant or insurer can then within 60 days of the notice lodge with the registering authority notice of his intention to refer the case for review by the Minister.(59) Section 8(4) of the Act gives the Minister absolute discretion in exercising his power of review but whatever decision he reaches, the trader who referred the case for review must be given reasons for the decision.(60) Nothing is said as to whether an appeal can be made against the decision to a court of law.

The Second-Hand and Scrap Metal Dealers Act does also allow an appeal to be made against the decision of the registering authority to the Minister. But unlike the Insurance Act, it provides that the Minister's decision on appeal is final and can not be subject to review by any court of law.(61) Of course under both statutes, there does not seem to be any qualification on the basis upon which an appeal can be

lodged. What is important is the fact that the trader is aggrieved with the registering authority's decision. Therefore it must be assumed that an appeal to the Minister here could involve a full re-hearing of the case. It can also be concluded from that that on appeal the Minister may depart from a finding of fact by the registering authority at the initial hearing.

This view is supported by the Divisional Court in the English case of R v Secretary of State for Transport, Ex Parte Cumbria County Council. In that case a coach company applied under the English Transport Act to traffic commissioners for the grant of a road service licence. The county council and a bus company who had a monopoly in respect of the provision of local bus services objected to the application on the ground that if it were granted, that would be against public interest. The commissioners upheld the objection and turned down the application. The coach company then appealed against the decision to the Secretary of State who appointed an inspector to look into the matter. The inspector recommended that the appeal be dismissed on the ground of public interest. However the Secretary of State allowed the appeal stating that the objectors had not satisfied him that the grant of the application would be against public interest. The county council then appealed to court contending that inter alia, the Secretary of State should not have acted in defiance of the facts found by the inspector. Woolf J dismissed the appeal saying:

"This ... submission ... does raise a point of principle.
Is the Secretary of State entitled to depart from the
conclusions of his inspector on a matter of this sort ?

There is no doubt that, subject to his acting fairly and giving parties the appropriate opportunity to make representations, in similar type of enquiries- such as highway or planning enquiries- the Secretary of State is entitled to differ from his inspector on findings of fact However this type of enquiry is different from those enquiries, as here the Secretary of State is acting as an appellate body to another which is acting in a quasi-judicial role, namely, the commissioners.

In dealing with appeals from the commissioners the Secretary of State's role is closer to a purely judicial role than his role when he is deciding a planning appeal. Nevertheless, it must be remembered that it is the Secretary of State who is giving the decision and not his inspector When the matter comes before him it is his decision and not the decision of his inspector which the appellant is entitled to have. If he could not override his inspector's findings of fact and conclusions then it would not be his decision but that of his insepctor".(62)

The idea of vesting appellate powers in these cases in the Minister seems, as already hinted, to be to ensure that the quest for justice does not detract from the government's pursuit of consistency in the implementation of policy in that particular area. But it could be argued that to the extent that the Minister is allowed to exercise his supervisory role in this respect only where the registering authority

has entered an unfavourable decision against a trader, the authority is generally free, if he is so minded, to decide cases on the basis of precedent or what it considers to be justice, and without the restraint of government policy for the trade. Indeed it is also arguable that although the actual decision which the Minister reaches on any appeal can not be questioned, that does not remove from courts of law their inherent power to determine whether or not any action taken by him (or by the registering authority) was done within the limits of the regulatory statute or the requirements of the rule of law in general.

An illustration of that is the English case of R v Assistant Commissioner of Police of the Metropolis, Ex parte Howell. Here the appellant who was a licensed cab-driver and sought to renew the licence was required by the licensing authority, the assistant commissioner of the metropolis, to supply medical evidence of his fitness to hold a cab-driver's licence. The assistant commissioner gave the appellant a form to be completed by a doctor of the appellant's choice. Although the doctor who examined him found him fit, he nevertheless mentioned in the form a report from hospital which stated that the appellant had suffered from epilepsy 3 years previously. The form was then returned to the assistant commissioner without being shown to the appellant. Because the licensing authority was dissatisfied with the doctor's report, he arranged for the appellant to be seen by a consultant physician. However the authority never disclosed to the appellant the causes of his dissatisfaction with the first report. When the appellant had been re-examined the consultant physician reported directly to the licensing authority that he found it difficult to escape the conclusion that the

appellant had had an attack of epilepsy and without giving the appellant a copy of the physician's findings, the assistant commissioner wrote to inform him that his licence could not be renewed on the ground that he had failed to meet the required medical standards. The appellant who denied ever suffering from epilepsy or having been diagnosed as so suffering sought judicial review of the licensing authority's decision. It was held by the Court of Appeal that although it could not challenge the decision actually reached by the assistant commissioner, it found the decision-making process used defective. In the words of Ackner LJ:

"I [wish to] emphasize that the process by which this decision has been reached is the only matter which we have to consider. It may well be that if the assistant commissioner had provided [the appellant] with a copy of [the doctor's] report and sought his comments, he would still have reached the same conclusion ... But what we are considering is whether the decision-making process was defective. In my judgement it was defective ... because it did not provide [the appellant] with any indication of what were the objections which the assistant commissioner thought disentitled [the appellant] from receiving a renewal of the licence and he was thereby denied an opportunity of meeting those objections ... This was unfair".(63)

As already shown, the position is different under the Automotive Trades Registration and Fair Practices Act. There the registering authority is like the inspector in the Ex parte Cumbria County case in

that his task is merely fact-finding while the Minister has the power to decide cases. However the trader is entitled to be present in person or to be represented by counsel at the hearing and to give evidence in support of his case. Just as under the Insurance Act and the Second-Hand and Scrap Metal Dealers Act, the decision of the Minister is final and is not subject to appeal to or question by any court of law. But unlike these statutes, the Automotive Trades Registration and Fair Practices Act frees the Minister from the duty to give reasons for his decision in any case coming before him.(64) Of course for reasons already given, there is nothing in this to stop a court of law determining whether or not any action taken by the Minister or the registering authority under the Act was properly done.

As already pointed out, the effect of the arrangement under this Act is to make administrative control a means of direct control of trade by the government. For here the Minister is not merely a supervisor; on the other hand, he has a monopoly of all the powers of adjudication under the Act and subject to the qualification given above, nobody else can decide cases falling under the Act. Arguably this will ensure not only that government policy for the trade is given due attention in the decision-making process but also that the policy is pursued with consistency. But the arrangement also serves another useful purpose. Under all the other Acts considered so far, including the English Consumer Credit Act, the roles of administration and adjudication are both performed by the same person: the registering authority. He runs the administrative control and decides registration cases and whether and how a trader should be penalised for violating standards prescribed

by Parliament as a pre-condition for that registration. However here the role of the authority is largely administrative and his involvement in the decision-making process purely that of fact-finding. And when it is realised that the Minister enjoys absolute discretion in exercising his powers of adjudication and that, as shown above, he can depart from the registering authority on a finding of fact, it becomes difficult to escape the conclusion that the Minister's powers in the decision-making process are exclusive and that the influence, if any, of the authority in that process is miniscule.

Now whether such an arrangement will allow justice to be done in the decision of cases is difficult to tell. It is true that the system does give an aggrieved party adequate opportunity to be heard. He can be present in person or be represented by counsel at the hearing of his case and he can produce evidence or make oral representations in support of the case. But that is offset by the fact that the person who decides the case has no first-hand impression of that evidence, the decision being based on a report made by the registering authority on those submissions. Furthermore, as just pointed out, the adjudicator can place an interpretation on the facts which is different from that placed on them by the registering authority. But more than that, there is no means of testing the correctness in fact of the Minister's decision since he is under no obligation to give reasons for his decisions under the Act. Thus although in the end justice may be done, it will not be easy to see it as being done. And depending on the trend which the decisions take, this may give rise to talk of collusion between the system and consumer or trade interests.

For these reasons, the better approach seems to be that under the other Acts where there is a possibility of appeal on a point of fact and (arguably) law as well. Of course that approach could be made even better by allowing the trader to be present at the hearing of his case (as under the Automotive Trades Registration and Fair Practices Act). And to allow policy to be considered in the decision-making process, the situation could be changed so that instead of allowing the right of appeal from the registering authority's decision only to the trader who is the subject of the case, the public generally and the government in particular could be given that right as well. Such a provision would also remove the pressure on the registering authority to decide cases in favour of traders. For by allowing appeal only where a trader who is the subject of the case has been aggrieved by the authority's decision, a distortion is created in favour of leniency towards traders in that the authority always knows that his judgement may be questioned and even reversed if he takes a firm position in the public interest and decides against the trader before him.⁽⁶⁵⁾ Then there would need to be a provision requiring the Minister to give reasons for his decisions in all appeal cases. Although this would not actually delimit his discretion, it would at least help to ensure that the Minister is seen to be even-handed in his decisions. And that image could further be enhanced by making the regulation self-financing through registration fees and by vesting power to appoint the registering authority and other officers entrusted with management of the administrative control not in the government but in Parliament.

8.5 Administrative Control and Registration of Traders

The third problem with administrative control relates to the question whether or not it should depend on the registration of traders engaging in the regulated trade or business. All the statutes discussed here proceed on the basis that positive registration of the traders is the way whereby this control should be effected. Thus besides providing for initial registration, both the Second-Hand and Scrap Metal Dealers Act and the Automotive Trades Registration and Fair Practices Act state that unless sooner surrendered, suspended or revoked, registration is renewable annually. The latter statute goes further and provides that the registering authority must hold an annual renewal of registration meeting in December of each year to renew existing registration for the following year.(66) All applications for renewal of registrations must be considered during that meeting (which may be held on more than one date) unless there is 'just cause' for consideration at a different meeting.(67)

As already stated, the argument for requiring registration before individuals can carry out business is to ensure that only those with an acceptable record of business conduct are allowed to participate in that trade. And provision for renewal enables the registering to 'review' their progress after registration and thus ensures that entry requirements are adhered to by traders even in the actual running of business. But a number of arguments can be raised here.

First, it could be argued that unless an applicant who is making a first application for registration is already known to the registering authority, it will not be easy to establish whether or not he is fit for

registration so that it is possible for him to be registered even though he is in fact ineligible for registration. Second, as Ison observes, by retaining title to several trade premises an unscrupulous trader can operate through several companies, each having a nominal 'controller' whose antecedents are acceptable and thus defeat the whole object of 'positive' registration.(68) Third, the system will work well if the number of those regulated is relatively small. Where the number is very large consideration of all applications in accordance with standards stipulated by the regulatory statute is likely to take much time and that may not be to the benefit of the system especially if, as in the case of the Second-Hand and Scrap Metal Dealers Act and the Automotive Trades Registration and Fair Practices Act, registration is renewable annually. On the other hand, attempts to speed up the process could result in perfunctoriness which again, will be against the whole purpose of administrative control. Fourth, the provision for renewal of registration will be superfluous if the registering authority is given power at any time to investigate the business conduct of any registered trader or to require him to supply the authority with information relating to the trader's business, and to caution him or suspend or revoke his registration if he is found to have contravened standards upon which he was initially registered. Thus it could be argued that just as under the Insurance Act, once registration has been granted, there should be no requirement for its renewal or persons should not need prior registration at all in order to carry on business in the regulated trade but that in either case, if a trader fails to comply with certain standards of conduct, he should lose the right to carry on

business in that trade.

The second approach has been adopted by the English Estate Agents Act, 1979. Subject to regulations which the Secretary of State is empowered to make under section 22 of the Act, every person is free to engage in estate agency work.(69) However the Director General of Fair Trading can make an order prohibiting him from doing any estate agency work or estate agency work of a specified description, if in the course of his work that person has inter alia

- a) engaged in any practice which involves breach of a duty owed by virtue of any enactment, contract or rule of law and which is material to his fitness to carry on estate agency work or
- b) has engaged in a practice which in relation to estate agency work has been declared undesirable by an order of the Secretary of State or
- c) has been convicted of offences including those involving fraud or other dishonesty or violence or
- d) has committed discrimination in the course of estate agency work or
- e) has failed to comply with any obligation imposed on him under sections 15 or 18 to 21 of the Act.(70)

In cases (b) and (e) the Director must first warn the person involved and if that warning is not heeded, that fact will be treated as conclusive evidence that that person is unfit to carry on estate agency work and the Director may proceed to make the order referred to above against him.(71) Of course the Director's order can be varied or revoked if the Director is duly satisfied by the person to whom it applies.(72)

The Act allows the Director to require any person to furnish him with such information as he may need to make a prohibition order against

any person or to exercise functions conferred on him by the Act.(73) Similarly, if any duly authorised officer has reasonable cause to suspect that an offence has been committed under the Act, to ascertain whether or not the offence has been committed, he can at all reasonable times

1. enter any premises other than a dwelling house
2. seize and detain any books or documents which he believes may be required as evidence in proceedings for an offence under the Act
3. require any person carrying on or employed in connection with a business to produce any books or documents relating to it.(74)

However it is possible to argue that the Estate Agents Act model does not provide an effective substitute to 'positive' registration. Under the other statutes discussed here, the position is not that the registering authority should register an applicant for registration or renew an already existing registration if the authority has no knowledge of any malpractice or relevant criminal record on the part of the trader. Rather, the statutes place a burden on the trader seeking registration or its renewal to satisfy the authority that he is fit to be registered or to retain his registration. Since the general view of registering authorities is that the standard of fitness imposed by these statutes is a high one, registration or its renewal, may be withheld if doubts and reservations are raised and not answered by the applicant.(75) On the other hand, there is no similar burden on those regulated through the 'negative' registration model of the English Estate Agents Act. Furthermore although there is power of entry and inspection under section 11 of the Act (which could allow the Director

access to how the regulatees actually conduct their business), that power is exercisable only if an offence under the Act has been committed. In other words, the power is not available for monitoring the conduct of estate agents in the course of business or where the conduct involved is not an offence under the Act but is nevertheless so unacceptable as to justify the making of a prohibition order by the Director against the person who engaged in it. Thus although the model may produce a reduction in the workload of the registering authority and through that, the expense of running the administrative control, that could be achieved at the expense of real protection to those intended to be protected by the regulation. Consequently it is urged that in spite of its shortcomings, 'positive' registration is a better form of administrative control than the 'negative' registration of the English Estate Agents Act.

Of course 'positive' registration can be made better by improving means of collecting and recording information about traders. Similarly, unless registration has been revoked or suspended, its duration could be made long enough to justify the requirement for its renewal. If it is put at 1 year, as is now the case under both the Second-Hand and Scrap Metal Dealers Act and the Automotive Trades Registration and Fair Practices Act, the danger is that it might prove counter-productive. Because that period is not long enough, the registering authority may find himself exclusively preoccupied with registrations and their renewals, with no time to perform other functions conferred on him by the Act. And attempts to give those other functions adequate attention may result in registration work having to be done perfunctorily.

Under the English Consumer Credit Act a standard licence (76), which corresponds to registration under Malawi statutes, is renewable after 10 years. No doubt this will allow the office of the Director General of Fair Trading to perform its routine supervisory functions under the Act and to deal adequately with licensing cases. It can also be argued that such a period is understandable where, as in Britain, there are thousands, if not millions, of consumer credit traders. But at the same time it should be realised that unless in the interim the registering authority has a means of ascertaining whether or not traders are adhering to standards set up by the administrative control, such a long period may remove from the authority the element of 'regular checking on traders' which the provision for renewal of regulation is partially about.(77) Thus there is need for a proper balance to ensure that while the registering authority is given adequate time to perform its functions, this element of monitoring traders is safeguarded. And any period between 3 and 5 years may provide that balance.

8.6 Registration and Corporate Personality

Another problem involves the personality of traders. It has been noted that to be registered, a trader must satisfy the registering authority with respect to certain standards and that if subsequent to registration a trader fails to meet those standards, the authority may caution him, suspend his registration or cancel it or refuse to renew it. Now where the trader is an individual, the application of these standards will not cause much difficulty. However the situation is

different where the trader is a firm with a number of employees. Since the firm will work through those employees, the question is to what extent its ability to get registered or to retain its registration should be affected by their conduct.

As far as criminal responsibility is concerned, it was shown in Chapter 7 that generally only acts of the 'directing will' of a company can be attributed to it. The company will be held responsible for the acts and defaults of its employees only if it failed to take reasonable precautions to prevent those acts or defaults. This was criticised on the ground that even if a default is committed by an employee after the company has taken those precautions to prevent the default, it is the company which will reap profits, if any, from that malpractice. The employee will have absolutely nothing to gain from it. Consequently it was argued that the firm ought to be criminally responsible for the default unless it is shown that it was not committed for the benefit of the firm.

As applied to administrative control the criminal law approach can be criticised on more or less the same grounds. The purpose of registration is not to ensure that only firms with a 'directing will' which is fit according to standards set by Parliament should carry on the regulated business. Rather it is that only persons who are fit according to those standards should be in that business. Arguably in the case of firms, the latter involves consideration not only of management but also those who actually carry on the business of the firm. In other words, it implies that the registering authority should find out whether persons entrusted with control of the firm together with those who

actually do the work attributed to it satisfy standards for registration.

The English Consumer Credit Act seems to adopt a similar line. Section 25(2) of the Act provides that in determining the fitness of an applicant for a licence, the Director General of Fair Trading must consider inter alia, the applicant's employees, agents or associates past or present. The provision also states that if the applicant is a body corporate the Director must have regard to any person appearing to him to be a controller of the body corporate or an associate of that person. What is interesting though is that in this second case it does not seem that the Director is obliged to look at the applicant's employees.

But if the fitness of a firm's employees is made important in determining whether the firm can get registered, there may be some problems with the application of that rule. Where the firm is applying for registration for the first time, it may not be easy to establish the fitness of the firm's workforce unless they are already known to the registering authority. Secondly, even if it was possible to screen the employees, the operation may prove costly in terms of both money and time. Of course the first problem is not exclusive to the matter under discussion now; it has already been shown that it applies to 'positive' registration as a whole. Thus it can be regarded as a flaw to be endured if society is to enjoy the benefits of administrative control. But the same can not be said about the second problem. As a result instead of involving the whole workforce in the screening process, if registration is to be applied to the consumer credit industry it would be better that

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only management and employees who deal with consumers and their accounts should meet the fitness test. For in practice it is the violence, dishonesty or inclination to unfair dealing of these individuals that consumers really need to be protected against. Indeed it would be absurd that a firm should have its registration revoked because one of its cleaners is sometimes inclined to violence. On the other hand it is a different thing if the person employed by the firm to handle its debt-collection has such an attribute.

8.7 The Status of Agreements concluded by Unregistered Traders

Once the decision to regulate suppliers of goods on credit through administrative control is taken, one question which is likely to arise is what should be the legal status of credit agreements entered into by unregistered traders or by traders whose registration has either been revoked or suspended. The problem will be how to ensure that while such traders are deterred from carrying on business, consumers with whom they entered into agreements are not assisted to take advantage of the law.

Ordinarily, such a trader will be subject to a criminal penalty for trading without registration.(78) Besides, the registering authority will consider that fact as relevant to his decision whether that trader should be allowed to carry on business when the trader does apply for registration or for suspension of an existing registration to be lifted. As for the agreement itself, it is at first difficult to see why, if it is otherwise fair, the trader should not be allowed to enforce it against the debtor. But if the trader were allowed to do that, the law

would be assisting him to benefit from his criminal conduct. On the other hand, if he was denied that right, the law may find itself abetting another form of unacceptable conduct. It would help consumers to conclude credit agreements with unregistered traders with the knowledge that the ineligibility of these traders to carry on business would enable the consumers to escape their obligations under such an agreement. None of the Malawi statutes deals with this legal dilemma.

By contrast, under the English Consumer Credit Act a consumer credit agreement made by an unlicensed creditor is unenforceable against the consumer unless the creditor applies for and obtains from the Director General of Fair Trading an order that the agreement be treated as if the creditor had been licensed when it was concluded.(79) The Director may refuse to grant the application or he may grant it on terms which are different from those applied for and in considering the application, the Director is empowered, in addition to any other relevant factors, to take into account

- a) how far the consumer was prejudiced by the trader's conduct;
- b) whether or not the Director would have been likely to grant the trader a licence covering the period during which the agreement was concluded and
- c) the degree of culpability for the failure to obtain a licence.(80)

The Director's order may be limited to specified agreements made during part of that period or may be conditional on the undertaking by the trader to do certain acts.(81)

It is submitted that in addition to these factors, the registering authority should also consider whether the consumer knew that the trader

was unregistered. If it is proved that he knew that the trader was unregistered and that he entered into the agreement in order to take undue advantage of the law, he should be subject to a fine. This would allow the law to deter unregistered traders from carrying on business and at the same time prevent chancers from abusing the system.

8.7 Primary Law Enforcers and Administrative Control

In Chapter 7 it was urged that there is need in Malawi to co-ordinate the work of those entrusted with policing compliance with consumer criminal statutes. It was argued that such co-ordination could be achieved by placing these primary law enforcers under one common organisation and supervision. Now since compliance with criminal law standards will also be relevant in the operation of administrative control in that in determining whether or not a trader should be registered, the registering authority will consider whether or not the trader has been convicted of certain criminal offences, there will need to be adequate co-operation between primary law enforcers and the registering authority. And there is no better way to get that than to make management of this primary law enforcement part of the registering authority's functions.

There is an argument for use in Malawi of administrative control to prevent unfair exchange in credit agreements. The flexibility inherent in that system would serve to deter traders from contravening not only criminal statutes applicable to those agreements, principles of contract law and the Hire-Purchase Act but also any standards of fair dealing which may be prescribed from time to time. This discussion has proceeded

on the premise that the regulation focuses on traders who actually supply consumer goods on credit. But there is no reason why for the sake of effective control, it can not be extended to credit brokers and those who are in the business of purchasing these agreements from suppliers of goods.

Already there are in operation in Malawi two models of administrative control of business. However it has been argued that for good reasons, Parliament would have to be eclectic with respect to the control to be applied to the consumer credit industry. The regulation could be based on the model created by the Second-Hand and Scrap Metal Dealers Act with the following major changes. First, the trader should be allowed to be present either in person or through counsel at the hearing of his application for registration or renewal of registration or of any charge which the registering authority may bring against him under the administrative control. The trader should also be allowed to give evidence or make other representations in support of his case at the hearing. Second, the Minister who is empowered to hear appeals from decisions of the registering authority should be required to give reasons for his decisions. Third, the right of appeal from decisions of the registering authority should be available to anyone aggrieved by them and not be open only to the trader who is the subject of the case before the authority. Fourth, the registering authority would need to work hand in hand with courts and primary law enforcement officers entrusted with policing compliance with criminal law standards. Fifth, apart from the sanctions of revoking or suspending registrations or refusal of registration in the first place, the registering authority

should also be allowed to caution the recalcitrant trader, to issue a cease and desist order against him or to require him to assure the authority in writing that he will not engage in the unacceptable conduct again. And finally, where the trader is a firm, its management and employees entrusted with consumer accounts and conclusion of credit agreements would have to satisfy the fitness test for registration.

Footnotes

1. See section 26 of the Malawi Hire-Purchase Act
2. M Friedman, Capitalism and Freedom, p.144
3. The Malawi Second-Hand and Scrap Metal Dealers Act, section 4(7)
4. Ibid., section 4(3)
5. Ibid., section 6(1)
6. Ibid., section 6(2)
7. Ibid., sections 9(2) and 10
8. Ibid., section 17(1)
9. Ibid., section 17(2)
10. Ibid., section 17(3)
11. Ibid., section 18(2)
12. The Malawi Insurance Act, section 15(4)
13. Ibid., section 33(1)
14. The English Consumer Credit Act, section 27
15. G Borrie, Licensing Practice under the Consumer Credit Act [1982] JBL
91, pp 94-100
16. Note here that under these statutes, the burden is on the trader to
satisfy the registering authority that he is fit for registration.
17. RM Goode, Consumer Credit Act: A Students' Guide, para. 325
18. Supra note 6
19. R Cranston, Consumers and the Law, 2nd ed., p.366 and Borrie,
op.cit., p.97
20. Cranston, op. cit., p.367
21. The US Uniform Consumer Credit Code, section 5.202(1)

22. Ibid., sections 5.301-5.302
23. For the compulsory licensing of credit suppliers, see ibid., section 3.502
24. Ibid., section 6.106(1)
25. Ibid., section 3.506(3)
26. Ibid., section 6.108
27. Ibid., section 6.109. See also section 34(1) of the English Fair Trading Act
28. Ibid., section 6.110
29. Ibid., section 3.504(1)
30. Ibid., section 6.111
31. Ibid., section 6.113
32. The Malawi Automotive Trades Registration and Fair Practices Act, section 2 gives the definition of 'automotive trade'.
33. Ibid., preamble
34. Ibid., section 3
35. Ibid., section 4(1)
36. Ibid., section 12
37. Ibid., section 13(2)
38. Ibid., section 17(2)
39. Ibid., sections 17(1), (4) and 18
40. Ibid., sections 29(2) and 26(3)
41. Ibid., section 26(6)
42. Ibid., section 27(2)
43. Ibid., section 23(1)
44. Ibid., section 23(4)

45. Ibid., section 23(6)
46. Ibid., section 23(8)
47. Ibid., section 23(7)
48. Ibid., section 23(10)
49. Ibid., section 24(2)
50. Ibid., section 30(1)
51. Ibid., section 30(3) and (4)
52. Ibid., sections 31 and 32
53. The unsuitability of the 'court-substitute' in economic regulation is discussed by Robert Baldwin in Regulating the Airlines: Administrative Justice and Agency Discretion, pp 27-78.
54. Subsidiary Legislation passed under section 1 of the Malawi Automotive Trades Registration and Fair Practices Act.
55. Of course under section 5(1) of the Act, the Automotive Registration Board has power to co-opt any one or more persons to attend its meetings to assist or advise it on any matter under consideration by the Board.
56. The other explanation is the difficulty of precise definition of standards of fairness in these cases.
57. The Malawi Insurance Act, section 82(1)
58. Ibid., section 6(4) and 7(1). See also section 17(2) of the Second-Hand and Scrap Metal Dealers Act.
59. Ibid., section 8(1). Under section 17(3) of the Second-Hand and Scrap Metal Dealers Act, the period is 7 days only.
60. Ibid., section 8(5)
61. The Malawi Second-Hand and Scrap Metal Dealers Act, section 17(3)

62. [1983] RTR 88, p.96
63. [1986] RTR 52, p.60
64. The Malawi Automotive Trades Registration and Fair Practices Act, sections 18(2) and 24(2).
65. TG Ison, Credit Marketing and Consumer Protection, p.391
66. The Malawi Automotive Trades Registration and Fair Practices Act, section 21(1)
67. Ibid., section 21(4)
68. TG Ison, op. cit., p.388
69. The English Estate Agents Act, section 1(1) defines 'estate agency work'.
70. Ibid., section 3(1)
71. Ibid., section 4
72. Ibid., section 6
73. Ibid., section 9
74. Ibid., section 11
75. Borrie, op. cit., pp 94-5
76. See section 22(1)(a) of the English Consumer Credit Act for definition of 'standard licence'.
77. The other reason for requiring periodic renewal of registrations is to generate funds for running the administrative control since an application for registration or its renewal must be accompanied by a registration fee.
78. See either section 13(2) of the Malawi Automotive Trades Registration and Fair Practices Act or section 39(1) of the English Consumer Credit Act.

79. The English Consumer Credit Act, section 40(1)
80. Ibid., section 40(2) and (3)
81. Ibid., section 40(4)

CHAPTER NINECONCLUSIONS AND FINDINGS

The major problem which a purchaser of goods on credit is likely to face is that the credit agreement may not be fairly balanced; it may be heavily tilted in favour of the supplier of the goods and credit. Many lawyers believe that the law of contract which governs some aspects of these agreements is indifferent to the fairness of bargains. Their view is that its exclusive object is enforcement of legally created agreements, however unfair they may be.(1) Perhaps nobody has expressed that belief more conclusively than Salmond and Winfield who once wrote:

"The law, though it insists that a contract shall amount to a bargain involving something done or promised on each side does not concern itself with the justice or reasonableness of the bargain. Each party is left free to bargain for what he is content to accept as sufficient recompense for his promise. Whether what he so bargains for is a fit equivalent for his promise, either in respect of profit to himself or in respect of loss to the promisee, is a matter as to which the law is indifferent".(2)

This thesis has attempted to show that this is wholly incorrect as a description of the modern law of contract. Indeed, as Reiter argues, there has never been 'a total and unthinking delegation of contract power in society'.(3) The truth is that the general law of contract does possess principles for limiting contract power with a view to ensuring

fair exchange.

It has been shown that at common law a court can refuse to enforce a minimum payment or forfeiture clause on the ground that it is penal. Although decided cases do not make it very clear, the question of when such a clause is penal involves estimating what is fair between the parties to the contract in which the clause is used. And generally, a minimum payment or forfeiture clause will not be enforced if the money which it requires the purchaser to forfeit or pay, as the case may be, is unreasonably greater than the greatest loss that could be expected to rise from the purchaser's breach on the ground of which it is sought to enforce that clause.

Secondly, general contract law shows its concern for fair exchange through the attitude which judges have adopted towards exclusion clauses. It has been demonstrated that it was in order to ensure that one party to a contract did not unfairly limit performance of his part of the bargain that courts at common law developed the so-called doctrine of fundamental breach. The device was used in a number of cases to refuse enforcement of unfair exclusion clauses until it was abandoned on the ground of conceptual indefensibility. Although it is now difficult to say with certainty what the common law position is with regard to these clauses, Chapter 2 showed that English courts at least showed reluctance to give legal effect to an exclusion clause, even if its language was clear and covered events upon which its enforcement was sought, if to enforce it would have the effect of denying the existence of a contract between the parties or if the enforcement would produce an unreasonable result.

Thirdly, the law seeks to ensure fair exchange in contracts through the doctrine of unconscionability which has been called into frequent use in recent times. Although the doctrine has been referred to by more than one name: sometimes as the doctrine of 'unequal bargaining power' and at other times as 'the jurisdiction against unconscionable or extortionate bargains', it is undeniable that its role has been to allow courts to refuse enforcement of contracts which are unreasonably balanced in favour of one party. And to emphasize the importance of the doctrine in re-adjusting such mal-adjusted bargains, it has been incorporated into consumer legislation such as the English Consumer Credit Act.

Fourthly, the general law of contract shows its concern for fair exchange by making void or voidable contracts in which one party is made, intentionally or otherwise, by the other to accept performance of the contract which is different from that which the latter has made him to expect. The law further protects these expectations by allowing the party affected by failure on the part of the other party to fulfil an expectation created by the latter, to rescind the bargain if fulfilment of the expectation by the party in breach was the basis upon which the innocent party entered into the contract. It also implies a number of obligations into contracts which serve to safeguard the expectations of the parties and also to approximate the values which they exchange. An example of these obligations are the implied conditions as to the fitness of goods supplied under a contract for the sale of goods for a particular purpose; compliance by the goods with the description under which they are supplied and merchantability of the goods so supplied.

However this concern for fair exchange is not always easy to perceive. One cause of its obscurity is the fact that ideally the primary object of contract law is enforcement of obligations. In other words, the law seeks to provide exceptions, as it were, to the basic starting point of the common law that no man is his brother's keeper, by showing when a person who causes loss to another may be required to make good the loss and the extent to which that loss should be compensated. Contract law provides that the loss can be compensated only if there is a binding agreement between the parties. But in determining when an agreement should be deemed to exist and what will make it binding, there are other sub-goals which the law seeks to achieve. Fair exchange is one of these sub-goals, encouragement of trust between individuals, and private enterprise, is another.(3) The result of this polycentricity has been that not only do the principles of contract law appear to be indifferent to fair exchange but also that bargains are sometimes enforced even though they are apparently unfair.

The second limitation of the contract 'model' in ensuring fair exchange arises from the very nature of a bargain as a private arrangement between individuals. This has meant that although courts use any dispute arising from that arrangement to enunciate principles of law which have an application beyond the parties to the bargain, enforcement of the law is 'bargain-centred'. Thus no person can set in motion the legal machinery for enforcement of any obligation which arises out of a contract unless he is a party to the bargain involved. This in essence means that unless parties to the bargain are prepared to bring

non-compliance with contract law before a court of law, the non-compliance will go unpunished. But even if a bargain-related dispute is brought before court, the fairness of that bargain may not be looked into unless it is in issue, it being the rule that the scope of a court's adjudicatory powers in a civil dispute is delimited by the parties' pleading.

Furthermore, the jurisdiction first developed by Chancery courts, through which common law has sought to give effect to the element of fair exchange is regarded as creating an exception to the general role of courts in the administration of the law of contract. Thus the principles upon which the jurisdiction is exercised affect enforceability of the contract and not its validity.(4) What this means in practice is that an unfair contract can be enforced. For as long as it is not conclusively shown that the bargain falls within *any* one of *those* principles, the court must enforce it since it is a valid agreement. Besides, the very fact that the principles are exceptions to what is regarded as the norm, means that court always treat with caution any attempt to bring any bargain *within* their ambit. And as the discussion shows, this has been particularly the case where enforceability of a forfeiture or minimum payment clause is challenged.

Finally, these principles lack conceptual coherence in themselves and as a legal regime. As indicated by Chapter 2, there is confusion as to when a minimum payment clause, a forfeiture clause and an exclusion clause will not be enforced on the ground that it is unfair. Similarly, there is uncertainty as to when a contract will be re-opened on the ground that it is unconscionable. Moreover, the principle on the

basis of which enforcement of a minimum payment clause is refused is different from that which underlies the unenforceability of a harsh bargain or exclusion clause or forfeiture clause.

The Hire-Purchase Act has sought to reform much of this. It has made prevention of unfair exchange in credit agreements its principal, and not subordinate, goal. Thus it provides clearer standards for the enforcement of minimum payment, forfeiture and exclusion clauses inserted in these agreements. Similarly, it renders of no legal effect certain unfair terms and waiver by the purchaser of any right conferred on him by it. Above all, it fixes several terms upon which the agreement should be concluded and creates judicial powers to assist courts in its enforcement.

But there are a number of problems too which are not solved. To begin with, the model created by the Act is based on the understanding that a credit agreement is a private arrangement between individuals. Thus enforcement of the Act, just like that of the general law of contract, is left to the parties to the agreement. And it should be noted in this respect that although the Act in essence creates standards of fair exchange in credit agreements, it does not provide a means for ensuring that those standards are in fact complied with by suppliers of goods on credit. Besides, the Act incorporates parts of the general contract law model without correcting some of its imperfections. Examples of this are the principles discussed in Chapter 3 of the law of misrepresentations and of the law which governs the quality of goods supplied under a credit agreement. There are a number of aspects of

this body of law, such as the rule in Seddon v NE Salt and the rules governing the passing of property in goods supplied under a contract for the sale of goods (incorporated into the Hire-Purchase Act by section 11), which ought to be abandoned. What all this means therefore is that although the changes brought by the Act are quantitatively important, their effect is salutary.

To correct this flaw, it has been suggested that the legal regime of credit agreements should incorporate a third model: public control. This additional model should comprise criminal law standards and sanctions. Section 8 of the Hire-Purchase Act does just that by imposing a fine and imprisonment on the supplier of goods if he fails to supply the purchaser with a statement of the latter's indebtedness under the credit agreement after the purchaser has asked for it. And as demonstrated in Chapter 7, there are a number of criminal law statutes which apply to credit agreements. But these measures are not enough. As far as the statutes are concerned, they apply only to the goods aspect of a credit agreement, and specifically, to statements made about the goods. Consequently it has been argued that criminal sanctions should also be available to deter non-compliance with standards of fairness relating to other aspects of the agreement. In particular, subject to the defences of mistake, accident and due diligence, it should be made a strict criminal offence to contravene provisions of the Hire-Purchase Act relating to disclosures, finance charges, rates of interest and rebates. Contravention of sections 7 and 21 of the Act should also be punishable by a criminal sanction. And to make these changes more meaningful, it has also been urged that there should be specially

appointed officers to ensure that the suggested standards of fairness are complied with by all those who supply consumer goods on credit.

It has also been suggested that this public control model should have a system of administrative control. The main object of this system should be to use compulsory registration of traders involved in credit agreements business as a means of ensuring their compliance with civil and criminal standards created to ensure fair exchange in credit agreements. Only persons with no serious history of fraudulent dealings and consumer abuse should be allowed to engage in this business. If after registration any trader engages in this unacceptable conduct or in any form of unfair dealing towards his customers, he should be cautioned or required to assure the registering authority that he will desist from that conduct. If in spite of that caution or assurance, he persists with the unfair dealing, his registration should be suspended or cancelled altogether, as the registering authority deems fit. And to ensure that the registering authority performs his duties properly, it has been suggested that he should work hand in hand with courts who should retain the power to administer criminal and civil sanctions applicable to credit agreements, and be granted supervisory powers over the primary law enforcement officers referred to above.

From the discussion it will have been seen that the contract law nature which the Hire-Purchase Act adopts to deal with unfair exchange in credit agreements can do the job if reformed as suggested in Chapter 6 of this thesis. But the main argument which the thesis sought to bring home is that ensuring fair exchange in these agreements involves controlling human conduct in a specific way. Now although contract

law-like measures can and do influence human behaviour, their control of behaviour is general. Indeed experience generally shows that where certain processes and results are expected from human interaction, that has not been achieved by leaving the matter to the self-interest of the individuals involved in that interaction. On the other hand, the practice has been for society to throw its weight behind the desired social transformation by providing criminal sanctions and administrative control. It is therefore argued that the issue of fair exchange in credit agreements should be treated in the same way. The law should accept public control as the tool which can effectively deal with this issue, and not merely pay lip-service to it as do sections 8 and 24 of the Hire-Purchase Act.

SELECTED BIBLIOGRAPHY

a) Books and Theses

- Anson's Law of Contract, 24th ed., (1975), Clarendon Press, Oxford.
- Aston, CW, Hire-Purchase Accounts and Finance, (1930), Gee & Co, London.
- Atiyah, PS, An Introduction to the Law of Contract, (1961), Clarendon Press, Oxford.
- The Sale of Goods, 6th ed., (1980), Pitman Publishing Ltd, London.
- Baldwin, R, Regulating the Airlines: Administrative Justice and Agency Discretion, (1985), Clarendon Press, oxford.
- Bellot, Bargains with Money-Lenders, 2nd ed., (1906), Stevens and Haynes, London.
- Benjamin, JP, A Treatise on the Law of Sale of Personal Property, 8th ed., (1950), Sweet and Maxwell, London.
- Cheshire and Fifoot, The Law of Contract, 9th ed., (1976), Butterworths, London.
- Clark, B et al, Handling Consumer Credit Cases, (1972), The Lawyers Co-operative Publishing Co, New York.
- Coetzee, AA, Judicial Control of Unfair Contracts in English and Scots Law, Ph. D thesis, University of Edinburgh, (1981).
- Coote, B, Exception Clauses, (1964), Sweet and Maxwell, London.
- Cranston, R, Consumers and the Law, 2nd ed., (1984), Weidenfeld and Nicolson, London.
- Regulating Business: Law and Consumer Agencies, (1979), MacMillan Press Ltd, London.
- Darnow, J (ed.), Essay on the Civil Law of Obligations, (1969), Louisiana State University Press, Baton Rouge.

- Diamond, AL (ed.), Instalment Credit, (1970), Stevens and Sons, London.
- Introduction to Hire-Purchase Law, (1967), Butterworths,
London.
- Deutch, S, Unfair Contracts, (1977), Lexington Books, Massachussets.
- Fridman, GHL, Sale of Goods in Canada, (1973), The Carswell Co Ltd,
Toronto.
- Goode, RM (ed.), Consumer Credit, (1978), AW Sijthoff, Leyden.
- et al, Hire-Purchase and Conditional Sale, (1968), British
Institute of International and Comparative Law,
London.
- Hire-Purchase Law and Practice, (1962), Butterworths,
London.
- The Consumer Credit Act: A Students' Guide, (1979),
Butterworths, London.
- Guest, AG, The Law of Hire-Purchase, (1966), Sweet and Maxwell, London.
- Guirdham, M, Marketing: The Management of Distribution Channels, (1972),
Pergamon Press, Oxford.
- Holdsworth, W, A History of English Law, vols 5 and 8, (1925), Sweet and
Maxwell, London.
- Ison, TG, Credit Marketing and Consumer Protection, (1979), Croom Helm,
London.
- Leigh, LH, The Criminal Liability of Corporations in English Law,
(1969), Weidendfeld and Nicolson, London.
- McLoughlin, J, Introduction to Negotiable Instruments, (1975),
Butterworths, London.
- Meston, The Law Relating to Money-Lenders, 5th ed., (1968), Oyez,
London.
- Mickleburgh, J, Consumer Protection, (1979), Professional Books, Oxon.
- Oliver, FR, The Control of Hire-Purchase, (1961), George Allen and Unwin

Ltd, London.

- Powell, JJ, Essay Upon the Law of Contracts and Agreements, vol. II, (1978), Garland Publishing Inc., New York and London.
- Richardson, G, et al., Policing Pollution, (1982), Clarendon Press, Oxford.
- Salmond and Winfield, Principles of the Law of Contracts, (1927), Sweet and Maxwell, London.
- Sheridan, LA, Rights in Security, (1974), Collins, London and Glasgow.
- Stephenson, G, The Criminal Law and Consumer Protection, (1983), Barry Rose, Chichester.
- Taparell, GQ, et al., Trade Practices and Consumer Protection, (1978), Butterworths, Sydney.
- Treitel, GH, The Law of Contract, 4th ed., (1975), Stevens and Sons, London.
- White and Tudor, Leading Cases in Equity, 8th ed., vol. I, (1910), Sweet and Maxwell, London.
- Yates, D, Exclusion Clauses in Contracts, 2nd ed., (1982), Sweet and Maxwell, London.

b) Articles, Papers and Reports

- Atiyah, PS, Contract and Fair Exchange, (1985), 35 UTLJ 1.
- Borrie, G, Licensing Practice under the Consumer Credit Act, [1982] JBL 91.
- Legislative and Administrative Control over Standard Forms of Control in England, [1979] JBL 317.
- The Credit Society; its Benefits and Burdens, [1986] JBL 181.
- Comment, A Case Study of the Impact of Consumer Legislation: The Elimination of Negotiability and the Cooling-Off Period,

- (1969), 78 Yale LJ 618.
- Coote, B, The Second Rise and Fall of Fundamental Breach, (1981) ALJ 788.
- Curran, BA, Administration and Enforcement under the Uniform Consumer Credit Code, (1968) 33 Law and Contemporary Problems 737.
- Davies, C, Merchantability and Fitness for Purpose: Implied Conditions of the Sale of Goods Act 1893, (1969) 85 LQR 74
- Dawson, JP, Economic Duress- An Essay in Perspective, (1947) 45 Mich. LR 253.
- Devlin, The Treatment of Breach of Contract, [1966] CLJ 192.
- Duggan, AJ, Consumer Credit Rate Disclosure in the United Kingdom and Australia: A Functional and Comparative Appraisal, (1986) 35 ICLQ 87.
- Criminal Sanctions for Misleading Advertising: The Penalty of Fine and Related Matters, (1976) 50 ALJ 625.
- Ervine, WC, Durability, Consumers and the Sale of Goods Act, (1984), The Juridical Review, 147.
- Goode, RM, Some Problems of Hire-Purchase Law, (1962), The Law Journal 216.
- Greig, DW, Condition or Warranty, (1973) 89 LQR 93
- Misrepresentation and Sales of Goods, (1971) 87 LQR 179.
- Gribetz and Grad, Housing Code Enforcement: Sanctions and Remedies, (1966) 66 Col. LR 1254.
- Hodkinson, K, Specific Performance and Deposits, (1984) 4 Oxford Journal of Legal Studies 137.
- Kripke, H, Chattel Paper as a Negotiable Specialty under the Uniform Commercial Code, (1950) 50 Yale LJ 1209.
- Gesture and Reality in Consumer Credit Reform, (1969) 44 NYULR 1.

Lawson, RG, Reasonable Precautions and All Due Diligence, [1983] JP 486.

Leff, AA, Unconscionability and the Code- the Emperor's New Clause, (1967) 115 Univ of Pitts. LR 485.

----- Unconscionability and the Crowds- Consumers and the Common Law Tradition, (1970) 31 Univ of Pitts. LR 349.

Montrose, JL, The Operation of Description in a Contract of Sale of Goods, (1937) Can. BR 760.

Page, AC, Self-Regulation and Codes of Practice, [1980] JBL 24.

Palmer, NE, Conditions and Warranties in English Contracts of Hire, (1975) Anglo-American LR 207.

Reiss, AJ, Consequences of Compliance and Deterrence Models of Law Enforcement for the Exercise of Police Discretion, (1984) 47 Law and Contemporary Problems 82.

Reiter, BJ, The Control of Contract Power, (1981) Oxford Journal of Legal Studies 347.

Review of the Trade Descriptions Act 1968: A Report by the Director-General of Fair Trading, (1976) Cmnd 6628.

Seidman, RB, Contract Law, the Free Market and State Intervention: A Jurisprudential Perspective, (1973) JES 553.

Smith and Pearson, The Value of Strict Liability, [1969] Crim. LR 5.

Stephens, DJ, The Consumer Credit Act 1974, (1976) 29 Current Legal Problems 112.

Stephenson, G, In Statutory Defence of Traders, [1981] NLJ 783.

Stoljar, SJ, Conditions, Warranties and Descriptions of Quality in Sales of Goods, (1952) 15 MLR 425 and (1953) 16 MLR 174.

----- The Contractual Conception of Condition, (1953) 69 LQR 485.

The Crowther Report, (1971) Cmnd 4596.

The Molony Committee Report, (1962) Cmnd 1781.

- Thorneley, JWA, Hire-Purchase: Minimum Payment and Damages, [1968] CLJ 185.
- Trebilcock, MJ, The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords, (1976) 26 UTLJ 359.
- Williston, S, Rescission for Breach of Warranty, (1903) Harvard LR 465.
- Wilkinson, HW, Extortionate Credit Bargains under the Consumer Credit Act 1974, (1979) 8 Anglo- American LR 240.

A P P E N D I C E S

CHAPTER 48:05

HIRE-PURCHASE

ARRANGEMENT OF SECTIONS

PRELIMINARY

SECTION

1. Short title
2. Interpretation

PART I

GENERAL PROVISIONS RELATING TO AGREEMENTS

3. Application of Part I
4. Provisions as to agreements
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CHAPTER 48:05

HIRE-PURCHASE

34 of 1956(F)
14 of 1959(F)
G.N.
309/1962(F)
92/1964(N)
16/1964(M)
Short title

An Act to make provision for the regulation of Hire-Purchase Agreements and certain instalment sales, and for other purposes incidental thereto

PRELIMINARY

Interpretation

1.—(1) This Act may be cited as the Hire-Purchase Act

(2) This Act shall not apply to any agreement under which the Government is the seller or, subject to section 28, to any agreement made before the 12th day of February, 1964.

2.—(1) In this Act, unless inconsistent with the context—

“agreement” means a hire-purchase agreement or an instalment sale agreement;

“cash price”, in relation to any goods, means the price at which the goods may be purchased outright for cash;

“goods” means any movable property which may lawfully form the subject-matter of a contract of hire or sale;

“hire-purchase agreement” means—

(a) any contract whereby goods are sold subject to the condition that notwithstanding delivery of the goods the ownership in such goods shall not pass except in terms of the contract and the purchase price is to be paid in two or more instalments;

(b) any contract which provides for the hiring of goods whereby the hirer has the right—

(i) to purchase such goods after two or more instalments have been paid in respect thereof; or

(ii) after two or more instalments have been paid in respect thereof, to continue or renew from time to time such hiring at a nominal rental, or to continue or renew from time to time the right to be in possession of the goods, without any further payment or against payment of a nominal amount periodically or otherwise;

whether or not the agreement may at any time be terminated by either party or one of the parties;

(c) any other contract which has, or contracts which together have, the same import as either or both the contracts defined in paragraph (a) or (b) of this definition, whatever form such contract or contracts may take;

“instalment” includes any cash amount payable in terms of section 24 (1) (a) and, where no cash amount is payable in terms of that paragraph, the amount of any deposit or initial payment payable under an agreement;

“instalment sale agreement” means any contract of sale under which—

(a) the ownership in the goods sold passes either before or upon delivery;

(b) the purchase price is to be paid in instalments, of which one or more are payable after delivery; and

(c) the seller is entitled to the return of the goods sold if the purchaser fails to comply with any provision thereof,

and includes any other contract which has, or contracts which together have, the same import, whatever form such contract or contracts may take;

“purchase price” means the total sum payable by the purchaser under an agreement, including any sum payable by him by way of a deposit or other initial payment, or credited or to be credited to him under such agreement on account of any such deposit or payment, whether that sum is to be or has been paid to the seller or to any other person or is to be or has been discharged by a payment of money or by the transfer or delivery of goods or by any other means, but excluding any sum payable—

(a) as compensation or damages for breach of the agreement;

(b) for licence or registration fees;

(c) for any insurance premiums which have been paid to insure the goods sold under the agreement;

(d) by way of interest upon instalments which are in arrear; or

(e) in respect of any installation as defined in section 18 (2);

“purchaser” means the person who, in terms of any agreement, is the purchaser or hirer, as the case may be, and includes his successors in title;

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“seller” means the person who, in terms of any agreement, is the seller or the lessor, as the case may be, and includes his successors in title.

“writing”—

(a) in relation to an agreement in a form the provisions of which the Act requires shall be set out in printed or typed letters, means printing or typewriting; and

(b) in relation to an agreement which is not in a form such as is referred to in paragraph (a), means writing as defined in section 2 of the General Interpretation Act.

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(2) References in sections 4, 6 and 24 to “contain,” “set out” and “provide” shall, without derogation from section 4 (1) (a), be construed as references to “contain expressly in writing”, “set out expressly in writing” and “provide expressly in writing” respectively.

(3) Where a seller has agreed that any part of the purchase price may be discharged otherwise than by the payment of money, any such discharge shall, for the purposes of this Act, be deemed to be a cash payment of that part of the purchase price.

PART I

GENERAL PROVISIONS RELATING TO AGREEMENTS

Application of Part I

3. Except for sections 4, 22 and 23, which shall apply to every agreement or, as the case may be, to the parties to every agreement, this Part shall not apply to an agreement under which the purchase price exceeds the sum of fifteen hundred pounds.

Provisions as to agreements

4.—(1) Every agreement shall—

(a) be reduced to writing and signed by or on behalf of all the parties to the agreement;

(b) contain a statement of the cash price.

(2) If an agreement does not comply with subsection (1)—

(a) the goods which are the subject of the agreement shall be deemed to have been sold to the purchaser—

(i) without any reservation as to the ownership of the goods or, as the case may be, without any stipulation as to the seller's right to the return of the goods; and

(ii) on credit at a price, payable in the same manner as that stipulated in the agreement, which is twenty-five per centum less than the purchase price;

and

(b) the seller shall not be entitled to enforce any contract of suretyship, indemnity or guarantee relating to the agreement except, in the case of an agreement which has been the subject of a cession or assignment, against a surety or guarantor who was the original seller under the agreement:

Provided that if, in any action arising out of the agreement, the court is satisfied that the purchaser would not, but for this subsection, have been prejudiced by the fact that the agreement does not comply with subsection (1), the court may, subject to such conditions that it thinks just and equitable to impose, order the parties to carry out the terms of the agreement as if the agreement had complied with subsection (1).

5.—(1) It shall be the duty of the seller to hand or send by registered post to the purchaser a copy of any agreement entered into between them as soon as possible after it has been entered into. If a seller fails so to supply such a copy, the purchaser may hand or send to him by registered post a written request for the supply of such a copy, and any seller who, within fourteen days of the receipt of such a request, fails to hand such a copy to the purchaser, or send it to him by registered post, shall be guilty of an offence.

Supply of
copies to
purchaser

(2) Any person who is guilty of an offence under subsection (1) shall be liable to a fine of fifty pounds or, in default of payment, to imprisonment for thirty days.

6.—(1) Every agreement shall set out—

(a) (i) the amount of the purchase price of the goods;

(ii) the amount paid or to be paid by the purchaser under section 26 (1) (a);

(iii) the amount of each of the instalments by which the purchase price is to be paid;

(iv) the mode of payment of such instalments;

(v) the date or mode of determining the date on which each instalment is payable; and

(vi) the rate of interest, which shall not exceed the maximum rate of interest referred to in section 7 (2), chargeable upon an instalment in arrear.

(b) a description of the goods let, sold or delivered under

Provisions to
be included
in agree-
ments

the agreement and of any goods delivered to the seller under section 24 (1) (a) which is sufficient to identify them;

(c) the terms as to the reservation and passing of ownership of the goods or as to the seller's right to the return of the goods, as the case may be.

(2) No seller shall use any form of agreement the provisions of which, whatever their nature, are not set out in clearly legible printed or typed letters of substantially the same size.

(3) If an agreement does not comply with subsection (1) or with subsection (2)—

(a) the goods which are the subject of the agreement shall be deemed to have been sold to the purchaser—

(i) without any reservation as to the ownership of the goods or, as the case may be, without any stipulation as to the seller's right to the return of the goods; and

(ii) on credit at a price, payable in the same manner as that stipulated in the agreement, which is twenty-five per centum less than the purchase price;

and

(b) the seller shall not be entitled to enforce any contract of suretyship, indemnity or guarantee relating to the agreement except, in the case of an agreement which has been the subject of a cession or assignment, against a surety or guarantor who was the original seller under the agreement:

Provided that if, in any action arising out of the agreement, the court is satisfied that the purchaser would not, but for the provisions of this subsection, have been prejudiced by the fact that the agreement does not comply with subsection (1), the court may, subject to such conditions that it thinks just and equitable to impose, order the parties to carry out the terms of the agreement as if the agreement had complied with subsection (1).

**Invalidity of
certain pro-
visions**

7.—(1) A provision of an agreement shall not be of any force or effect if it provides whether expressly or impliedly that—

(a) the seller or any person acting on his behalf is authorized to enter upon any premises for the purpose of taking possession of goods which are the subject of any agreement, or is relieved from liability for any such entry;

(b) the right conferred on a purchaser by this Act to determine the agreement is excluded or restricted;

(c) any liability, in addition to the liability imposed by this

Act, is imposed on a purchaser by reason of the termination of the agreement by him under this Act;

(d) a purchaser, after the termination of the agreement in any manner whatsoever, is subject to a liability which exceeds the liability to which he would have been subject if the agreement had been terminated by him under this Act;

(e) any person acting on behalf of a seller in connexion with the formation or conclusion of an agreement is to be treated as or deemed to be the agent of the purchaser;

(f) a seller is to be relieved from liability for the acts or defaults of any person acting on his behalf in connexion with the formation or conclusion of an agreement;

(g) the purchaser shall pay interest on an instalment in arrear at a rate which exceeds the maximum rate of interest referred to in subsection (2).

(2) The maximum rate of interest chargeable under an agreement on an instalment in arrear shall be the rate per centum per annum specified by the Minister in fixing, in terms of section 26, the maximum amount by which the purchase price under agreements of the class in question may exceed the cash price, which was so specified at the date of the agreement.

8.—(1) If a purchaser hands or sends by registered post a request therefor to the seller and tenders to the seller a sum of five shillings for expenses, the seller shall, within thirty days after the tender is received by him, hand or send by registered post to the purchaser all or any of the following particulars as the purchaser may specify—

Purchaser
entitled to
certain in-
formation

(a) a statement signed by or on behalf of the seller, showing—

(i) the amount paid under the agreement by or on behalf of the purchaser and the date of each payment;

(ii) the amount due under the agreement and unpaid, the date upon which each unpaid instalment became due and the amount of each such instalment; and

(iii) the amount which is to become payable under the agreement, the date or mode of determining the date upon which each future instalment is to become payable and the amount of each such instalment;

(b) a copy of the agreement.

(2) In the event of a failure without reasonable cause to comply with subsection (1), then, while the default continues—

(a) no person shall be entitled to enforce the agreement against the purchaser or to enforce any contract of suretyship, indemnity or guarantee relating to the agreement, and the seller shall not be entitled to enforce any right to recover the goods from the purchaser; and

(b) no security given by the purchaser in respect of money payable under the agreement or given by a surety or guarantor in respect of money payable under such a contract of suretyship, indemnity or guarantee as aforesaid shall be enforceable by any holder thereof against the purchaser, surety or guarantor, as the case may be;

and, if the default continues for a period exceeding thirty days, the defaulter shall be liable to a fine of £50 or, in default of payment, to imprisonment for thirty days.

Removal of goods

9.—(1) It shall be lawful for the seller of goods under a hire-purchase agreement to stipulate—

(a) that the purchaser shall record his address in such agreement; and

(b) that if before the ownership of the goods has passed to the purchaser the purchaser changes such address or at any time removes or allows such goods or any part thereof to be removed from any premises for keeping at other premises, he shall, prior to such change of address or removal, notify the seller or his agent in writing of all or any of the following particulars—

(i) his new address;

(ii) the premises to which such goods have been removed;

(iii) the name and address of the landlord, if any, of such new premises;

but no such stipulation shall require the purchaser to notify the seller more than 48 hours before such change or removal.

(2) If any purchaser fails to comply with any stipulation made in terms of subsection (1), he shall be liable to a fine of £50 or, in default of payment, to imprisonment for thirty days. In any prosecution for a contravention of this subsection it shall be a sufficient defence if the purchaser satisfies the court that his failure to comply with any such stipulation was due to circumstances over which he had no control.

(3) If the seller of goods under a hire-purchase agreement has given written notice of his ownership thereof to the landlord of the premises where such goods are kept, such landlord shall not have any right of distress over such goods for rental.

10.—(1) It shall be lawful for the seller of goods under a hire-purchase agreement to stipulate that the purchaser shall not remove or permit the removal of the goods from Malawi without the consent of the seller. Removal of goods from Malawi

(2) If a purchaser, in breach of a stipulation made in terms of subsection (1) and with intent to deprive the seller of his ownership of the goods or to defeat the rights of the seller to obtain any payment due to him under the agreement, removes or permits the removal of the goods from Malawi, he shall be liable to a fine of £100 and to imprisonment for three months.

(3) If a hire-purchase agreement contains a stipulation such as is referred to in subsection (1) and the seller believes that the goods sold under the hire-purchase agreement have been removed or are being removed or are about to be removed from Malawi without his consent, he may bring an action for the return of the goods.

(4) A seller referred to in subsection (3) may, before bringing the action referred to in that subsection or while his action is pending, make an application, in which the purchaser or other person substantially interested in the goods shall be made respondent, to a court for an order for the attachment of the goods.

(5) An application for an order referred to in subsection (4) may be made, on summons or notice to the respondent or *ex parte*, to a court having jurisdiction in the area in which the respondent or the goods proposed to be attached may be or through which the goods are likely to be removed.

(6) The rules of court governing applications on summons or notice or, as the case may be, applications *ex parte* in interlocutory proceedings of a like nature to an application referred to in subsection (4) which are in force in the court to which such an application is made shall, subject to subsections (7) to (9) inclusive, *mutatis mutandis*, apply to that application.

(7) A court which makes an order *ex parte* for the attachment of goods in terms of this section may require the applicant to give such security for damages as may be caused by the order as the court may think fit.

(8) An order referred to in subsection (7)—

(a) may be discharged or varied by the court on cause shown by any person affected by the order and on such terms as to costs as the court may think fit; and

(b) shall *ipso facto* be discharged upon the giving of security by the respondent for the amount of the value of the goods to which the order relates, together with costs.

(9) If goods are attached by order of a court other than the court in which the action for the return of the goods is brought, the court which made the order of attachment shall cause copies of the application, order and proceedings, together with the goods attached or, as the case may be, the security given for their release, to be transmitted to the court in which the action is brought.

Conditions
and warranties
implied
in agree-
ments

11.—(1) In every agreement there shall be—

(a) an implied warranty that the purchaser shall have and enjoy quiet possession of the goods;

(b) an implied condition on the part of the seller that he is not and will not be precluded from passing the ownership of the goods to the purchaser at the time when the ownership is to pass;

(c) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party at the time when the ownership is to pass;

and such warranties and conditions shall be implied notwithstanding any agreement to the contrary.

(2) Every agreement shall be deemed to contain any warranties or conditions implied in a contract for the sale of goods under any enactment or under the common law applicable in Malawi.

(3) The seller shall not be entitled to rely on any provision in the agreement excluding or modifying any warranty or condition referred to in subsection (2) unless he proves that, before the agreement was made, the provision was brought to the notice of the purchaser and its effect made clear to him.

Appropriation
of payments made
in respect of
agreements

12. A purchaser who is liable to make payments to the same seller in respect of two or more agreements shall, notwithstanding any agreement to the contrary, be entitled, on making any payment in respect of the agreements which is not sufficient to discharge the total amount then due under all the agreements, to appropriate the sum so paid by him in or towards the satisfaction of the sum due under any one of the agreements, or in or towards the satisfaction of the sums due under any two or more of the agreements, in such proportions as he thinks fit, and, if he fails to make any such appropriations, the payment shall by virtue of this section be appropriated towards the satisfaction of the sums due under the respective agreements in the proportions which those sums bear to one another.

Negotiable
instruments

13.—(1) If a seller takes from a purchaser any negotiable instrument (other than a dated cheque which is not a post-dated

cheque) in respect of any instalment or part of an instalment payable under an agreement, the seller shall not have any right to recover any such instalment or part of an instalment in terms of the agreement, and any such seller shall be confined, in respect of the recovery of such instalment or part of an instalment, to his rights of action, if any, in relation to such negotiable instrument, so, however, that nothing in this subsection contained shall affect any other rights of such seller under the agreement or this Act.

(2) If any negotiable instrument (other than a dated cheque which is not a post-dated cheque) is given or drawn by a purchaser in respect of any liability under an agreement, the seller shall when he takes it from the purchaser—

(a) write clearly on the face of such negotiable instrument the words “Issued in connexion with a hire-purchase agreement” or “Issued in connexion with an instalment sale agreement”, as may be appropriate; and

(b) write clearly at the top of the first page of such agreement the words “A negotiable instrument has been issued in connexion with this agreement” or “Negotiable instruments have been issued in connexion with this agreement”, as may be appropriate.

(3) Nothing contained in subsection (2) shall prevent the seller from writing on either the negotiable instrument or the agreement in question such further words as may serve to identify with greater particularity the negotiable instrument or agreement to which he refers.

(4) Any seller who fails to comply with subsection (2) shall be liable to a fine of £50 or, in default of payment, to imprisonment for thirty days.

14.—(1) If the seller has, as a result of the failure of the purchaser to pay any instalment of the purchase price due under any agreement, recovered possession, otherwise than by an order of a court, of any goods to which the agreement relates, the purchaser shall, unless he himself has terminated the agreement, be entitled, if he pays all arrear instalments of the purchase price due under the agreement within a period of twenty-one days after the seller recovered possession of the goods, to the return of the goods at the seller's place of business or, if he has no place of business or if the purchaser so requests, at the premises in which the goods are kept, and to be reinstated in his rights under the agreement.

Right of purchaser to be reinstated after return of goods to seller

(2) The seller shall, after the return of the goods under subsection (1), be entitled to recover the reasonable expenses incurred by him in the taking and storing of such goods.

Right of purchaser to pay outstanding balance of purchase price

15. A purchaser shall at all times be entitled to pay any instalment of the purchase price before it is due and shall, if he pays the whole of the purchase price remaining unpaid in one amount, be entitled to the reduction of each instalment not due at the said date of payment by an amount calculated at the rate of five per centum per annum on such instalment in respect of the period by which the payment of such instalment is accelerated.

Passing of ownership

16. The ownership in any goods which are the subject of a hire-purchase agreement shall pass to the purchaser upon payment of all sums payable by him in terms of the agreement.

Right of purchaser to terminate hire-purchase agreement

17.—(1) A purchaser shall, at any time before the final payment under a hire-purchase agreement falls due, be entitled, upon the return to the seller of any goods which are the subject of the agreement, to terminate the agreement by giving notice of termination in writing to any person entitled or authorized to receive the sums payable under the agreement.

(2) On the termination of a hire-purchase agreement by the purchaser in terms of subsection (1), the purchaser shall be liable, without prejudice to any liability which has accrued before the termination—

(a) to pay to the seller—

(i) the amount, if any, by which one half of the purchase price exceeds the sum of—

(A) all instalments in respect of the purchase price paid by the purchaser before the date of the termination; and

(B) all instalments in respect of the purchase price in arrear at the date of the termination;

or

(ii) if an amount less than the sum referred to in subparagraph (i) is payable under the agreement on its termination by the purchaser in terms of subsection (1), the amount payable under the agreement;

and

(b) if the purchaser has failed to take reasonable care of the goods, to pay to the seller damages in respect of his failure.

(3) Nothing in this section shall prejudice any right of a purchaser to terminate a hire-purchase agreement otherwise than by virtue of this section.

Special provisions as to installation charges

18.—(1) Where under any hire-purchase agreement the seller is required to carry out any installation and the agreement specifies the amount to be paid in respect of the installation, the

reference in section 17 (1) to one-half of the purchase price shall be construed as a reference to the aggregate of the said amount and one-half of the purchase price.

(2) For the purposes of this section, the expression "installation" means—

(a) the installing of any gas or water pipe, or the installing of any line or other means of conveying, transmitting, distributing or supplying electricity;

(b) the fixing of goods to which the agreement relates to the premises where they are to be used, and the alteration of premises to enable any such goods to be used thereon; and

(c) where it is reasonably necessary that any such goods should be constructed or erected on the premises where they are to be used, any work carried out for the purpose of such construction or erection.

19.—(1) If any agreement is lawfully terminated or rescinded at the instance of the seller after he has been paid fifty per centum of the purchase price, the seller shall not, save with the written consent of the purchaser, be entitled to recover possession of the goods which are the subject-matter of such agreement, but the goods shall be sold by a person appointed on the application of the seller by a magistrate, who, in making the appointment, shall have regard to the information available to him as to the whereabouts of the goods and may give directions as to the advertisement and place, date and method of sale. Before making any appointment in terms of this subsection, the magistrate shall ascertain whether or not any negotiable instrument has been given or drawn by the purchaser in respect of any instalment or part of an instalment payable under the provisions of the agreement in question and, if any such instrument has been so given or drawn, the magistrate shall not appoint a person to sell the goods unless he is satisfied that—

Disposal of goods upon termination of agreement

(a) every such negotiable instrument has been cancelled or returned to the purchaser; or

(b) the seller has made arrangements to indemnify the purchaser against any liability on the part of the purchaser in respect of such instrument which may be in excess of the amount outstanding under the agreement after the disposal of the proceeds of the sale of the goods in terms of this section.

(2) The seller shall give notice of such appointment to the purchaser by handing it to him or sending it to him by registered post at his last known address.

(3) If the purchaser fails within fourteen days of such notice to deliver the goods to the person so appointed, the seller shall be entitled to recover possession of the goods, and this section shall not apply in relation to such goods.

(4) After the sale, the person selling the goods shall, after deducting his reasonable costs, pay to the seller the purchase price and all other moneys payable in terms of the agreement, less the total amount of any payments actually made thereunder, and shall pay over the balance of the proceeds of the sale to the purchaser.

(5) In the event of the net proceeds of the sale being insufficient to discharge the amount outstanding under the agreement, the seller may recover such amount from the purchaser.

(6) If any dispute arises as to the amount payable to the purchaser or the seller, the person selling such goods shall deposit the amount in dispute with a magistrate, who shall retain such amount pending action brought by either party to the agreement against the other, and the person who sold the goods shall be discharged from any further liability in the matter.

(7) Where a hire-purchase agreement has been terminated under this section, the purchaser shall, if he has failed to take reasonable care of the goods, be liable to pay damages for the failure.

**Powers of
the court**

20.—(1) In any action by the seller for the return of any goods to which any agreement relates, the court may, without prejudice to any other power and subject to sections 17 and 19—

(a) make an order for the return of the goods to the seller, subject to repayment by the seller of so much of the purchase price received by him as the court may deem just;

(b) make an order for the return of a part of the goods to the seller and—

(i) in the case of an instalment sale agreement, for the retention by the purchaser of the remainder of the goods; or

(ii) in the case of a hire-purchase agreement, for the transfer to the purchaser of the seller's title to the remainder of the goods;

(c) make an order—

(i) in the case of an instalment sale agreement, for the retention by the purchaser of part of the goods; or

(ii) in the case of a hire-purchase agreement, for the transfer to the purchaser of the seller's title to part of the goods,

and an order referred to in paragraph (e) in respect of the remainder of the goods;

(d) make an order referred to in paragraph (b), subject to—

(i) repayment by the seller of so much of the purchase price received by him; or

(ii) payment by the purchaser of so much of the unpaid balance of the purchase price.

as the court may deem just; or

(e) make an order requiring the goods to be sold by public auction by a person appointed by the court, within a period stated in the order, or, if the parties so agree, by private treaty.

(2) No order shall be made in terms of subsection (1) (d) (ii) unless the purchaser satisfies the court that the order will be carried out forthwith.

(3) In making any order in terms of this section, the court may, if any negotiable instrument has been given or drawn by the purchaser in respect of any instalment or part of an instalment payable under the agreement in question, order that the seller shall—

(a) cancel such negotiable instrument or return it to the purchaser; or

(b) indemnify the purchaser against any liability on the part of the purchaser in respect of such negotiable instrument.

(4) Any order referred to in subsection (1) (e) shall state—

(a) the total amount found by the court to be payable under the agreement;

(b) the amount fixed by the court as damages for any failure by the purchaser to take reasonable care of the goods;

(c) the total amount of payments so found to have been made thereunder;

(d) the party by whom the costs incidental to the sale shall be borne; and

(e) any directions given by the court as to advertisement and the place, date and method of the sale of the goods;

and the court may, when making any such order, at the same time order the purchaser to pay to the seller the deficiency referred to in subsection (6), if any.

(5) If any goods are sold in pursuance of an order referred to in subsection (1) (e), the person appointed by the court or, in the case of a sale by private treaty, the seller shall, after deducting—

(a) any costs incidental to the sale awarded by the court against the purchaser;

(b) any other costs so awarded; and

(c) the total amount stated in the order to be payable under the agreement, less the total amount of payments so stated to have been made thereunder,

pay over the balance of the proceeds of the sale to the purchaser. Any costs incidental to the sale which have been so awarded shall be a first charge upon the proceeds of the sale.

(6) If the net proceeds of the sale are insufficient to discharge the purchaser's liability in respect of any costs referred to in subsection (5) and his liability under the agreement, the seller may recover the deficiency from the purchaser.

(7) If damages have been awarded against the seller in the proceedings, the amount thereof or so much of such amount as the court may determine shall be deemed to have been paid by the purchaser in respect of the purchase price of the goods, and thereupon the damages shall be remitted either in whole or in part.

(8) On the institution of an action referred to in subsection (1) and pending the conclusion of the proceedings, the court shall, in addition to any other powers, have power, upon the application of the seller, to make such orders as the court may deem just for the purpose of protecting the goods from damage or depreciation, including orders restricting or prohibiting the use of the goods or giving directions as to their custody.

Waiver of rights by purchaser

21. No waiver by any purchaser of any right under this Act shall be of any force or effect.

Agreements binding on liquidator or trustee of seller

22. If a company is being wound up under any enactment in force in Malawi relating to companies or a person is adjudged or otherwise declared bankrupt under any enactment in force in Malawi relating to bankruptcy, any agreement entered into by such company or person as seller shall remain of full force and effect and shall be binding on the liquidator of such company or the trustee concerned, as the case may be :

Provided that nothing in this section shall affect the powers of the court to set aside any disposition of property made by way of undue preference.

23.—(1) In this section “trustee’s expenses”, in relation to goods which are the subject of an agreement entered into by a purchaser referred to in subsection (2) (a) means—

Bankruptcy
of
purchaser

- (a) the trustee’s remuneration in respect of the goods; and
- (b) the costs incurred by the trustee in conserving the goods; and
- (c) all other expenses of liquidation or administration incurred by the trustee in connexion with the goods.

(2) (a) If, in terms of an enactment in force in Malawi relating to bankruptcy, a purchaser is adjudged or otherwise declared bankrupt, the goods which are the subject of the agreement entered into by the purchaser shall, notwithstanding the terms of the agreement, vest in his trustee:

Provided that if the goods are used by the trustee on behalf of the purchaser’s estate, the trustee shall pay to the seller, as a cost in the administration of the estate, each instalment in respect of the purchase price which becomes due under the agreement during the period the goods are so used.

(b) The trustee of a purchaser referred to in paragraph (a) shall pay to the seller out of the proceeds of the sale of the goods referred to in that paragraph, reduced by the amount of the trustee’s expenses and the cost of realizing the goods, so far as there are proceeds available, an amount equal to the balance of the unpaid purchase price together with all other sums due to the seller under the agreement.

(c) If the full amount due to the seller in terms of paragraph (b) is unpaid by reason of the insufficiency of the proceeds of the sale of the goods, the seller shall, unless he relies for the satisfaction of the payment due to him solely on the proceeds of the sale of the goods, have a claim in the bankruptcy in respect of the balance.

(3) (a) The trustee of a purchaser referred to in subsection (2) (a) shall give not less than twenty-eight days notice in writing to the seller of the date on which he proposes to sell the goods which are the subject of the agreement.

(b) The trustee shall, if required in writing by the seller not less than seven days before the date referred to in paragraph (a), deliver the goods to the seller on the pre-payment by the seller of the cost of delivery and the trustee’s expenses.

(c) On the delivery of the goods to the seller, the seller shall thereupon have, in respect of the goods, a lien or right of retention with all the rights of a creditor holding a security under any law in force in Malawi.

(d) In proving a claim in bankruptcy a seller referred to in this subsection shall state in his affidavit or other document of claim the nature, particulars and value of his security.

(4) If the purchaser is a company which is in course of being wound up under an enactment in force in Malaŵi providing for the winding up of companies, subsections (2) and (3) shall apply as if the company were an individual adjudged or otherwise declared bankrupt and the liquidator of the company were the trustee of the purchaser.

(5) This section shall, notwithstanding section 1(2), apply in relation to an agreement under which the Government is the seller.

PART II

FINANCIAL PROVISIONS RELATING TO AGREEMENTS

Initial pay-
ments and
periods for
repayment

24.—(1) Every agreement under which the purchase price exceeds ten pounds shall provide—

(a) that payment shall be made in money (which for this purpose shall include a cheque) or in goods before any of the goods which are the subject of the agreement are delivered to the purchaser of a sum equal at least to that percentage of the cash price which is specified in the second column of the Schedule for the particular class of goods sold under the agreement; and

(b) that the period within which the full purchase price is payable shall not exceed the period specified in the third column of the Schedule for the particular class of goods sold under the agreement.

(2) The period referred to in subsection (1) (b) shall be reckoned from the date of the payment made in terms of paragraph (a) of that subsection:

Provided that if the agreement provides for the delivery of the goods which are the subject of the agreement from a place outside Malaŵi to a purchaser who at the time of delivery is outside Malaŵi the period shall, at the election of the seller, be reckoned from the date on which the goods are first imported into Malaŵi.

(3) If an agreement does not comply with subsection (1) or payment has not been made in terms of paragraph (a) of that subsection—

(a) the goods which are the subject of the agreement shall be deemed to have been sold to the purchaser—

(i) without any reservation as to the ownership of the goods or, as the case may be, without any stipulation as to the seller's right to the return of the goods; and

(ii) on credit at a price, payable in the same manner as that stipulated in the agreement, which is twenty-five per centum less than the purchase price;
and

(b) the seller shall not be entitled to enforce any contract of suretyship, indemnity or guarantee relating to the agreement except, in the case of an agreement which has been the subject of a cession or assignment, against a surety or guarantor who was the original seller under the agreement.

(4) No payment in cash shall, to the extent to which it is made out of moneys borrowed directly or indirectly from or through the seller or any person whose business or part of whose business it is by arrangement with the seller to advance money for payments under agreements with the seller, and no payment in goods shall, to the extent to which the amount thereof exceeds the normal market price for the goods, be deemed to be a payment for the purposes of subsection (1) (a).

(5) The Schedule may be varied by the Minister by notice published in the *Gazette* so, however, that no such variation shall affect the operation of any agreement entered into prior to the date of publication of such notice.

25.—(1) A seller shall have no right to institute a suit or action for—

Time limit
for certain
actions

(a) the return of goods to which an agreement relates; or

(b) the recovery of a portion of the purchase price due under an agreement,

after the lapse of the period prescribed by subsection (2).

(2) The period after the lapse of which no suit or action referred to in subsection (1) may be brought shall be the period, fixed by or under subsection (3), which was so fixed at the time the right to institute the suit or action first accrued.

(3) The period to which subsection (2) relates shall be—

(a) such number of days, not less than one hundred and fifty, as the Minister may by notice published in the *Gazette* fix; or

(b) if no period is fixed in terms of paragraph (a), three hundred and sixty-five days.

commencing on the day following the last day of the appropriate period within which this Act requires the full purchase price to be paid.

(4) In determining for the purposes of paragraph (a) or, as the case may be, subsection (3) (b) the number of days which have elapsed there shall not be taken into account any period during which—

(a) the purchaser was absent from Malawi; or

(b) service of summons issued by the seller for the return of any goods or the recovery of any portion of the purchase price could not be effected owing to the whereabouts of the purchaser being unknown or owing to the purchaser wilfully evading service or owing to his absence from Malawi; or

(c) the seller was a minor or was of unsound mind; or

(d) the obligation of the purchaser to pay instalments was suspended pursuant to this Act or any other relevant written law.

(5) This section shall not apply if at any time before the end of the period of limitation prescribed by subsection (2) the seller or purchaser—

(a) is adjudged or otherwise declared bankrupt; or

(b) makes an assignment to or composition with his creditors; or

(c) being a company, is wound up or placed under judicial management; or

(d) dies.

Control of
purchase
price

26.—(1) The Minister shall, for all classes of agreement and goods, by notice published in the *Gazette*, fix the maximum amount, to be determined by reference to the rate per centum per annum referred to in subsection (2), by which the purchase price under an agreement may exceed the cash price.

(2) The rate per centum per annum to which subsection (1) relates shall be a rate per centum per annum, specified by the Minister in the notice referred to in that subsection, of the balance of the cash price remaining unpaid before the due date of each instalment.

(3) The Minister may, in fixing the maximum amount referred to in subsection (1), make different provision in respect of different classes of agreements and different classes of goods.

(4) A provision in an agreement shall be of no effect in so far as it provides for the payment of a purchase price exceeding the cash price by more than the appropriate amount fixed in terms of

subsection (1) at the date of the agreement and the amount of each instalment payable under an agreement containing such a provision shall be decreased accordingly.

PART III

MISCELLANEOUS

27. The Minister may, by notice published in the *Gazette*, order that any agreement or class of agreements entered into by anybody corporate established directly by any law shall be exempted from any of the provisions of this Act. Exemptions

*28. Any agreement made before the 12th day of February, 1964, shall continue to be subject to the legislation to which it was subject immediately prior to such date (notwithstanding that such legislation may have been modified or adapted for use in Malawi) and, for that purpose, such legislation shall be deemed to remain in force. Saving

SCHEDULE

s. 24

INITIAL PAYMENTS AND PERIODS FOR PAYMENT

<i>Class of Goods</i>	<i>Percentage of cash to be paid before goods are delivered</i>	<i>Period within which full purchase price is payable</i>
1. Accounting, adding, calculating and cash register machines; air-conditioning units; auto-cycles; boats; bicycles; caravans (non-motorized); commercial, industrial and domestic refrigeration appliances and equipment; duplicating machines; floor polishers; furniture geysers; invalid tricycles; lawn mowers; marine engines (including outboard motors); motor cycles; <u>motor cycle combinations</u> ; <u>motor scooters</u> ; pianos; photographic equipment; radios; radiograms; <u>sewing machines</u> ; <u>stoves</u> ; <u>tape-recorders</u> ; television sets; television-radiogram sets; typewriters; vacuum cleaners; washing machines.	twenty per centum	twenty-four months

*The Hire-Purchase Amendment Act, 1959 (14 of 1959(F)) provided (in section 17) that an agreement entered into before the date of commencement of that Act (28th August, 1959) was to continue to be subject to the principal Act as in force before that date.

LAWS OF MALAWI

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Cap. 48:05

Hire-Purchase

	<i>Percentage of cash to be paid before goods are delivered</i>	<i>Period within which full purchase price is payable</i>
2. Others.	thirty-three and one- third per centum	twenty-four months

SUBSIDIARY LEGISLATION

HIRE-PURCHASE (FINANCE CHARGES) NOTICE

G.N.
437/1961(F)
92/1964(N)*under s. 26*

1. This notice may be cited as the Hire-Purchase (Finance Charges) Notice. Citation

2. For all classes of agreement the purchase price shall not exceed the cash price by more than an amount which together with the accountancy costs, credit control and collection expenses and all other administrative costs connected with the agreement, other than the sums excluded from the purchase price in terms of section 2 (1) of the Act— Maximum excess of purchase price over cash price

(a) in respect of new goods, is an amount calculated at the rate of 15.69 per centum per annum of the balance of the cash price remaining unpaid before the due date of each instalment; and

(b) in respect of used goods, is an amount calculated at the rate of 17.54 per centum per annum of the balance of the cash price remaining unpaid before the due date of each instalment.

EXPLANATORY NOTE

(This note is not part of the notice, but is intended to indicate its general purport.)

The effect of the variation set out in the notice is to increase the maximum amount by which the purchase price of second-hand goods, purchased under a hire-purchase agreement, may exceed the cash price, to an amount calculated at the rate of 17.54 per centum per annum of the balance outstanding before the date of payment of each instalment.

Where payment, after the first instalment, is to be made in equal instalments the finance charge per £100 may be calculated by applying the following formula:—

(a) in the case of new goods—

$$F = \frac{15.69 \times (n + p)}{24}$$

LAWS OF MALAWI

24

Cap. 48:05

Hire-Purchase

[Subsidiary]

Hire-Purchase (Finance Charges) Notice

(b) in the case of second-hand goods—

$$F = \frac{17.54 \times (n + p)}{24}$$

where

F = finance charge

n = number of months in which the full purchase price is payable

p = period, in months, between each instalment.

CHAPTER 48:03

BILLS OF SALE

ARRANGEMENT OF SECTIONS

SECTION

1. Short title
2. Interpretation
3. Application of Act
4. Certain instruments giving power of distress to be subject to this Act
5. Fixtures or growing crops not to be deemed separately assigned when the land passes by the same instrument
6. Avoidance of certain duplicate bills of sale
7. Bill of sale to be void unless attested and registered
8. Mode of attesting and registering bills of sale
9. Renewal of registration
10. Bill of sale to have schedule of property attached
11. Bill of sale not to affect after-acquired property
12. Exception as to certain things
13. Limitation of causes of seizure
14. Form of bill of sale
15. Avoidance of bill of sale under £30
16. Rules as to situation and sale of chattels
17. Bill of sale not to protect chattels against rates, duties and taxes
18. Form of register
19. Rectification of register
20. Entry of satisfaction
21. Right of search and to have copies
22. Time of registration
23. Exclusion of certain debentures
24. Affidavits
25. Rules, fees
26. Savings

SCHEDULE

An Act to provide for Bills of Sale

29 of 1967

[6TH NOVEMBER, 1967]

1. This Act may be cited as the Bills of Sale Act. Short title

- 2.—(1) In this Act, unless the context otherwise requires— Interpreta-
tion
 "bill of sale" includes bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods

L.R.O. 1/1968

with receipt thereto attached, or receipts for purchase moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities or licences to take possession of personal chattels as security for any debt, and also any agreement whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, is conferred, but shall not include the following documents, that is to say—

(a) assignments for the benefit of the creditors of the person making or giving them, marriage settlements, transfers or assignments of any ship or vessel or any share thereof, transfers of goods, in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts or at sea, bills of lading, warehousekeepers' certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented;

(b) an instrument charging or creating any security on, or declaring trusts of, imported goods, given or executed at any time prior to their deposit in a warehouse, factory or store, or to their being re-shipped or re-railed for export, or delivered to a purchaser not being the person giving or executing that instrument; or

(c) for the purposes of sections 7, 8(1), 10 to 17 inclusive and 21, bills of sale or other instruments hereinbefore mentioned which may be given otherwise than by way of security for the payment of money;

“crops” means coffee berries, tea leaves, sisal leaves, sugar cane, tung nuts, timber, bark, cotton, tobacco, hemp, hops, wheat, maize, barley, oats and grass (whether for hay or for grain), and all cereal and root crops, fruit, nuts and all other crops grown above or below the ground;

“executed” means signed by the grantor or his attorney;

“factory” or “workshop” means any premises on which any manual labour is exercised by way of trade or for purposes of gain in or incidental to the making, altering, repairing, ornamenting, assembling, finishing or adapting for sale of any article or part of any article;

“personal chattels” means goods, furniture and other articles capable of complete transfer by delivery, and, when separately assigned or charged, fixtures and growing crops, but shall not include—

(a) chattel interests in real estate;

(b) fixtures, except trade machinery as hereinafter defined, when assigned or transferred together with a freehold, registered or leasehold interest in any land or building to which they are affixed;

(c) growing crops when assigned together with any interest in the land on which they grow;

(d) shares or interests in the stock, funds or securities of any government, or in the capital or property of incorporated or joint stock companies;

(e) things in action;

(f) any stock or produce upon any farm or land which, by virtue of any covenant or agreement or of the custom of the country, ought not to be removed from any farm where they are at the time of making or giving of the bill of sale;

“Registrar” means the Registrar General or the Deputy Registrar General;

“stock” includes any sheep, goats, cattle, horses, pigs, poultry, and any other living animals;

“trade machinery” means the machinery used in or attached to any factory or workshop, and machinery and plant used in connexion with the production, preparation or manufacture of agricultural products, but shall not include—

(a) the fixed motive powers, such as the waterwheels and steam and other engines and the steam boilers, donkey engines and other fixed appurtenances of the said motive powers;

(b) the fixed power machinery (such as the shafts, wheels, drums and their fixed appurtenances) for transmitting the action of the motive powers to the other machinery fixed and loose; or

(c) the pipes for steam, gas and water.

(2) Nothing in subsection (1) (b) shall affect the operation of section 40 of the Bankruptcy Act in respect of goods comprised in any instrument in this section described if those goods would otherwise be “goods” within the meaning of section (40) (iii) of the said Bankruptcy Act. Cap. 11:01

(3) Personal chattels shall be deemed to be in the “apparent possession” of the person making or giving a bill of sale, so long as they remain or are in or upon any house, mill, warehouse, building, works, yard, land or other premises occupied by him, or are used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof has been taken by or given to any other person.

(4) Trade machinery as defined in subsection (1) shall, for the purposes of this Act, be deemed to be personal chattels and any disposition of trade machinery by the owner thereof which would be a bill of sale in respect of any other personal chattels shall be deemed to be a bill of sale within the meaning of this Act, but any machinery and effects excluded from the definition of trade machinery shall not be deemed to be personal chattels within the meaning of this Act.

Application
of Act

3. This Act shall apply to every bill of sale (whether or not the same is absolute or subject to any trust) whereby the holder or grantee has power, either with or without notice, and either immediately or at any future time, to seize or take possession of any personal chattels comprised in or made subject to such bill of sale.

Certain in-
struments
giving power
of distress to
be subject to
this Act

4. Every attornment, instrument or agreement, not being a mining lease, whereby a power of distress is given or agreed to be given by any person to any other person by way of security for any present, future or contingent debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance or otherwise for the purpose of such security only, shall be deemed to be a bill of sale, within the meaning of this Act, of any personal chattels which may be seized or taken under such power of distress:

Provided that nothing in this section shall extend to any mortgage of any estate or interest in any land, tenement or hereditament which the mortgagee, being in possession, has demised to the mortgagor as his tenant at a fair and reasonable rent.

Fixtures or
growing
crops not to
be deemed
separately
assigned
when the
land passes
by the same
instrument

5.—(1) No fixtures or growing crops shall be deemed under this Act to be separately assigned or charged by reason only that they are assigned by separate words, or that power is given to sever them from the land or building to which they are affixed, or from the land on which they grow, without otherwise taking possession of or dealing with the land or building, or land, if by the same instrument any freehold, registered or leasehold interest in the land or building to which those fixtures are affixed, or in the land on which those crops grow, is also conveyed, transferred or assigned to the same persons.

(2) The same rule of construction shall be applied to all deeds or instruments, including fixtures or growing crops, executed before the commencement of this Act and then subsisting and in force, in all questions arising under any bankruptcy, liquidation, assignment for the benefit of creditors or execution of any process of a court, which takes place or is issued after the commencement of this Act.

6. Where a subsequent bill of sale is executed within or on the expiration of fourteen clear days after the execution of a prior unregistered bill of sale, and comprises all or any part of the personal chattels comprised in such prior bill of sale, then, if such subsequent bill of sale is given as a security for the same debt as is secured by the prior bill of sale or for any part of such debt, it shall, to the extent to which it is a security for the same debt or part thereof and so far as respects the personal chattels or part thereof comprised in the prior bill, be absolutely void, unless it is proved, to the satisfaction of the court having cognizance of the case, that the subsequent bill of sale was *bona fide* given for the purpose of correcting some material error in the prior bill of sale, and not for the purposes of evading this Act.

Avoidance
of certain
duplicate
bills of sale

7.—(1) Every bill of sale shall be duly attested, and shall be registered within fourteen clear days after the execution thereof, or if it is executed in any place out of Malawi then within fourteen clear days after the time at which it would in the ordinary course of post arrive in Malawi if posted immediately after the execution thereof; and shall truly set forth the consideration for which it was given; otherwise such bill of sale shall be void in respect of the personal chattels comprised therein.

Bills of Sale
to be void
unless
attested and
registered

8.—(1) A bill of sale shall be attested and registered in the following manner—

Mode of
attesting and
registering
bills of sale

(a) such bill, with every schedule or inventory thereto annexed or therein referred to, and also a true copy of such bill and of every such schedule or inventory and of every attestation of the execution of such bill of sale, together with an affidavit of the time of such bill of sale being made or given, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving the same (or in case the same is made or given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process issued), and of every attesting witness to such bill of sale, shall be presented to and the said copy and affidavit shall be filed with the Registrar within the period prescribed under section 7;

(b) if the bill of sale is made or given subject to any defeasance or condition, or declaration of trust not contained in the body thereof, such defeasance, condition, or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy filed under this Act therewith and as part thereof, otherwise the registration shall be void;

(c) the execution by the grantor of every Bill of Sale shall be

attested by a commissioner for oaths, not being the legal practitioner of the grantee, who shall personally explain to the grantor the effect thereof, and attestation shall state that before the execution of the Bill of Sale the effect thereof was so explained as aforesaid.

(2) In case two or more bills of sale are given, comprising in whole or in part any of the same chattels, they shall have priority in the order of the time and date of their registration respectively as regards such chattels.

(3) A transfer or assignment of a registered bill of sale need not be registered.

Renewal of registration

9.—(1) The registration of a bill of sale must be renewed once at least every five years, and if a period of five years elapses from the registration or renewed registration of a bill of sale without a renewal or further renewal, as the case may be, the bill of sale shall become void.

(2) The renewal of a registration shall be effected by filing with the Registrar an affidavit stating the date of the bill of sale and of the last registration thereof, and the names, residences and occupations of the parties thereto as stated therein, and that the bill of sale is still a subsisting security.

(3) Every such affidavit shall be in Form No. 1 in the Schedule.

(4) A renewal of registration shall not become necessary by reason only of a transfer or assignment of a bill of sale.

Bills of sale to have schedule of property attached

10. Every bill of sale shall have annexed thereto or written thereunder a schedule containing an inventory of the personal chattels comprised in the bill of sale; and such bill of sale, save as hereinafter mentioned, shall have effect only in respect of the personal chattels specifically described in the said schedule, and shall be void, except as against the grantor, in respect of any personal chattels not so specifically described.

Bill of Sale not to affect acquired after property

11. Save as hereinafter in this Act mentioned, a bill of sale shall be void, except as against the grantor, in respect of any personal chattels specifically described in the schedule thereto of which the grantor was not the true owner at the time of the execution of the bill of sale.

Exception as to certain things

12. Nothing hereinbefore in this Act contained shall render a bill of sale void in respect of any of the following things—

(a) any growing crops separately assigned or charged where such crops were actually growing at the time when the bill of sale was executed; and

(b) any fixtures separately assigned or charged and any plant or trade machinery where such fixtures, plant, or trade machinery are or is used in, attached to, or brought upon any land, farm, factory, workshop, shop, house, warehouse, or other place in substitution for any of the like fixtures, plant, or trade machinery specifically described in the schedule to such bill of sale.

13. Personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee for any other than the following causes—

Limitation
of causes of
seizure

(a) if the grantor makes default in payment of the sum or sums of money thereby secured at the time therein provided for payment or in the performance of any covenant or agreement contained in the bill of sale and necessary for maintaining the security; or

(b) if the grantor becomes a bankrupt or suffers the said goods or any of them to be distrained for rent, rates, or taxes; or

(c) if the grantor fraudulently either removes or suffers the said goods or any of them to be removed from the premises; or

(d) if the grantor does not, without reasonable excuse, upon demand in writing by the grantee, produce to him his last receipts for rent, rates, and taxes; or

(e) if execution has been levied against the goods of the grantor under any judgment at law:

Provided that the grantor may, within five clear days from the seizure or taking possession of any chattels on account of any of the abovementioned causes, apply to the High Court and the Court may, if satisfied that, by payment of money or otherwise, the said cause of seizure no longer exists, restrain the grantee from removing or selling the said chattels or may make such other order as may seem just.

14. A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with Form No. 2 in the Schedule.

Form of Bill
of sale

15. Every bill of sale made or given in consideration of any sum under thirty pounds shall be void.

Avoidance
of bill of
sale under
£30

16. All personal chattels seized or of which possession is taken under or by virtue of any bill of sale shall remain on the premises where they were so seized or so taken possession of, and shall not be removed or sold until after the expiration of five clear days from the day they were so seized or so taken possession of.

Rules as to
situation and
sale of
chattels

Bill of sale
not to
protect
chattels
against
rates, duties
and taxes

17. A bill of sale to which this Act applies shall be no protection in respect of personal chattels included in such bill of sale which, but for such bill of sale, would have been liable to distress under a warrant or order for the recovery of rates, duties and taxes imposed by law.

Form of
register

18.—(1) The Registrar shall keep a book (in this act referred to as "the register") for the purposes of this Act, and shall, on the filing of any bill of sale or copy under this Act, enter therein the name, residence and occupation of the person by whom the bill was made or given, or, in case the same was made or given by any person under or in the execution of process, then the name, residence and occupation of the person against whom such process was issued, and also the name of the person to whom or in whose favour the bill was given, and any other particulars prescribed under this Act, and shall number all such bills registered in each year consecutively, according to the respective dates and times of their registration.

(2) On the registration of any affidavit of renewal, the like entry shall be made, with the addition of the date and number of the last previous entry relating to the same bill, and the bill of sale or copy originally filed shall be thereupon marked with the number affixed to such affidavit of renewal.

(3) The Registrar shall also keep an index of the names of the grantors of registered bills of sale with reference to entries in the register of the bills of sale given by each grantor.

(4) The index referred to in subsection (3) shall be arranged in divisions corresponding with the letters of the alphabet, so that all grantors whose surnames begin with the same letter (and no others) shall be comprised in one division, but the arrangement within each such division need not be alphabetical.

Rectification
of register

19. The High Court on being satisfied that the omission to register a bill of sale or an affidavit of renewal thereof within the time prescribed by this Act, or the omission or mis-statement of the name, residence or occupation of any person, was accidental or due to inadvertence, may order such omission or mis-statement to be rectified by the insertion in the register of the true name, residence, or occupation, or by extending the time for such registration, on such terms and conditions, if any, as to security, notice by advertisement or otherwise, or as to any other matter, as it thinks fit to direct.

Entry of
satisfaction

20. Subject to and in accordance with any rules made under this Act, the Registrar may order a memorandum of satisfaction to be written upon any registered copy of a bill of sale, upon the prescribed evidence being given that the debt, if any, for which such bill of sale was made or given has been satisfied or discharged.

21.—(1) Any person shall be entitled to have an office copy or extract of any registered bill of sale and affidavit of execution filed therewith, or copy thereof, and of any affidavit filed therewith, or registered affidavit of renewal, on paying for the same at the like rate as for office copies of judgments of the High Court.

Right of search and to have copies

(2) Any copy of a registered bill of sale, and affidavit purporting to be an office copy thereof, shall, in all courts and before all arbitrators or other persons, be admitted as *prima facie* evidence thereof and of the fact and date of registration as shown thereon.

(3) Any person shall be entitled at all reasonable times to search the register, on payment of such fee as may be prescribed, and subject to such rules as may be prescribed, and shall be entitled at all reasonable times to inspect, examine, and make extracts from any and every registered bill of sale without being required to make a written application, or to specify any particulars in reference thereto, upon payment of one shilling for each bill of sale inspected:

Provided that the said extracts shall be limited to the dates of execution, registration, renewal of registration, and satisfaction, to the names, addresses, and occupations of the parties, to the amount of the consideration, and to any further prescribed particulars.

22. When the time for registering a bill of sale expires on a Sunday or other day on which the offices of the Registrar are closed, such registration shall be valid if made on the next following day on which the offices are open.

Time of registration

23. Nothing in this Act shall apply to any debenture issued or charge created by a body incorporated by or under any law, and secured upon the capital, stock, goods, chattels, effects or other assets of such incorporated body, which debenture or charge is required to be registered under any written law relating to incorporated bodies.

Exclusion of certain debentures

24. Every affidavit required for the purposes of this Act may be made before any commissioner for oaths or the Registrar. Whoever wilfully makes or uses any false affidavit for the purposes of this Act shall be deemed guilty of perjury, and shall be liable to the penalties therefor.

Affidavits

25. The High Court may make rules for the better carrying into effect of the purposes of this Act, including the prescribing of fees payable in respect of matters or things done or which may be done under this Act.

Rules, fees

Savings

7 of 1916
21 of 1965
41 & 42 Vict.
c. 31
45 & 46 Vict.
c. 43

26. Notwithstanding the repeal of the Bills of Sale Registration Ordinance and the Bills of Sale (Amendment) Act, 1965, and, in so far as they had effect in Malawi, the Bills of Sale Act, 1878, and the Bills of Sale Act, 1882, of the United Kingdom, nothing in this Act shall affect any bill of sale executed before the commencement of this Act, and in respect of any such bill of sale any renewal of the registration of a bill of sale executed before the commencement of this Act, and registered under the repealed Ordinance and Acts, shall be made under this Act in the same manner as the renewal of a registration made under this Act.

s. 9

SCHEDULE

FORM NO. 1

Affidavit of Renewal

I..... of do swear that a bill of sale bearing date the..... day of 19..... and made between and which said bill of sale (or a copy of which said bill of sale), was registered on the day of 19..... is still a subsisting security.

Sworn this..... day of 19.....

s. 14

FORM NO. 2

Bill of Sale

This bill of sale made the day of 19....., between of of the one part, and of of the other part, witnesseth that, in consideration of the sum of £....., now paid to by the receipt of which sum the said..... hereby acknowledges (or whatever else the consideration may be), he, the said..... doth hereby assign unto his executors, administrators, and assigns, all and singular the several chattels and things specifically described in the schedule hereto annexed by way of security for the payment of the sum of £..... and interest thereon at the rate of..... per cent. per annum. And the said..... doth further agree and declare that he will duly pay to the said..... the principal sum aforesaid, together with the interest then due, by..... payments of £..... on the day of 19..... And the said doth also agree with the said..... that he will (here insert terms as to insurance, payment of rent or otherwise, which the parties may agree to for the maintenance or defeasance of the security):

CHAPTER 50:05
AUTOMOTIVE TRADES REGISTRATION AND FAIR
PRACTICES

ARRANGEMENT OF SECTIONS

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CHAPTER 50:05

AUTOMOTIVE TRADES REGISTRATION AND FAIR PRACTICES

19 of 1971
51 of 1971
G.N.
151/1972

An Act to provide for the registration of persons engaged for profit or reward in the business of the assembly, sale or repair of motor vehicles or internal combustion or other motor vehicle engines or of any electrical or mechanical parts or accessories of such vehicles or engines or engaged in businesses incidental to the maintenance or repair thereof and to provide for the protection of the general public from unfair or unconscionable practices by such persons and for matters related or incidental to any of the purposes aforesaid

[30TH SEPTEMBER, 1972]

PART I

PRELIMINARY

Short title,
commence-
ment and
application

1. This Act may be cited as the Automotive Trades Registration and Fair Practices Act, and shall come into operation on such date as the Minister may appoint by notice published in the *Gazette*:

Provided that, by one notice or by separate notices, different dates may be appointed for the coming into operation of this Act in relation to different specified Regions, local authority areas, Districts or places in Malawi.

Interpreta-
tion

2. In this Act unless the context otherwise requires—

“annual renewal of registration meeting” means that meeting of the Board, held annually, at which renewals of registration are considered pursuant to section 21;

“automotive trade” means the commercial garage business operating throughout Malawi;

“Board” means the Automotive Trades Registration Board established by section 3;

*For parts of Malawi in relation to which Act is in operation see subordinate legislation at page 22 of this Chapter.

- “Chairman” means the Chairman of the Board, appointed and designated pursuant to section 4 (2) (a);
- “commercial garage” means any garage operated as a business for profit or reward;
- “date of commencement” means, in relation to any Region, Local Government Area, District or place in Malawi, the date of the coming into operation of this Act, in such Region, Area, District or place, by notice pursuant to section 1;
- “decision of the Minister” means any decision in respect of registration under this Act, made by the Minister under section 18, 24, 27 or 29;
- “garage” means any premises used for the purpose of the assembly, repair or renovation of motor vehicles or of internal combustion or other engines designed to be the propelling force of such vehicles; or used for the purpose of the assembly, repair or renovation of mechanical or electrical components, parts or accessories of such vehicles or engines; or used for the assembly, repair or renovation of motor vehicle bodies, or for the breaking-up of old or damaged motor vehicles for scrap or salvage; or for the sale of new or second-hand motor vehicles; or for the re-treading or re-capping or other such renovation of motor vehicle tyres; and includes premises used for the manufacture, assembly, repair or renovation of self-propelled farm machinery; but does not include premises used solely as a petrol service station;
- “investigation” means an investigation by the Board into the business conduct or practices of a registered proprietor pursuant to Part IV;
- “motor vehicle” means any self-propelled vehicle whose propulsive force is provided by a built-in internal combustion or other engine, and includes a motor car, motor cycle and self-propelled farm and road machinery but shall not include any ship or aircraft;
- “petrol service station” means any premises used for the purpose of the sale of petrol and oil for delivery on such premises directly into motor vehicles for immediate use therein; for the sale of petrol or oil in containers and quantities of not more than five gallons in respect of each sale; for the sale and installation of tyres for motor vehicles; for tyre repairs; and for the sale or replacement and the installation of electric bulbs, windscreen wipers and other minor motor vehicle accessories;
- “premises” means any land and includes any buildings and trade fixtures upon such land;
- “Public Service” bears the meaning ascribed to the term “public service” by section 98 of the Constitution;

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- (2) The Board shall consist of—
- (a) one member designated as Chairman by the Minister;
 - (b) one member designated as Vice-Chairman by the Minister;
 - (c) the Chairman of the Price Control Board established pursuant to regulations made under the Control of Goods Act; Cap. 18:08
 - (d) one member representing the Malaŵi Congress Party;
 - (e) the Director of Plant and Vehicles, *ex officio*;
 - (f) the Road Traffic Commissioner, *ex officio*.

(3) The Minister may appoint to the Board such additional Members as he deems essential to the Board in the exercise of its powers and functions.

- (4) No person shall be appointed to the Board who—
- (a) is an undischarged bankrupt;
 - (b) has, within three years last past, been convicted of an offence under this Act;
 - (c) has, within three years last past, been convicted of an offence under any written law and been sentenced therefor to imprisonment for a term of six months or more without the option of a fine;
 - (d) has, within five years last past, been convicted of an offence involving fraud or dishonesty.

(5) Members of the Board shall not, by virtue only of their appointments to the Board, be deemed to be officers in the Public Service.

(6) The names of all members of the Board as first constituted and every change in membership thereof shall be published in the *Gazette*.

5.—(1) The Board may, with the consent of the Minister, co-opt any one or more persons to attend any particular meeting or series of meetings for the purpose of assisting or advising the Board in respect of any particular matter under consideration by the Board. Board may co-opt persons to attend meetings

(2) Any person co-opted pursuant to subsection (1) may take part in the deliberations of the Board at any meeting he so attends, but shall have no voting powers.

6.—(1) There shall be a Secretary to the Board who shall be an officer in the Public Service and shall be designated as Secretary by the Minister. Secretary/Registrar

(2) The Secretary to the Board shall be the Registrar for all of the purposes of this Act.

7.—(1) Members of the Board, other than *ex officio* members, shall, subject to the provisions of this section, hold office for such period, being not less than two years, as may be specified in their respective appointments. Tunure of office of Board members

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(2) *Ex officio* members of the Board shall hold office as such so long as they hold the public office whereby they are members of the Board pursuant to this Act.

(3) A retiring member shall be eligible for re-appointment.

(4) On the expiry of the period for which a member, other than an *ex officio* member, is appointed he shall continue to hold office until his successor has been appointed, but in no case shall such further period exceed three months.

(5) The office of a member other than an *ex officio* member shall be vacated—

(a) upon his death;

(b) if he is adjudged a bankrupt;

(c) if he is convicted of an offence under this Act;

(d) if he is convicted of an offence under any other written law and sentenced therefor to imprisonment for a term of six months or more without the option of a fine;

(e) if he is convicted of an offence involving fraud or dishonesty;

(f) if he is absent from three consecutive meetings of the Board without the permission of the Board;

(g) upon the expiry of one month's notice in writing of his intention to resign his said office given by him to the Minister;

(h) upon the expiry of one month's notice in writing terminating his appointment to such office given to him by the Minister;

(i) if he becomes mentally or physically incapable of performing his duties as a member of the Board;

(j) if, being registered as a registered proprietor under this Act, his registration has been cancelled on the direction of the Minister.

Remunera-
tion of
members of
the Board

8. Any member of the Board who is not an officer in the Public Service shall be paid such remuneration and allowances, if any, as the Minister may in his case fix.

Meetings of
the Board

9.—(1) The Board may meet at such places and times as the Chairman may determine or as he may be directed by the Minister and such meetings shall be convened by notice to the members given by the Chairman.

(2) In the absence of the Chairman from any meeting of the Board the Vice-Chairman shall preside, and in the absence of

both the Chairman and the Vice-Chairman from any such meeting the members present shall elect one of their number to preside at that meeting and the person so elected shall have all of the powers and shall perform all of the duties of the Chairman for that meeting.

(3) Save where otherwise provided by this Act, the Board shall conduct its proceedings in such manner as may be directed by the Minister or, in the absence of such direction, in such manner as the Board deems meet.

(4) Minutes of each meeting shall be kept by the Secretary and shall be confirmed at the succeeding meeting by the Chairman, or, in his absence, by the Vice-Chairman or member presiding, as the case may be.

(5) Three members of the Board shall form a quorum.

(6) At all meetings of the Board the person presiding shall have a deliberative vote and in the event of an equality of votes shall also have a casting vote.

10. No member of the Board shall be personally liable for any act or default of his, or of the Board, done in the exercise in good faith of the functions of the Board.

Non-
liability of
members of
the Board

11.—(1) If a member of the Board or his spouse, or any company of which he or she is a director or major shareholder, or any partner of such member or of his spouse has or acquires any pecuniary interest, direct or indirect, in any matter in which his private interests conflict with his duties as a member and which is the subject of consideration by the Board he shall, as soon as he becomes aware of such interest in such matter, disclose the facts relating thereto to the Board and the Minister.

Member to
declare
pecuniary
interests

(2) A member referred to in subsection (1) shall not take part in the consideration of, or vote on, any question before the Board which relates to the matter referred to in that subsection.

(3) For the purposes of this section, the expression "major shareholder" means any person who, at the relevant time, in his own right or by right of any other person, has the power to exercise or control not less than ten *per centum* of the voting rights in the relevant company, whether by reason of share holdings, debenture holdings, proxy or otherwise.

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B. Functions and Duties of the Board

12. The functions and duties of the Board shall be—

Functions
of the Board

(a) to advise the Minister on matters relating to—

(i) the maintenance and improvement of the services, facilities and workmanship offered to the general public by commercial garages within Malawi;

(ii) what minimum standards of workmanship and materials the proprietors of commercial garages should use and maintain in their operations in order to be registered under this Act or to retain such registration;

(iii) such other matters concerning the automotive trade in Malawi as the Board deems meet;

(iv) any question concerning the automotive trade submitted to the Board by the Minister for its opinion and advice thereon;

(b) to keep and maintain a register of commercial garage proprietors and commercial garages in Malawi pursuant to Part III;

(c) to hear complaints against commercial garage proprietors pursuant to Part IV and to make recommendations to the Minister thereon.

PART III

REGISTRATION OF COMMERCIAL GARAGE OWNERS AND COMMERCIAL GARAGES

Compulsory registration of garage owners and garages

13.—(1) After six months from the date of commencement, no person shall carry on the business of a commercial garage on any premises without being registered as a commercial garage proprietor (hereinafter called "the registered proprietor") in respect of such premises, nor shall such proprietor carry on such business on such premises without the said premises being registered as a commercial garage (hereinafter called a "registered garage") under this Act.

(2) Any person who, after six months from the date of commencement—

(a) carries on the business of a commercial garage without being registered as a registered proprietor; or

(b) carries on the business of a commercial garage on any premises without the said premises being registered as a registered garage,

shall be guilty of an offence and liable to a fine of K1,000 and to imprisonment for one year.

(3) Where a company or other body corporate is found guilty of an offence under subsection (2) there shall be imposed in lieu of the penalty provided by the said subsection, a penalty of K3,000.

(4) Subsection (2) (b) shall not apply to any registered proprietor carrying on business at the scene of any breakdown or accident for the purpose of dealing with such breakdown or accident.

14. The Registrar, under the direction of the Board, shall keep, in the prescribed form, a Register of Commercial Garage Proprietors and Commercial Garages (hereinafter called "the Register") for the purposes of this Act.

Register of proprietors and garages

15.—(1) An application for registration under this Act or for a renewal or transfer of such registration shall be made to the Board in the manner prescribed.

Application for registration

(2) Not less than two weeks before making his application to the Board under this section, the applicant shall cause notice, in the prescribed form, of his intention to apply for registration, renewal or transfer to be published in the *Gazette* and in one issue of a newspaper in general circulation in the area in which the relevant garage is located.

(3) Where an application is made in respect of a partnership firm, the partners shall nominate one member of the firm, who shall, upon the application being granted by the Minister, be registered as the proprietor in respect of the premises registered pursuant to such application.

(4) Every application for registration under this Act, or for renewal or transfer of such registration shall be accompanied with the appropriate prescribed fee.

(5) Any application for a transfer of registration under this Act may be made by the intended transferee or transferor and such application shall be accompanied with the current Certificate of Registration of the registered proprietor for purposes of cancellation upon the grant of the applied for transfer.

(6) Where any person carries on the business of a commercial garage in more than one premises a separate application shall be made by such person in respect of each separate premises in which such business is carried on.

16. Every applicant for registration, or for renewal of registration, under this Act, shall, at the time of his application, furnish to the Board a description in writing of the premises used or proposed to be used by him as a commercial garage, and shall, if so required by the Board, furnish a map or plan of such premises.

Applicant to furnish description of premises

17.—(1) As soon as is practicable after receiving an application under section 15 the Board shall consider the same in accordance with this section and report thereon in writing to the Minister—

Consideration by and report of the Board

(a) in the case of an application for a new registration, whether—

(i) the applicant is already registered under this Act in respect of other premises;

(ii) they consider the applicant a person suitable for registration;

(iii) they consider the premises, in respect of which the application is made, suitable for the intended uses thereof;

(iv) they consider the applicant reasonably capable of providing the service intended or of employing persons so capable;

(v) the applicant has previously been refused registration under this Act or whether any previous registration of the applicant hereunder has been cancelled by direction of the Minister and the date and cause of such cancellation;

(b) in the case of an application for renewal of an existing registration, whether—

(i) if the applicant has been registered in respect of the relevant premises during the entire past registration year, he has been the subject of any investigation under Part IV during the said period and the outcome of such investigation;

(ii) if the applicant has been first registered in respect of the premises, whether by way of new registration or transfer, during the past registration year, he has been the subject of any investigation under Part IV during the said period and the outcome of such investigation;

(iii) anything has been done to the premises during the past registration year, whether by way of alteration or reconstruction, to render them unsuitable for registration;

(c) in the case of a transfer of an existing registration, whether—

(i) the applicant is already registered in respect of other premises;

(ii) they consider the applicant reasonably capable of providing the service intended or of employing persons so capable;

(iii) the applicant has been refused registration under this Act or whether any previous registration of the applicant hereunder has been cancelled by direction of the Minister and the date and cause of such cancellation;

(iv) anything has been done to the premises during the past registration year, whether by way of alteration or reconstruction, to render them unsuitable for registration.

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(2) Each applicant shall be entitled to attend before the Board in person (or, if the applicant is a body corporate, by a senior director or executive of such body corporate) or to be represented thereat by a legal practitioner during the consideration of his application, and shall be entitled to be heard and to adduce evidence in respect of any matter relevant to such application. 51 of 1971

(3) The Board shall notify each applicant, by letter sent by ordinary post to the address given on the application, of the date, hour and place of consideration of his said application by the Board.

(4) Having considered the application and such other matters as were adduced thereon by the applicant, or deemed relevant by the Board, the Board shall, without undue delay, forward to the

Minister its report together with a copy of the application and such other documents in its possession as it deems relevant to the application.

(5) The applicant shall not be entitled to a copy, or to be informed of the contents, of any report made to the Minister by the Board pursuant to this section.

18.—(1) The Minister, having considered the application and the report of the Board thereon and such other documents in relation thereto as were submitted to him by the Board, shall decide whether the application should be granted or refused, and shall notify the Board of his decision.

Minister to
decide
application

(2) Any decision of the Minister made pursuant to subsection (1) shall be final and shall not be subject to appeal to, or question by, any court of law, and the Minister shall not be required to assign any reasons for such decision.

19.—(1) Whenever the Minister grants an application for registration, renewal of registration, or transfer of registration under this Part, and notifies the Board of his decision thereon, the Board shall cause the Registrar to enter such registration, renewal or transfer in the appropriate parts or part of the Register and shall notify the applicant thereof and cause notice thereof to be published in the *Gazette*.

Registration
or refusal

(2) Having entered any registration or renewal of registration pursuant to subsection (1) the Registrar shall, within one month thereafter, furnish the registered proprietor with a certificate of his registration as registered proprietor and of the registration of the relevant garage as a registered garage.

(3) Having entered any transfer of registration pursuant to subsection (1) the Registrar shall, within one month thereafter, furnish the new registered proprietor with a certificate of his registration in the prescribed form as registered proprietor of the relevant registered garage together with a certified copy of the registration of the said relevant garage.

(4) Whenever the Minister refuses an application under this Part and notifies the Board of his decision thereon, the Board shall cause the Registrar to notify the applicant, in writing, of such refusal.

20. Registration under this Act shall be effective from the date of its entry in the Register by the Registrar and shall determine on the 1st January following unless sooner surrendered or cancelled.

Duration of
registration

21.—(1) The Board shall, in the month of December of each year, hold an annual renewal of registration meeting for the

Annual
renewal of
registration

purposes of renewal of registration of existing registrations for the following year:

In this regard the Board may fix different dates in the said month of December for the holding of the annual renewal of registration meeting in respect of different places or areas in Malawi.

(2) The Board shall, during the first week of the month of October of each year, publish, in one issue of the *Gazette* and in one issue of a newspaper in general circulation in Malawi, a notice setting forth the date, time and venue of such annual renewal of registration meeting, and if the said meeting is to be held on different dates in respect of different areas the said notice shall specify the place or area in respect of which each such meeting is to be held.

(3) Application for renewal of registration shall be made pursuant to section 15 and shall be delivered to the Board not later than 21 days before the date of the relevant annual renewal of registration meeting of the Board.

(4) Application for renewal of registration shall be considered at the relevant annual renewal of registration meeting and shall normally not be considered at any other meeting of the Board save for just cause.

(5) The Board may adjourn any annual renewal of registration meeting from time to time until all applications for renewal of registration to be considered at such meeting have been considered by the Board.

(6) If, in respect of any application for renewal of registration, the decision of the Minister thereon under section 18 has not been notified by the said 31st December, the existing registration shall be deemed to be extended, for the purposes of this Act, until such time in the following year as the Minister notifies his decision on such application to the Board in accordance with the said section 18.

PART IV

SURRENDER, SUSPENSION AND CANCELLATION OF REGISTRATION

Surrender
of registra-
tion

22. Any registered proprietor of any registered garage may, at any time, by notice in writing to the Board, surrender his registration in relation to any specified registered garage, and upon receipt of such surrender the Board shall cause the Registrar to strike off the Register the registration of the said registered proprietor in relation to the said garage and also to strike off the Register the registration of the said registered garage.

23.—(1) Any person who has had repairs or alterations or any other work or service done upon any motor vehicle or internal combustion or other engine or upon any mechanical or electrical parts or accessories of such motor vehicle or engine or who has had any new mechanical or electrical accessories or devices attached to such motor vehicle or engine at any registered garage and is of opinion that—

Complaints
to and
hearings
by the
Board

- (a) the quality of the workmanship was bad; or
- (b) the work was negligently executed; or
- (c) the work executed was unnecessary; or
- (d) the re-assembly of the said motor vehicle or engine, after the work was completed, was negligently executed; or
- (e) the replacement parts fitted were of inferior quality or not reasonably suited to the purpose for which they were installed; or
- (f) the replacement parts fitted were of inferior quality or second-hand parts and were so fitted without his knowledge or consent; or
- (g) while the motor vehicle or internal combustion or other engine was in the said registered garage for the purposes of the said work, parts thereof, unrelated to and not involved in the said work, were removed therefrom without his knowledge or consent and were replaced by parts of inferior quality; or
- (h) the said motor vehicle or internal combustion or other engine, when re-delivered to him, was unfit for immediate use, and no warning was given to him as to its condition; or
- (i) the statement of time attributed to the work, and charged for, was false; or
- (j) the charges generally were unreasonably high; or
- (k) the requirements of section 33 were not complied with; or
- (l) the inefficient or negligent manner in which the work was executed and the unreasonable charges for such work constituted an unconscionable act towards him by the registered proprietor,

may, in the prescribed manner, make complaint in writing to the Board against the registered proprietor of the said registered garage.

(2) Every complaint made to the Board under subsection (1) shall be made within ninety days after the execution of the work in question, or after receipt of the statement of charges therefor whichever is the later:

Provided that, in any case where the Board deems it just and reasonable so to do, the Board may extend the time specified by this subsection.

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(3) The Board shall, as soon as practicable, scrutinize each complaint received pursuant to subsection (1), and, if it is of opinion that the subject matter thereof should be investigated by it, it shall fix a date and place for the hearing of such complaint, and, shall cause notice, in the prescribed form, of the said hearing to be served upon the complainant and the registered proprietor not less than twenty days before the said date of hearing.

(4) Every notice of hearing issued by the Board shall contain a statement of the matters of complaint which the Board intends to investigate at the hearing.

(5) The Board may require the complainant to attend the hearing in person and adduce evidence on the matters arising out of his complaint which are under investigation by the Board.

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(6) Every registered proprietor whose business activities are under hearing by the Board pursuant to this section shall be entitled to attend such hearing in person or, if the registered proprietor is a body corporate, by a senior director or executive of such body corporate, and shall also be entitled to adduce evidence on any of the matters under investigation.

(7) The Registrar, or, in his absence, any officer of the Public Service who is acting as Registrar, or any member of the Board, shall be empowered to administer an oath for the purpose of any hearing pursuant to this section.

(8) The Board shall be empowered to summon witnesses to attend and give evidence on oath or produce documents at any hearing pursuant to this section.

(9) Having heard the evidence adduced and any representations made by or on behalf of the complainant and the registered proprietor the Chairman, Vice-Chairman or other member presiding shall declare the hearing closed.

(10) The Board shall, as soon as practicable after the close of the hearing, consider the evidence adduced and representations made thereat and shall, without undue delay, furnish the Minister with its report thereon together with such documents as were produced and are relevant to the matters investigated, and shall make its recommendations as to whether in its opinion the complaint should be dismissed or the registered proprietor cautioned, or the registration suspended or cancelled, as the case may be.

(11) Neither the applicant nor the registered proprietor shall be entitled to a copy, or to be informed of the contents, of any report or of the recommendations made thereon to the Minister pursuant to this section.

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24.—(1) Having considered the report and recommendations of the Board on any investigation of a complaint pursuant to section 23, and also having considered such other matters as he deems relevant, the Minister shall decide whether—

Minister to
decide
complaints

- (a) the complaint should be dismissed; or
- (b) the registered proprietor should be required to compensate the complainant in a stated sum for his default in workmanship

or service, and thereupon cautioned, or in the event of his failure to so compensate the complainant within a stated time, whether his registration in respect of the relevant registered garage be suspended or cancelled; or

(c) the registration of the registered proprietor in respect of the relevant registered garage be suspended for a stated period of time and may attach terms and conditions to such suspension; or

(d) the registration of the registered proprietor in respect of all garages registered under his name be suspended for a stated period of time and may attach terms and conditions to such suspension; or

(e) the registration of the registered proprietor in respect of the relevant registered garage be cancelled; or

(f) the registration of the registered proprietor in respect of all garages registered under his name be cancelled,

and shall notify the Board of his said decision.

(2) Any decision of the Minister made pursuant to subsection (1) shall be final and shall not be subject to appeal to, or question by, any court of law, and the Minister shall not be required to assign any reason for such decision.

25.—(1) Upon the Board being notified of the decision of the Minister pursuant to section 24, the Board shall cause the Registrar to make the appropriate entry thereof in the record of the relevant investigation held under section 23.

Implementa-
tion of
decision of
Minister
under
section 24

(2) Where the decision of the Minister is one of caution of the registered proprietor or suspension of his registration, the Board shall further cause the Registrar to make the appropriate entry thereof in the appropriate place or places in the Register.

(3) Where the decision of the Minister is one of cancellation of registration, the Board shall cause the Registrar to strike the relevant registration off the Register, and to publish notice thereof in one issue of the *Gazette*.

(4) Within three days after making an entry in the Register pursuant to subsection (2), the Registrar shall notify the registered proprietor, in writing, of the caution or suspension, as the case may be, and of any conditions attached by the Minister to such caution or suspension.

(5) As soon as practicable after striking a registration off the Register pursuant to subsection (3) the Registrar shall cause notice thereof, in the prescribed form, to be given to the registered proprietor and shall cause a copy of such notice to be posted in a prominent place on any garage premises whose registration has been cancelled by reason of such striking off.

Board-
initiated
Investigation

26.—(1) If the Board is of opinion that any registered proprietor—

(a) knowingly and habitually engages in practices, in the course of his business as a garage proprietor, which are dishonest, fraudulent or unconscionable; or

(b) has, notwithstanding any caution given pursuant to a decision of the Minister under section 24 (1) (b), knowingly continued to commit acts similar to those which gave rise to such caution; or

(c) has wilfully failed to compensate a complainant as directed pursuant to a decision of the Minister under section 24 (1) (b); or

(d) has, notwithstanding the suspension of his registration pursuant to a decision of the Minister under section 24 (1) (c) or (d), engaged in business as a garage proprietor contrary to the terms and conditions of such suspension; or

(e) has been convicted of an offence which, in the opinion of the Board, renders him unfit to continue in business as a registered proprietor,

the Board may, by notice, require such registered proprietor to appear before the Board and show cause why the Board should not recommend to the Minister the cancellation of his registration under this Act.

(2) The notice referred to in subsection (1) shall be in the prescribed form, shall set forth the grounds upon which it is issued by the Board and the day, time and place of hearing thereon, which shall be not more than two months and not less than one month from the date of its issue, and it shall be served upon the said registered proprietor within ten days of the said date.

(3) The said registered proprietor shall be entitled to attend such hearing in person, or if the said registered proprietor is a body corporate, by a senior director or executive of such body corporate, and shall also be entitled to adduce evidence on any of the matters under investigation.

(4) The provisions of section 23 (7) and (8) shall apply *mutatis mutandis* to any hearing under this section.

(5) Having heard any evidence adduced and any representations made by or on behalf of the said registered proprietor, the Chairman, Vice-Chairman or other member presiding shall declare the hearing closed.

(6) The Board shall, as soon as practicable after the close of the hearing, consider the evidence adduced and the representations made thereat, and shall, without undue delay, furnish the Minister with its report thereon together with such documents as were produced and are relevant to the matters investigated and shall

make its recommendations as to whether in its opinion the said registered proprietor has shown cause why his registration should not be cancelled or whether he has failed to show such cause and, in its opinion, his registration should be cancelled.

(7) The said registered proprietor shall not be entitled to a copy, or to be informed, of the contents of any report or the recommendations made thereon to the Minister pursuant to this section.

27.—(1) Having considered the report and recommendations of the Board on any investigation made pursuant to section 26, and also having considered such other matters as he deems relevant, the Minister shall decide whether the registration of the said registered proprietor should or should not be cancelled, and shall notify the Board of his said decision.

Minister to
decide on
report of the
Board

(2) Any decision of the Minister made pursuant to subsection (1) shall be final and shall not be subject to appeal to, or question by, any court of law, and the Minister shall not be required to assign any reason for such decision.

28.—(1) Upon the Board being notified of the decision of the Minister, pursuant to section 27, the Board shall cause the Registrar to make the appropriate entry thereof in the record of relevant investigation held under section 26.

Implementa-
tion of
decision of
Minister
under
section 27

(2) Where the decision of the Minister is one of cancellation of registration, the Board shall cause the Registrar to strike the relevant registration off the register and to publish notice thereof, in the prescribed form, in one issue of the *Gazette*.

(3) As soon as practicable after striking a registration off the Register pursuant to subsection (2), the Registrar shall cause notice thereof in the prescribed form to be given to the registered proprietor and shall cause a copy of such notice to be posted in a prominent place on any garage premises whose registration has been cancelled by reason of such striking off.

29.—(1) The Minister may, at any time, direct the Board to investigate the business activities of, or any specific act done in the course of business by, any registered proprietor.

Minister may
direct
investigation
by the Board

(2) Upon receiving any direction of the Minister pursuant to subsection (1) the Board shall issue a notice to the registered proprietor requiring him to appear before it in person, or if the said registered proprietor is a body corporate, by a senior director or executive of such body corporate, and answer any questions put by the Board in respect of the said business activities or specific act, as the case may be.

(3) The notice referred to in subsection (1) shall be in the prescribed form, shall set forth in general terms the matters intended to be investigated by the Board and the day, time and place of hearing thereon, which shall not be more than two months and not less than one month from the date of its issue, and it shall be served upon the registered proprietor within ten days of the said date.

(4) The provisions of section 23 (6), (7), (8), (9) and (10), and of sections 24 (1) (a), (c), (d), (e) and (f), 24 (2) and 25 shall apply *mutatis mutandis* to any investigation under this section.

Power of the
Minister re
registration

30.—(1) Notwithstanding any other provision of this Act, the Minister may, at any time, in his absolute discretion, direct the Board to cancel any registration of any registered proprietor in respect of any registered garage under this Act and the Board shall thereupon cause the Registrar to strike the relevant registration off the Register and to publish notice thereof in one issue of the *Gazette*.

(2) As soon as practicable after striking a registration off the Register pursuant to subsection (1), the Registrar shall cause notice thereof, in the prescribed form, to be given to the registered proprietor and shall cause a copy of such notice to be posted in a prominent place on any garage premises whose registration has been cancelled by reason of such striking off.

(3) Notwithstanding any other provision of this Act, the Minister may, at any time, in his absolute discretion, direct the Board to reinstate on the Register the name of any garage proprietor whose name was struck off the Register under this Act, and such reinstatement on the Register may, in the absolute discretion of the Minister, be in respect of any or all garage premises in respect of which the said garage proprietor was registered before such striking off, and such premises shall, on such reinstatement of such registration, thereupon become and be registered garage premises for all of the purposes of this Act, and the Board shall thereupon cause the Registrar to make the necessary amendments to the Register and publish the notices necessary to implement the decision of the Minister.

(4) The Minister may, at any time, in his absolute discretion, lift any suspension of any registered garage proprietor made pursuant to this Act and the Board shall cause any direction of the Minister in this regard to be implemented by the Registrar.

(5) Any direction of the Minister given pursuant to subsection (1) shall not be subject to appeal to, or question by, any court of law.

(6) The Minister shall not be required to assign any reason for any direction given by him pursuant to this section.

31.—(1) A cancellation of the registration of a registered proprietor in accordance with this Act may be a general cancellation, whereby the resultant striking of his name off the Register effects the cancellation and striking off of the registration of all Registered garages in respect of which the said garage proprietor is registered under this Act. Effect of cancellation

(2) Where a cancellation of the registration of a registered proprietor in accordance with this Act is not a general cancellation, the resultant striking of his name off the Register shall be in respect of the particular registered garage or registered garages to which the direction of the Minister made under section 24 (1) (e), 24 (1) (f), 27, 29 or 30, as the case may be, expressly refers, and shall effect the cancellation and striking off of the registration of the said registered garage or registered garages expressly referred to. The said registered proprietor shall in such event remain registered as registered proprietor of any other registered garage in respect of which he is registered under this Act.

32.—(1) Suspension of the registration of a registered proprietor, pursuant to this Act, may be a general suspension whereby the said registered proprietor is, for the duration of the suspension, deemed not to be registered under this Act in respect of all registered garage premises in respect of which he is registered as the registered proprietor, and all such registered garages shall be deemed not to be registered, for the duration of the said period of suspension. Suspension of registration

(2) Suspension of the registration of a registered proprietor pursuant to this Act may be expressed to be in respect of one or more particular registered garage premises in respect of which he is registered as the registered proprietor whereby, for the duration of the period of suspension, the said registered proprietor is deemed not to be registered under this Act in respect of the said particular registered garage or registered garages, and the said particular registered garage or registered garages shall be deemed not to be registered for the duration of the said period of suspension.

(3) Where any registered proprietor is registered as such in respect of more than one registered garage and the Minister directs suspension of his registration, the Minister shall, in his direction thereon to the Board, state the duration of such suspension, and, if the said suspension is not intended to be general, the registered garages in respect of which it is to apply.

PART V

MISCELLANEOUS

Duty of
registered
proprietor
on repair of
vehicle or
engine

33.—(1) Every registered proprietor, who, in the course of repairing a motor vehicle or internal combustion or other engine, causes any existing part of such vehicle or engine to be replaced shall, at the time of re-delivery of such vehicle or engine to the owner thereof—

(a) either—

(i) deliver the said replaced part to the said owner; or

(ii) show the said replaced part to the said owner and seek his directions as to its disposal; and

(b) furnish the said owner with a statement in writing, signed by the said registered proprietor or his agent, stating whether the replacement is—

(i) a new part issued by the manufacturers of the said vehicle or engine; or

(ii) a new part made by a motor spares manufacturer, giving the name of such manufacturer; or

(iii) a substitute part made by the registered proprietor, or by another person on his behalf, for the purpose of such repair; or

(iv) a second-hand part, and stating that such second-hand part is reasonably fit for the purpose for which it is intended.

(2) Where a registered proprietor wilfully and habitually fails to comply with the provisions of this section such conduct shall be deemed to be unconscionable practice for the purposes of any investigation of the business activities of the said registered proprietor by the Board under Part IV.

Duty of
registered
proprietor
who is agent
of manufac-
turer

34.—(1) Every registered proprietor who is, in Malawi or in any part thereof, the approved or accredited agent of any manufacturer in respect of any type or make of motor vehicle or internal combustion or other engine, or of any mechanical or electrical part or accessory of any such vehicle or engine, shall, at all times, keep in stock in Malawi a reasonable quantity of spare parts and accessories appertaining to each model of motor vehicle or internal combustion or other engine of such manufacturer's making sold in Malawi or, as the case may be, a reasonable quantity of such mechanical or electrical parts or accessories of such manufacturer's making.

(2) Failure to comply with subsection (1) shall, of itself, be sufficient grounds for the Board to recommend to the Minister that the registration of the registered proprietor concerned be cancelled.

35. The Minister may make regulations for the better carrying out of this Act, and, without prejudice to the generality of the foregoing, such regulations may provide for—

Regulations

- (a) the forms to be used for any register, application or notice;
- (b) the forms of certificates of registration;
- (c) the fees for registration under this Act;
- (d) the fees for any application to the Board;
- (e) the form to be used for any complaint to the Board;
- (f) the places where the Board may meet for the purposes of the investigation of complaints;
- (g) any matter to be or which may be prescribed.

36.—(1) Nothing in this Act shall apply to any person who is carrying on business as a commercial garage proprietor immediately prior to the date of commencement until the expiry of six months from such date:

Exemptions

Provided that if, within such period of six months, such person first applies for registration, nothing in this Act shall apply to him until the notification to him of the result of such application under section 19.

(2) The Minister may by Order, published in the *Gazette*, and subject to such conditions, if any, as he may impose, exempt any particular commercial garage proprietor, or any class or description of commercial garage proprietors, from this Act, either generally or in respect of any area or place, or in respect of any class or description of garage premises, business or undertaking.

37. Registration under this Act shall be in addition to and not in derogation of any applicable licensing, registration or other requirement of the Businesses Licensing Act, or the Second-hand and Scrap Metal Dealers Act, or any other written law.

Registration not in lieu of licensing or registration, etc., under other written laws Cap. 46:01 Act No. 7 of 1971

38. This Act shall not apply to the Government or to any local authority.

Not applicable to Government or local authorities

CHAPTER 50:06

SECOND-HAND AND SCRAP METAL DEALERS

ARRANGEMENT OF SECTIONS

SECTION

1. Short title and commencement
2. Interpretation
3. Appointment of registering authority
4. Registration of dealers
5. Dealer to furnish description of premises
6. Non-registration of certain persons
7. Dealers to keep books
8. Dealers to retain articles for seven days
9. Dealers to enter names of purchasers, etc.
10. False entries and information
11. Dealers to produce articles and books on demand
12. Dealers to report stolen goods
13. Dealer may not alter or deface article without permission
14. Dealer may not possess smelting pots, etc.
15. Business not to be transacted with persons under 14 years of age
16. Dealers to have their names over shop doors
17. Revocation of registration
18. Cancellation of registration
19. Regulations
20. Exemptions
21. Registration not in lieu of licensing, etc., under other written laws

An Act to provide for the registration of dealers in second-hand goods and scrap metal and for matters incidental thereto and connected therewith 7 of 1971
G.N. 73/1972

[12TH MARCH, 1973]

1. This Act may be cited as the Second-hand and Scrap Metal Dealers Act. Short title

2. In this Act unless the context otherwise requires— Interpreta-
tion
“article” in relation to second-hand goods, means any item of second-hand goods, and in relation to scrap metal means anything consisting wholly or partly of metal and includes any part of such item or thing;



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“scrap metal dealer” means any person who carries on a trade or business which consists wholly or partly of buying and selling scrap metal, whether the scrap metal sold is in the form in which it was bought or otherwise, and includes any person who, from a person other than a scrap metal dealer, buys or acquires scrap metal for further processing or for the manufacture of other things or for export, but does not include any person engaged in mining who in the course of his mining business buys or sells scrap metal from or to another such person;

“second-hand goods” means any goods which have been bought or delivered or are possessed for sale after use by a previous owner, and includes goods received by any person from their previous owner in partial or full consideration for any contract, or by way of deposit or part deposit in respect of any hire-purchase or instalment sale agreement, but does not include re-possessed goods so long as the said goods remain in the possession of the seller thereof.

3.—(1) There shall be a registering authority who shall be the Commissioner of Police and who shall, subject to the general or special directions of the Minister, be responsible for the administration of this Act. Appointment
of registering
authority

(2) The registering authority may designate a police officer of the rank of superintendent or of any higher rank as registrar for the purposes of this Act.

(3) The police officer in charge of each District shall be *ex officio* assistant registrar for the purposes of this Act.

(4) The registering authority may, subject to the general or special directions of the Minister, delegate any of his powers or functions under this Act to any police officer or public officer.

4.—(1) On and after the date of commencement of this Act, no person shall carry on the business of a second-hand dealer or scrap metal dealer without being registered as such under this Act. Registration
of dealers

(2) The registering authority shall keep a register in the prescribed form for the purposes of this Act.

(3) An application for registration under this Act or for a renewal thereof shall be made, in the prescribed manner and at the prescribed time, to the registering authority and may be granted or refused at the discretion of that authority.

(4) Where an application for registration is made under this Act in respect of a partnership firm, the partners shall nominate one member of the firm who shall, upon the application being granted by the registering authority, be registered as the registered dealer in respect of the said partnership business.

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(5) Every application for registration or for a renewal thereof shall be accompanied with the appropriate prescribed fee.

(6) Registration under this Act shall be effective from the date of its entry in the register by the registering authority and shall determine on the 1st January following unless sooner revoked or cancelled.

(7) Any person who carries on business as a second-hand dealer or scrap metal dealer without being registered as such under this Act or who contravenes the terms of his registration shall be guilty of an offence and liable to a fine of K1,000 and to imprisonment for one year.

Dealer to
furnish
description
of premises

5. Every person applying for registration under this Act or for a renewal thereof shall, at the time of his application, furnish to the registering authority a description, in writing, of his premises, including all cellars, closets and other places proposed to be used by him in the course of his business, and shall, if so required by the said authority, furnish a map or plan of such premises.

Non-
registration
of certain
persons

6.—(1) Save with the consent of the Minister, the registering authority shall not register any person under this Act who—

(a) is not a resident of Malawi; or

(b) has been convicted of an offence under this Act and sentenced therefor to a fine of K20 or more or to imprisonment without the option of a fine; or

(c) has been convicted of an offence under any fiscal or revenue law; or

(d) has been convicted of an offence involving fraud or dishonesty; or

(e) has, within six years last past, been convicted of an offence under any written law and sentenced therefor to a term of imprisonment without the option of a fine.

(2) Nothing in this section provided shall be deemed to impair or delimit the general discretion of the licensing authority to refuse registration under this Act.

Dealers to
keep books

7.—(1) Every dealer shall enter in a bound book (hereinafter referred to as the "dealings book") to be kept, exclusively for the purposes of this Act, by him on his premises the particulars of each transaction in second-hand goods or scrap metal, as the case may be, entered into by him in the course of his said business, including—

(a) a proper and distinctive description of each article purchased or received by him;

(b) the name and residential address of the person from whom he purchased or received the article;

(c) the date and hour of the day of each transaction;

- (d) the price paid or agreed to be paid for the article;
- (e) in the case of a transaction in scrap metal, the source of such scrap metal;
- (f) such other particulars as may be prescribed:

Provided that, where articles of the same kind, value and description are on any particular occasion bought or sold in a lot or parcel, it shall be sufficient to describe such lot or parcel without describing each of the several articles comprising same.

(2) Where a dealer engages in business in more premises than one he shall keep a dealings book for and in respect of each such premises and each dealings book shall be kept on the premises to which it relates and shall contain a record of transactions in second-hand goods or scrap metal, as the case may be, entered into on such premises.

(3) Every entry in the dealings book kept by a dealer shall be deemed, unless the contrary is proved, to have been made by or under the authority of that dealer.

(4) Any person who fails to comply with any requirement of this section shall be guilty of an offence and liable to a fine of K100.

8.—(1) Every article purchased or received by a dealer shall be kept by him, on his premises, for seven days from the date on which it was so purchased or received, unless in the meantime he shall, on giving twenty-four hours' previous notice to the officer in charge of the Police of the District in which the premises are located, have received from such officer permission to dispose of such article.

Dealers to retain articles for seven days

(2) Every dealer shall, when required so to do by a police officer, produce to him any such article before the expiration of the said period of seven days.

(3) Any person who fails to comply with any requirement of this section shall be guilty of an offence and liable to a fine of K20.

9.—(1) Every dealer shall enter in the dealings book the name and address of the person to whom any article, lot or parcel is sold or delivered by him and also the date of the sale or delivery.

Dealers to enter names of purchasers, etc.

(2) Any person who fails to comply with the requirement of this section shall be guilty of an offence and shall be liable to a fine of K5.

10. Any person who—

- (a) knowingly makes any false entry in any dealings book; or
- (b) knowingly gives to a second-hand dealer or his servant or agent any false particulars concerning his name and address; or

False entries and information

- (c) gives to any scrap metal dealer or his servant or agent any false particulars concerning his name and address or concerning the source of any scrap metal,

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shall be guilty of an offence and liable to a fine of K2,000 or imprisonment for a term of two years.

Dealers to produce articles and books on demand

11.—(1) Every dealer shall at all reasonable times produce on demand to any police officer any article in his possession and shall also so produce the dealings book in which the description of any article is or ought to have been entered.

(2) Any police officer obtaining the production of any dealings book shall on each occasion subscribe his name immediately after the last entry therein.

(3) Whenever any article which has been stolen or fraudulently obtained is found in the possession of any dealer, he shall, on being informed by any police officer that such article was stolen or fraudulently obtained, hand over the said article to such officer.

(4) Any dealer who fails to comply with any requirement of this section shall be guilty of an offence and liable to a fine of K20, without prejudice to his being also proceeded against under any other written law as a receiver of stolen goods.

Dealers to report stolen goods

12.—(1) Where any article, with respect to which information in writing is given by any police officer to a dealer that it has been stolen or fraudulently obtained, is then in, or subsequently comes into, the possession of the said dealer, he shall as soon as is practicable inform a police officer that an article answering the description of the said stolen or fraudulently obtained article is in his possession and shall state the name and address given by the person from whom the article was received.

(2) Any dealer who contravenes the provisions of this section shall be guilty of an offence and liable to a fine of K10:

Provided that, in the case of any article which it may be difficult to trace and identify, no fine shall be imposed under this section unless it appears to the court that the article was knowingly concealed by the dealer.

Dealer may not alter or deface articles without permission

13. Where any dealer, after receiving information of the theft or fraudulent obtaining of any article, melts, alters, defaces or conceals any article answering to the description of the aforesaid article, or causes the same to be melted, altered, defaced or concealed, without having been authorized in writing by a police officer so to do, and it is found that the said article was stolen or fraudulently obtained by the person from whom the dealer received the same or by any other person, then in such case it shall be held that the dealer knew that the said article was stolen or fraudulently obtained and he shall be proceeded against according to law as a receiver of stolen goods, and no evidence of his guilt shall be necessary other than the evidence of such melting, altering, defacing or concealing, after receiving such information as aforesaid.

14. Any dealer, who, without permission in writing from the police officer in charge of the District in which his premises are located, possesses, keeps or knowingly allows to be kept on his premises any smelting pot or implement for melting, altering or defacing metals or precious metals shall be guilty of an offence and liable to a fine of K1,500 and to imprisonment for a term of one year.

Dealer may not possess smelting pots, etc.

15.—(1) A dealer shall not sell to or purchase from any person apparently under the age of fourteen years, whether such person is acting on his own behalf or on behalf of any other person.

Business not to be transacted with persons under 14 years of age

(2) Any dealer who contravenes the provisions of this section, either by himself or any agent or servant, shall be guilty of an offence and liable to a fine of K20.

16.—(1) Every registered dealer shall have his name with the words "registered second-hand dealer" or "registered scrap metal dealer", as the case may be, painted over the door or principal entrance to his premises in legible characters, either black upon a white ground or white upon a dark ground, and shall replace the same if removed, obliterated or defaced.

Dealers to have their names over shop doors

(2) The requirements of this section shall be met if the said name and words are legibly painted, impressed or embossed on a plate of metal or other durable material which is affixed over the said door or principal entrance.

(3) Any person who fails to comply with the requirements of this section shall be guilty of an offence and liable to a fine of K5.

17.—(1) The registering authority may, with the approval of the Minister, revoke any registration under this Act, if

Revocation of registration

(a) the registered dealer fails or refuses to comply with any term or condition of his registration; or

(b) by reason of any structural alterations, or otherwise, the said authority is of opinion that the premises in which the registered dealer carries on his business as such have become unsuitable for such business; or

(c) the registered dealer has been convicted of an offence under this Act or under any fiscal or revenue law;

(d) the said authority is of opinion that the registered dealer has failed to make entries, or has made inaccurate or misleading entries, in any dealings book.

(2) Whenever the registering authority decides to revoke any registration pursuant to subsection (1), he shall send to the registered dealer a notice in the prescribed form stating that he has decided to revoke the said registration as of a date not less than one month or more than three months from the date of the said notice.

(3) Any registered dealer who receives a notice pursuant to subsection (2) may, within seven days after receipt thereof, appeal in writing to the Minister against the decision of the registering authority to revoke the said registration and the decision of the Minister on such appeal shall be final and not subject to review by any court.

(4) Where a registration has been revoked pursuant to this section the dealer concerned shall be allowed thirty days from the date of the revocation or from the date of the decision of the Minister disallowing any appeal pursuant to subsection (3), whichever is the later, within which to dispose of second-hand goods or scrap metal, as the case may be, in stock on his premises at the date of the revocation and during the said period the said dealer shall be subject to this Act in respect of such second-hand goods or scrap metal, as the case may be, as if his said registration had not been revoked.

(5) A dealer whose registration has been revoked pursuant to this section shall not buy or receive for sale any article on or after the date of such revocation notwithstanding that the said dealer may, during the said time, be entitled to dispose of existing stocks of second-hand goods or scrap metal, as the case may be, pursuant to subsection (4).

(6) Any person who contravenes the provisions of subsection (4) or (5) shall be guilty of an offence and liable to a fine of K1,500 and to imprisonment for a term of one year.

Cancellation
of registra-
tion by court

18.—(1) Upon the conviction of any registered dealer of an offence under this Act or under any fiscal or revenue law or of an offence involving fraud or dishonesty the court, in addition to any other penalty it may impose, may order the cancellation of the registration of the said registered dealer under this Act, and if requested so to do by the prosecution in any such case, the court shall so order the cancellation of the said registration.

(2) Whenever a court makes an order pursuant to subsection (1) it shall cause a certified copy of such order to be delivered to the registration authority, who shall, as soon as the said order becomes final, strike the name of the said dealer from the register.

(3) Any person whose registration has been cancelled pursuant to this section shall, as soon as the order of cancellation becomes final, cease to deal in second-hand goods whether on his own behalf or through any partner, manager, employee or agent.

Regulations

19. The Minister may make regulations for the better carrying out of this Act, and, without prejudice to the generality of the foregoing such regulations may provide for—

- (a) the forms to be used for any register, return or application;
- (b) the fees for any registration or application;

(c) the form of and particulars to be entered into any dealings book, and, in this regard, may provide for different forms and particulars in respect of different articles and businesses and in respect of different areas;

(d) the terms and conditions of registration;

(e) the penalties for breaches of the regulations;

(f) any matter to be or which may be prescribed.

20. The Minister may, by Government Notice, exempt any dealer or class of dealer from the provisions and requirements of this Act, or any of them, and may, in like manner, revoke or alter any such exemption. Exemptions

21. Registration under this Act shall be in addition to and not in derogation of any applicable licensing or other requirements of the Businesses Licensing Act or any other written law. Registration not in lieu of licensing, etc., under other written laws Cap. 46:01

CHAPTER 18:08

CONTROL OF GOODS

ARRANGEMENT OF SECTIONS

SECTION

1. Short title
2. Interpretation
3. Regulations for the control of goods
4. Rationing of commodities and animals
5. Evidence
6. Penalties

An Act to enable the Minister to provide by regulation for the control of the distribution, disposal, purchase, and sale, and the wholesale and retail prices of any manufactured or unmanufactured commodity or of any animal or poultry specified by the Minister by order or of any class of any such commodity, animal, or poultry, for the control of imports into and exports from Malawi, and for other purposes incidental and supplementary to the foregoing.

12 of
1954 (F)
G.N.
2/1964(N)
219/1964(N)

[26TH MARCH, 1954]

1. This Act may be cited as the Control of Goods Act. Short title.
2. In this Act, unless inconsistent with the context— Interpreta-
tion

“animal” means any animal, poultry or fish or any class of animal, poultry or fish specified by the Minister by order published in the *Gazette* to be an animal for the purposes of this Act;

“commodity” means any manufactured and unmanufactured commodity or any class of a commodity specified by the Minister by order published in the *Gazette* to be a commodity for the purposes of this Act;

“goods” means anything capable of being imported or exported.
- 3.—(1) Whenever it appears to the Minister necessary or expedient to control— Regulations
for the
control of
goods
 - (a) the import into or export from Malawi of any goods;
 - (b) the distribution, disposal, purchase and sale, or the wholesale or retail prices of any commodity or animal and the charges which may be made—
 - (i) for services relating to the distribution, disposal, purchase, and sale of the commodity or animal, as the case may be; and
 - (ii) for delivery of any commodity or animal, the whole-sale or retail prices of which are controlled under this section,

he may make such regulations as appear to him to be necessary or expedient for such purposes.

- Citation 1. These Regulations may be cited as the Control of Goods (Price Control) Regulations.
- Interpretation 2.—(1) In these Regulations, unless the context otherwise requires—
- “controlled goods” means any commodity in respect of which an Order is made;
- “dealer” means any person who carries on the business of buying and selling controlled goods;
- Cap. 48:05 “hire purchase agreement” and “instalment sale agreement” have the meanings assigned to them in section 2 of the Hire Purchase Act;
- “inspector” means a person appointed as an inspector under these Regulations;
- “Order” means an Order made by the Minister under these Regulations;
- “price” includes any form of consideration;
- “sell” includes—
- (a) to sell ~~by auction~~; or
 - (b) to offer or attempt to sell; or
 - (c) to expose, display or advertise for sale; or
 - (d) to sell or hire under a hire-purchase or instalment sale agreement; or
 - (e) to exchange or dispose of controlled goods for any valuable consideration,
- and the expressions “sale” and “seller” shall be construed accordingly.

(2) The date of sale of controlled goods which are the subject of a hire-purchase or instalment sale agreement shall be the date on which the agreement is signed by or on behalf of all the parties to the agreement and for the purposes of these Regulations the cash price shall be taken to be the price at which the seller has sold or agreed to sell such goods.

(3) For the purposes of these Regulations, the cost of controlled goods to the seller shall be determined in a manner prescribed by Order and the Minister may prescribe different methods of determining such cost in respect of different classes of controlled goods.

3.—(1) The Minister may appoint inspectors for the purposes of these Regulations.

Appoint-
ment of
inspectors
and Price
Control
Board

(2) Every inspector shall be furnished with a certificate signed by the Minister, which shall state that the inspector has been appointed as an inspector under these Regulations.

(3) An inspector exercising any power or performing any duty conferred or imposed upon him by these Regulations or about to exercise or perform any such power or duty shall, on demand by any person concerned, produce the certificate referred to in subregulation (2).

(4) (a) The Minister may establish a Price Control Board and may appoint thereto such persons as he thinks fit.

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(b) Any person who sells or delivers any controlled goods and who is dissatisfied with any Order relating to such controlled goods or the delivery thereof, may apply to the Price Control Board for a review of such order.

(c) The Price Control Board shall—

(i) make a report and recommendations to the Minister on any Order reviewed under this paragraph;

(ii) when required by the Minister to do so, make recommendations on any other matter that may be referred to it by the Minister;

(iii) make recommendations to the Minister on such other matters relating to the prices of goods as, in its opinion, require particular attention.

Fixing of
prices by
Order

6.—(1) The Minister may, by Order—

(a) fix a maximum price, a minimum price or a specified price for the sale of any commodity by persons generally, by any specified person or by any person of a specified class or group either to persons generally or to a specified person or to a person of a specified class or group;

(b) prohibit any person, any specified person or any person of a specified class or group from increasing the price charged by him for any commodity sold by him above the price ordinarily charged by him on a specified date or during a specified period for similar goods sold under similar conditions regarding delivery or payment;

(c) fix the maximum, minimum or specified charge that may be made by any person for the delivery of any commodity.

(2) Without prejudice to the generality of the powers conferred by subregulation (1), the Minister may, by Order—

(a) fix the maximum, minimum or specified price of any commodity irrespective of the cost to the seller;

(b) prescribe that the maximum, minimum or specified price shall be a specified price less a specified discount or plus a specified premium;

(c) prescribe that the maximum, minimum or specified price of any commodity shall not exceed the cost to the seller plus a stated sum or a stated percentage of such cost;

(d) prescribe that the maximum, minimum or specified price of any commodity shall not exceed the price ordinarily charged for such commodity on a specified date or during a specified period plus a stated sum or a stated percentage of such price, or less a stated sum or a stated percentage of such price.

(3) The Minister may, by Order, direct that any person or any person of a specified class or group who deals in any commodity, shall display in such manner as may be prescribed by the Minister the price at which such person offers such commodity for sale.

8. No person—

(a) who has purchased controlled goods from a dealer shall resell the said controlled goods or any portion thereof to another dealer or to a manufacturer at a price in excess of the price which the dealer who sold the controlled goods in the first instance was permitted by Order to sell such controlled goods;

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(b) who has purchased any controlled goods from a dealer who ordinarily sells such controlled goods to persons who are not dealers in such controlled goods shall resell the said controlled goods or any portion thereof to any other person at a price in excess of the price at which such dealer would have been permitted by Order to sell the said controlled goods to such other person plus such charge as may be allowed by the Minister;

(c) who has re-purchased any controlled goods which have been sold by him shall resell the said controlled goods or any portion thereof to any person at a price in excess of the price at which he was permitted by Order to sell the said controlled goods in the first instance.

Charges for
containers

9. The Minister may, by Order, prescribe—

(a) the amount of the deposit which any person selling any controlled goods, subject to the condition that the container of those goods is to be returned, may require in respect of any such container; and

(b) the amount which such person shall, on the return of the container, refund to the person by whom the container is returned and the conditions subject to which such refund shall become payable.

Furnishing
of invoices

10. The Minister may, by Order, direct—

(a) that in respect of controlled goods the seller shall give to the purchaser at the time of the sale, or within a reasonable period thereafter, an invoice or memorandum giving, in respect of any such controlled goods, such particulars, in such manner, as may be prescribed by the Minister.

(b) that the seller shall retain a copy of such invoice or memorandum for such period as the Minister may prescribe; and

(c) that the purchaser of any controlled goods which are purchased with the object of resale, shall maintain and preserve, for such period as the Minister may prescribe, such records as will enable the cost to him of the said goods and the price at which he sold them to be readily and accurately ascertained.

Inducement
to sell
prohibited

11. No person shall, directly or indirectly, as an inducement to any other person to sell any controlled goods, offer, give or promise to such person any consideration in money or otherwise in addition to the price which such person is permitted by Order to charge for such controlled goods.

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[Subsidiary]

12.—(1) Save as is provided in subregulation (2) no person shall sell any controlled goods to any other person on condition that such other person purchases or acquires from him or from any other person any other goods whatsoever in addition to such controlled goods. Conditional selling

(2) Nothing in this regulation shall apply to any sale described in subregulation (1) if the other goods referred to in that subregulation are—

(a) goods which, according to the custom of the trade, are not sold separately from the controlled goods referred to in subregulation (1); or

(b) goods forming part of the same set of goods as such controlled goods.

13. The Minister may exempt any person from all or any of the provisions of any Order and the Minister may at any time, without giving any reasons therefor, withdraw any such exemption granted. Exemptions

14. If any person has received in respect of the sale by him of any controlled goods a price in excess of the price permissible for such goods under any Order the Minister may, irrespective of any action which may have been taken or which may be taken against such person under regulation 16, order him to refund to the purchaser, or, if the identity or whereabouts of the purchaser cannot readily be ascertained, to pay into the Consolidated Fund, a sum not exceeding twice the amount by which the price at which he sold the goods exceeds the controlled price. Refunds

15. In any prosecution for the contravention of any provision of these Regulations a certificate alleging— Evidence

(a) the cost of the controlled goods to the seller thereof;

(b) the maximum charge for delivery under regulation 6 (1) (c);

(c) the price at which it was or would have been permissible for any specified person to sell such controlled goods on any specified date or during any specified period and the method by which such price was arrived at;

(d) the contents of any Order made by the Minister and not published in the *Gazette*;

(e) the conditions imposed by the Minister in any permission or exemption granted under these Regulations;

(f) that any controlled goods which are alleged to have been sold or purchased, as the case may be, are controlled goods of a particular class, type or description.

[Subsidiary]

Control of Goods (Price Control) Regulations

shall, if purporting to have been signed by or on behalf of the Minister, be admissible as *prima facie* evidence of the facts therein stated.

Offences

16.—(1) Any person who—

(a) contravenes or fails to comply with any order or request or demand lawfully made under these Regulations;

(b) wilfully furnishes the Minister or an inspector with any incorrect or incomplete information or explanation;

(c) hinders or obstructs or delays an inspector in the performance of his duties or the exercise of his powers under these Regulations;

(d) refuses or fails to answer to the best of his knowledge any question lawfully put to him under these Regulations;

(e) fails to comply with any conditions lawfully imposed by the Minister in granting any permission or exemption under these Regulations;

(f) sells or agrees to sell any controlled goods at a price which exceeds, is less than or differs from, the appropriate price at which it is permissible for him to sell such controlled goods under any Order;

(g) renders, in respect of any controlled goods sold, an account specifying a price which exceeds the appropriate price at which it is permissible for him to sell such goods under these Regulations;

(h) makes a charge for delivery of controlled goods which exceeds the appropriate charge which it is permissible for him to make for such service under these Regulations;

(i) makes use of any art, device or contrivance which has the effect of evading these Regulations or any Order;

(j) gives to any other person in connection with any sale of controlled goods and the delivery thereof any invoice, statement of account or like document which is fictitious or false in any material particular;

(k) discloses, except to the Minister or to any person whose duty it is to deal with the subject matter of the disclosure, or when required to do so as a witness in a court of law, or for the purposes of these Regulations, any information in relation to any person or business acquired in the performance of his duties in carrying out, or in the exercise of his powers under, these Regulations;

(l) contravenes or fails to comply with any of these Regulations or any Order,

shall be guilty of an offence.

on manufacturing operations over a continuous period of at least six months ending on a date within twelve months of the date of sale.

6. Notwithstanding paragraphs 3 and 4 a dealer who has at one time stocks on hand of controlled goods of like quality, size and nature, the costs of which differ, may average such costs by dividing the aggregate cost of the whole stock of such goods by the total number of units of such goods on hand immediately after receiving the last consignment of such goods provided that he shall—

Averaging of costs

(a) keep a record which will show full particulars of the costs and quantities of the controlled goods upon which he determined the average cost;

(b) preserve all records and documents upon which he relied in making the entries referred to in paragraph (a) for a period of not less than twelve months;

(c) not alter his basis of determination of the cost of such goods without the written permission of the Minister; and

(d) not sell any such goods at a price based on an average cost until the entries in the record have been completed.

CONTROL OF GOODS (DISPLAY OF PRICES) ORDER

G.N. 71/1970

under reg. 6

of the Control of Goods (Price Control) Regulations

1. This Order may be cited as the Control of Goods (Display of Prices) Order. Citation

2. In this Order, unless the context otherwise requires— Interpretation
 "dealer" means a person who in any premises carries on the business of selling goods by retail or by wholesale;
 "premises" includes any display window, shop window or show case.

3. A dealer who in or upon the premises upon which he carries on business offers for sale any goods whatsoever shall display the prices at which such goods are so offered by placing such prices thereon in figures clearly legible to intending purchasers viewing the goods: Display of prices

Provided that the individual prices of goods of an identical kind grouped together may be indicated by single ticket.