[COURT OF APPEAL]

*R. & B. CUSTOMS BROKERS CO. LTD. v. UNITED DOMINIONS TRUST LTD.

SAUNDERS ABBOTT (1980) LTD. (THIRD PARTY)

1987 Dec. 4, 7; 21

Dillon and Neill L.JJ.

Sale of Goods—Implied term—Fitness for purpose—Plaintiff in business as shipping brokers—Plaintiff buying second-hand car for use of director—Whether term to be implied that car fit for ordinary use on English roads in English weather—Contract of sale containing clause excluding implied term as to fitness for purpose from sales in course of business—Whether plaintiff buying car "as consumer"—Whether implied term excluded from sale contract—Unfair Contract Terms Act 1977 (c. 50), ss. 6(2)(3), 12(1)(a) (as amended by Sale of Goods Act 1979 (c. 54), s. 63, Sch. 2, para. 19)[1]*—Sale of Goods Act 1979, s. 14(3)*[2]

The plaintiff company was in the business of freight forwarding and shipping agency. On 20 September 1984 one of its directors saw a Colt Shogun car at the third party's showrooms. He arranged for its purchase by the company for his use. The sale was arranged through the defendants, a finance company. The company traded in its existing car in part-exchange. Under clause 2(a) of the defendants' conditional sale agreement any warranty or condition as to condition, description, quality or fitness for any particular purpose was excluded from the contract of sale unless the buyer was dealing as a consumer. The defendants' forms were signed on behalf of the company on 21 September and the director drove the car away. During October he discovered that the roof of the car leaked. He made arrangements with the third party for its repair and for certain other work to be done. On 3 November the defendants countersigned the contract of sale. Two days later the car was taken in for repairs, but the third party failed to cure the leak. Eventually, in February 1985 the company rejected the car and claimed damages for breach of contract. The defendants claimed an indemnity from the third party. Judge McDonnell held that the company could not rely on an implied condition of merchantable quality under section 14(2) of the Sale of Goods Act 1979 because it had notice of the defect before the contract was made with the defendants. He found that the car was at all material times unfit for the purpose for which it was sold, namely ordinary use on English roads, and that the company was dealing as a consumer so that clause 2(a) of the conditional sale agreement did not operate by virtue of section 6(2) of the Unfair Contract Terms Act 1977 and the defendants were in breach of an implied term of fitness for purpose. He gave judgment for the company against the defendants and for the defendants against the third party.

On appeal by the third party:—

Held, dismissing the appeal, that under section 14(3) of the Sale of Goods Act 1979 there was to be implied into the contract of sale a condition that the car was reasonably fit for the particular purpose for which it had been purchased, namely, ordinary use upon the roads in England in English weather; that where an activity was merely incidental to the carrying on of a

[1] Unfair Contract Terms Act 1977, as amended, s.6(2)(3): see post, p. 328B–D. S. 12(1)(*a*): see post p. 328F.

[2] Sale of Goods Act 1979, s.14(3): see post, pp. 325H—326A.

business a degree of regularity had to be established before it could be said that the activity was an integral part of the business and so carried on in the course of that business; that since the company had not held itself out as making the contract for the purchase of the car in the course of business, and since, on the facts, the necessary degree of regularity had not been shown, the company was dealing as a consumer within the meaning of section 12(1) of the Unfair Contract Terms Act 1977, and by virtue of section 6(2) of that Act the implied term of fitness for purpose could not be excluded (pp. 326G—327A, 328H—329A, 330G—331C, 333H, 336H).

Dictum of Lord Keith of Kinkel in *Davies v. Sumner* [1984] 1 W.L.R. 1301, 1305, H.L.(E.) applied.

Per Dillon L.J. If the company had been dealing otherwise than as a consumer, in view of the facts that the company would, ex hypothesi, have been dealing in the course of business and that, even though the defendants would have had recourse against the third party, the defendants had never had possession of or inspected the car, had it been necessary to decide the point, the reasonableness test under section 6(3) of the Act of 1977 would have been satisfied (p. 332A–B).

The following cases are referred to in the judgments:

D. H. N. Food Distributors Ltd. v. Tower Hamlets London Borough Council [1976] 1 W.L.R. 852; [1976] 3 All E.R. 462, C.A.

Davies v. Sumner [1984] 1 W.L.R. 1301, H.L.(E.)

Hardwick Game Farm v. Suffolk Agricultural Poultry Producers Association [1969] 2 A.C. 31; [1968] 3 W.L.R. 110; [1968] 2 All E.R. 444, H.L.(E.)

Havering London Borough Council v. Stevenson [1970] 1 W.L.R. 1375; [1970] 3 All E.R. 609, D.C.

Symmons (Peter) & Co. v. Cook (1981) 131 N.L.J. 758

The following additional cases were cited in argument:

Cammell Laird and Co. Ltd. v. Manganese Bronze and Brass Co. Ltd. [1934] A.C. 402, H.L.(E.)

Rasbora Ltd. v. J. C. L. Marine Ltd. [1977] 1 Lloyd's Rep. 645

Teheran-Europe Co. Ltd. v. S. T. Belton (Tractors) Ltd. [1968] 2 Q.B. 545; [1968] 3 W.L.R. 205; [1968] 2 All E.R. 886, C.A.

APPEAL from Judge McDonnell sitting at the Mayor's and City of London Court.

The plaintiff company, R. & B. Customs Brokers Co. Ltd., claimed rescission and damages in respect of a contract for the credit sale of a Colt Shogun car supplied by the third party, Saunders Abbott (1980) Ltd., against the defendants, United Dominions Trust Ltd. On 31 March 1987 Judge McDonnell found for the plaintiff against the defendants, and for the defendants against the third party. He held that there was to be implied into the contract of sale a term that the car was reasonably fit for the purpose for which it had been supplied, and that such a term was not excluded by virtue of the provisions of section 6(2) and section 12(1) of the Unfair Contract Terms Act 1977.

The third party appealed on the grounds, inter alia, that (1) the judge erred in holding that the contract of sale between the plaintiff and the defendants was subject to a condition as to fitness for purpose implied by section 14(3) of the Sale of Goods Act 1979 in that there were no circumstances to show that the plaintiff did not rely or that it was unreasonable for them to rely on the third party's skill or judgment; (2) the judge's finding above was wholly inconsistent with his finding that the plaintiff had possession of the car for about six weeks before it

A entered into a contract with the defendants and the defective condition of the roof had indeed been revealed to it some three weeks before that contract had been concluded; (3) the judge erred in holding that the plaintiff dealt with the defendants as a consumer in relation to the sale between them, and that the contract was a consumer sale; (4) the judge erred in so finding in that he had held that one of the uses for which the plaintiff had bought the car was for use in its business as forwarding B agents, and having so found he erred in not finding that the plaintiff had bought the car or alternatively held itself out as buying the car in the course of a business within the meaning of the Unfair Contract Terms Act 1977 and the Sale of Goods Act 1979.

By a respondent's notice the plaintiff gave notice that it intended to rely on, inter alia, the following additional grounds: (1) there was no C evidence upon which the judge could find that the defective condition of the roof had been revealed to the plaintiff some weeks before the contract had been concluded; (2) the judge erred in holding that the implied condition as to merchantable quality in the contract between the plaintiff and the defendants was excluded under section 14(2)(*b*) of the Sale of Goods Act 1979; (3) the judge was wrong to hold that the implied condition as to merchantable quality was excluded when no such D defence had been pleaded; (4) the judge erred in holding that the plaintiff did not rely on the defendants' skill and judgment for the purposes of the implication of the condition of reasonable fitness for purpose under section 14(3) of the Act of 1979; and (5) the judge was wrong in finding that the defendants' exclusion clause in clause 2(a) of the contract was reasonable.

E The facts are stated in the judgment of Dillon L.J.

Timothy Scott for the third party.
Martin Farber for the plaintiff company.
Bernard O'Sullivan for the defendants.

Cur. adv. vult.

F 21 December. The following judgments were handed down.

DILLON L.J. The third party in these proceedings, Saunders Abbott (1980) Ltd., a motor dealer, appeals, with the support of the defendants, United Dominions Trust Ltd., a finance company, against a decision of Judge McDonnell in the Mayor's and City of London Court given on 31 G March 1987 whereby he awarded the plaintiff, R. &. B. Customs Brokers Ltd. ("the company"), judgment against the defendants and awarded the defendants a corresponding judgment against the third party.

The matter concerns a Colt Shogun hard top four wheel drive motor vehicle ("the car") which was sold to the company in 1984, but proved, as the judge found and the finding is not disputed, to be not reasonably H fit for the purpose for which it was sold, viz. the purpose of ordinary use upon the roads in England. The appeal raises questions as to the terms to be implied in a contract of sale under section 14 of the Sale of Goods Act 1979 and also questions of some general importance in relation to the Unfair Contract Terms Act 1977.

The events in question happened in 1984. The company had by then, it seems, been in business for some five or six years. It was a private company whose only directors and shareholders were a Mr. Roy Bell

and his wife. Its business was that of shipping brokers and freight forwarding agents. It owned a Volvo car and in September 1984 Mr. Bell was minded to exchange the Volvo for another vehicle. He saw the car offered for sale second-hand at the third party's showrooms. The third party had taken the car into stock on 18 September, cleaned it up and put it out for resale. The third party did not know, and had no reason for knowing, that the car suffered from the serious defect which later became apparent.

Mr. Bell saw the car on 20 and 21 September and decided that the company should buy it, and hand in the Volvo in part exchange. In his evidence he said that the four wheel drive vehicle would be more appropriate to his needs. The intention was that the car would be bought for personal and company use. The third party's cash price for the car was £10,295, but they were prepared to allow £5,645 as a turn-in price on the Volvo. That left a balance of £4,650 to be raised. That balance Mr. Bell wanted to raise for the company by a hire-purchase or credit sale arrangement. His evidence was that the car was the second or third vehicle acquired on credit terms.

The third party had a long-standing trading relationship with the defendants where credit sales were required. The third party carried stocks of the defendants' forms. The upshot was the usual triangular relationship: the third party sold the car to the defendants, who entered into their standard form of conditional sale agreement with the company.

So far as dates are concerned, Mr. Bell saw the car, as I have mentioned, on 20 and 21 September, and on 21 September he was allowed to take it away. He left the Volvo and the agreed turn-in price for the Volvo was treated as a deposit in relation to the car. He and his wife signed on behalf of the company a credit application form for the defendants and the defendants' form of conditional sale agreement. It is likely that these forms were signed on 21 September. They were sent by the third party to the defendants, and in due course the defendants countersigned the form of conditional sale agreement and returned the buyers' part to the third party for handing to Mr. Bell for the company. The defendants did not however actually countersign the documents until 3 November 1984, which happens to have been a Saturday. The reason for that delay is not known. It is clear that the defendants would only have signed the documents after they had in their hands the parts signed on behalf of the company.

Throughout these proceedings 3 November 1984 has accordingly been taken as the date of the contract by the third party to sell the car to the defendants, and the date also when a binding contract came into existence between the defendants and the company for the conditional sale of the car by the defendants to the company. There was indeed a late attempt by the company in the court below to argue that some form of contract had been made on or a few days after 21 September, but the judge refused to allow such a case to be made, since it was a new departure which had never been pleaded. It seems to me that, pleading apart, the contract must only have become binding when the defendants signed their part of the conditional sale agreement; the form of agreement incorporates statutory notices, and, even if there had been informal agreement to a transaction being entered into, it was always intended that written forms of contract should be signed and exchanged. The monthly hire payments or instalments under the conditional sale

A agreement only became payable a month after the date of the contract, and the first instalment was in fact paid on 4 December 1984.

In the meantime, between 21 September and 3 November 1984 certain things had happened. In the first place, on 10 October 1984, Mr. Bell had written on behalf of the company to the third party; he commented about certain alterations he desired for fitting his radio in the car and for connecting an electric facility from the tow bar and he B ended: "I await your advice of booking for you to provide the above." More importantly, though the weather at 21 September and for two or three weeks afterwards had been very fine, the second half of October was very wet and Mr. Bell then found that the roof of the car leaked. The result was that the car was taken into the third party's repair shop on 5 November 1984, to change over the radio and to attend to a water C leak in the roof. Mr. Bell's evidence was clear that when the car was taken in on 5 November, Mr. Wyeth, the third party's salesman, promised to have the leak detected and fixed. There is no evidence one way or the other to indicate whether the taking in of the car on 5 November was booked in advance; it appears, however, to have been entirely fortuitous that it happened two days after the defendants had, on 3 November, signed the forms of contract.

D Unfortunately, the third party failed to cure the leak. Though the car was sent back several times, and was at one stage sent to specialist subcontractors, the leak, so far from being cured, got worse. The resulting condition was very unpleasant. The upholstery became sodden with water, mouldy and evil-smelling. By February 1985 Mr. Bell rejected the car and asked for his money back. On the facts there is, in E my judgment, no doubt that because of the roof leak the car was, as the judge found, at all material times unfit for the purpose for which it was sold of ordinary use upon the roads in England.

There is no basis for any suggestion that the third party acted negligently or in bad faith and no such claim has been made. The company puts its claim in contract, and so necessarily makes it against the defendants, with whom alone it had a contract. The defendants F naturally claim indemnity against the third party.

The company relies on section 14 of the Sale of Goods Act 1979, which in its form relevant to this contract, having regard to its date, provides so far as material:

> "(1) Except as provided by this section . . . and subject to any other enactment, there is no implied condition or warranty about the G quality or fitness for any particular purpose of goods supplied under a contract of sale. (2) Where the seller sells goods in the course of a business, there is an implied condition that the goods supplied under the contract are of merchantable quality, except that there is no such condition—(*a*) as regards defects specifically drawn to the buyer's attention before the contract is made; or (*b*) if the buyer H examines the goods before the contract is made, as regards defects which that examination ought to reveal. (3) Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known to the seller any particular purpose for which the goods are being bought, there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the

buyer does not rely, or that it is unreasonable for him to rely, on the seller's skill or judgment. . . . (5) The preceding provisions of this section apply to a sale by a person who in the course of a business is acting as agent for another as they apply to a sale by a principal in the course of a business, except where that other is not selling in the course of a business and either the buyer knows that fact or reasonable steps are taken to bring it to the notice of the buyer before the contract is made. . . . (7) In the application of subsection (3) above to an agreement for the sale of goods under which the purchase price or part of it is payable by instalments any reference to the seller includes a reference to the person by whom any antecedent negotiations are conducted; . . ."

So far as subsection (2) is concerned, the relevant date is the date when the contract was made. With the usual tripartite arrangement between a dealer, a finance company and a purchaser, that is likely to be the entirely fortuitous date when the relevant documents are countersigned by the finance company, just as in the present case the contract was made on 3 November 1984. That is not satisfactory for the working of the Act, because if, as here, the purchaser is allowed interim possession of the car (or other goods) in question he may well by the experience of use become aware of defects, without appreciating their gravity, before the date on which the contract happens to be made. So in the present case the company was, through Mr. Bell, aware by experience before 3 November that the roof of the car leaked, though he had no idea that the leak was incurable.

The question therefore that arises under subsection (2) is whether, even though the car was in fact not of merchantable quality at 3 November, the company is precluded from relying on the condition in subsection (2) by virtue of the exception (*b*) because the company knew there was a leak in the roof even though it did not know that the leak was incurable. The judge held that the company was precluded from relying on the condition in subsection (2) because the company had knowledge that there was a leak in the roof; in effect, caveat emptor once the purchaser has notice of a defect, however apparently slight. If that is right, then, in the usual tripartite case involving a finance company, subsection (2) is something of a trap for a purchaser; he may lose his rights under the subsection if he fails to return the car or goods, or renegotiate the proposed contract, on the first appearance of an apparently slight defect.

However, in the circumstances of the present case I find it unnecessary to express a concluded view on whether the company can rely on the condition in subsection (2). On the facts of this case it is sufficient for the company if there is in the contract an implied condition either of merchantable quality under subsection (2) or in the terms of subsection (3) of section 14. I agree with the judge—subject to the questions in relation to the Act of 1977 to which I have yet to come—that there is to be implied in the contract between the company and the defendants an implied condition, under subsection (3), that the car was reasonably fit for the purpose for which it was being bought and that that condition was broken.

Subsection (3) refers to "any particular purpose for which the goods are being bought." Nothing has turned on the words "particular purpose" on this appeal; it has been common ground that the particular purpose

made known by implication to the third party (who is to be treated as the seller by virtue of subsection (7)) was the purpose of ordinary use upon the roads in England—in English weather. As Lord Morris of Borth-y-Gest observed in *Hardwick Game Farm v. Suffolk Agricultural Poultry Producers Association* [1969] 2 A.C. 31, 93:

> "There is no magic in the word 'particular.' A communicated purpose, if stated with reasonably sufficient precision, will be a particular purpose. It will be the given purpose. Sometimes the purpose of a purchase will be so obvious that only one purpose could reasonably be in mutual contemplation. An only purpose or an ordinary purpose may therefore be a particular purpose: . . . sometimes it will be made known by implication."

What is said for the third party in relation to subsection (3) is that the condition is not to be implied because of the final words of the subsection—"except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the seller's skill or judgment." It is said that by the date of the contract, 3 November, Mr. Bell knew of the roof-leak and had so far chosen not to tell the third party of it, while the third party did not know of it at all. It is said further for the third party that, though on 5 November Mr. Bell undoubtedly relied on the third party when Mr. Wyeth promised to have the leak detected and fixed, that came too late and was inadmissible, as the defendants had signed the forms of contract on 3 November.

I do not accept those submissions of the third party. What happened on 5 November is, in my judgment, admissible as part of the evidence to show what the state of mind of Mr. Bell and therefore of the company was on 3 November. It is accepted on behalf of the third party that, in respect of most matters concerning the car, the company was relying on the skill and judgment of the third party. That would have been particularly so on 20 and 21 September, but it would have been a continuing reliance; if Mr. Bell after taking possession of the car drove it at speed, he would have done so in continuing reliance on the third party not having "sold" him a car with defective brakes. When he realised that the roof of the car leaked, his reliance on the third party did not automatically terminate. The car was at that stage anyhow to go back to the third party on a date to be arranged for the radio to be fitted, as indicated in the letter of 10 October. I can see nothing in the short delay from when the leak was first apparent and 3 November to indicate that Mr. Bell had ceased to rely on the third party's skill and judgment. Then what happened on 5 November confirms that he did still rely on it. Accordingly, as indicated above, I agree with the judge on section 14(3).

I come therefore to the Act of 1977 and the defendants' printed conditions on their form of contract with the company. It is not in dispute that those conditions were sufficiently drawn to Mr. Bell's attention, although he did not trouble to read them, and therefore, in so far as they were applicable and valid, they are part of the conditional sale agreement of 3 November between the defendants and the company.

The relevant condition of the defendants, printed on the back of the form of conditional sale agreement, reads:

> "If the buyer deals as a consumer within the meaning of section 12 of the Unfair Contract Terms Act 1977 or any statutory modification

or re-enactment thereof . . . the buyer's statutory rights are not affected by sub-clause (a) of the following clause.

"*Exclusion of warranties and conditions.* 2(a) The seller not being the manufacturer of the goods nor at any time prior to the making of this agreement being in actual possession or control of them does not let the goods subject to any warranty or condition whether express or implied as to condition description quality or fitness for any particular purpose or at all."

The Act of 1977 provides by section 6 (as amended by the Sale of Goods Act 1979, section 63 and Schedule 2, paragraph 19):

"(2) As against a person dealing as consumer, liability for breach of the obligations arising from—(*a*) section 13, 14 or 15 of the 1979 Act (seller's implied undertakings as to conformity of goods with description or sample, or as to their quality or fitness for a particular purpose); (*b*) section 9, 10 or 11 of the 1973 Act (the corresponding things in relation to hire-purchase), cannot be excluded or restricted by reference to any contract term. (3) As against a person dealing otherwise than as consumer, the liability specified in subsection (2) above can be excluded or restricted by reference to a contract term, but only in so far as the term satisfies the requirement of reasonableness."

Two questions therefore arise, and success on either of them is sufficient for the company's purposes, viz.: (1) In entering into the conditional sale agreement with the defendants, was the company "dealing as consumer?" If it was, then, on the wording of the defendants' printed conditions, the condition 2(a) did not apply, no doubt because under section 6(2) of the Act of 1977 the liability could not be excluded. (2) If the company was dealing otherwise than as a consumer, does the defendants' condition 2(a) excluding liability under section 14(3) satisfy "the requirement of reasonableness?"

"Dealing as a consumer" is defined in section 12 of the Act of 1977, which provides:

"(1) A party to a contract 'deals as consumer' in relation to another party if— (*a*) he neither makes the contract in the course of a business nor holds himself out as doing so; and (*b*) the other party does make the contract in the course of a business; and (*c*) in the case of a contract governed by the law of sale of goods or hire-purchase, or by section 7 of this Act, the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption. (2) But on a sale by auction or by competitive tender the buyer is not in any circumstances to be regarded as dealing as consumer. (3) Subject to this, it is for those claiming that a party does not deal as consumer to show that he does not."

It is accepted that the conditions (*b*) and (*c*) in section 12(1) are satisfied. This issue turns on condition (*a*). Did the company neither make the contract with the defendants in the course of a business nor hold itself out as doing so?

In the present case there was no holding out beyond the mere facts that the contract and the finance application were made in the company's corporate name, and in the finance application the section headed

A "Business Details" was filled in to the extent of giving the nature of the company's business as that of shipping brokers, giving the number of years trading and the number of employees, and giving the names and addresses of the directors. What is important is whether the contract was made in the course of a business.

In a certain sense, however, from the very nature of a corporate entity, where a company which carries on a business makes a contract, it B makes that contract in the course of its business; otherwise the contract would be ultra vires and illegal. Thus, where a company which runs a grocer's shop buys a new delivery van, it buys it in the course of its business. Where a merchant bank buys a car as a "company car" as a perquisite for a senior executive, it buys it in the course of its business. Where a farming company buys a landrover for the personal and C company use of a farm manager, it again does so in the course of its business. Possible variations are numerous. In each case it would not be legal for the purchasing company to buy the vehicle in question otherwise than in the course of its business. Section 12 does not require that the business in the course of which the one party, referred to in condition (*a*), makes the contract must be of the same nature as the business in the course of which the other party, referred to in condition (*b*), makes D the contract, e.g., that they should both be motor dealers.

We have been referred to one decision at first instance under the Act of 1977, *Peter Symmons & Co. v. Cook* (1981) 131 N.L.J. 758, but the note of the judgment is too brief to be of real assistance. More helpfully, we have been referred to decisions under the Trade Descriptions Act 1968, and in particular to the decision of the House of Lords in *Davies* E *v. Sumner* [1984] 1 W.L.R. 1301.

Under the Trade Descriptions Act 1968 any person who in the course of a trade or business applies a false trade description to goods is, subject to the provisions of the Act, guilty of an offence. It is a penal Act, whereas the Act of 1977 is not, and it is accordingly submitted that decisions on the construction of the Trade Descriptions Act 1968 cannot assist on the construction of section 12 of the Act of 1977. Also the F legislative purposes of the two Acts are not the same. The primary purpose of the Trade Descriptions Act 1968 is consumer protection, and the course of business referred to is the course of business of the alleged wrongdoer. But the provisions as to dealing as a consumer in the Act of 1977 are concerned with differentiating between two classes of innocent contracting party—those who deal as consumers and those who do not— G for whom differing degrees of protection against unfair contract terms are afforded by the Act of 1977. Despite these distinctions, however, it would, in my judgment, be unreal and unsatisfactory to conclude that the fairly ordinary words "in the course of business" bear a significantly different meaning in, on the one hand, the Trade Descriptions Act 1968, and, on the other hand, section 12 of the Act of 1977. In particular I would be very reluctant to conclude that these words bear a significantly H wider meaning in section 12 than in the Trade Descriptions Act 1968.

I turn therefore to *Davies v. Sumner* [1984] 1 W.L.R. 1301. That case was not concerned with a company, but with an individual who had used a car for the purposes of his business as a self-employed courier. When he sold the car by trading it in part exchange for a new one, he had applied a false trade description to it by falsely representing the mileage the car had travelled to have been far less than it actually was. Lord Keith of Kinkel, who delivered the only speech in the House of

Lords, commented, at p. 1304F, that it was clear that the transaction—sc. of trading in the car on the purchase of a new one—was reasonably incidental to the carrying on of the business, but he went on to say, at p. 1305:

> "Any disposal of a chattel held for the purposes of a business may, in a certain sense, be said to have been in the course of that business, irrespective of whether the chattel was acquired with a view to resale or for consumption or as a capital asset. But in my opinion section 1(1) of the Act is not intended to cast such a wide net as this. The expression 'in the course of a trade or business' in the context of an Act having consumer protection as its primary purpose conveys the concept of some degree of regularity, and it is to be observed that the long title to the Act refers to 'misdescriptions of goods, services, accommodation and facilities provided in the course of trade.' Lord Parker C.J. in the *Havering* case [1970] 1 W.L.R. 1375 clearly considered that the expression was not used in the broadest sense. The reason why the transaction there in issue was caught was that in his view it was 'an integral part of the business carried on as a car hire firm.' That would not cover the sporadic selling off of pieces of equipment which were no longer required for the purposes of a business. The vital feature of the *Havering* case appears to have been, in Lord Parker's view, that the defendant's business *as part of its normal practice* bought and disposed of cars. The need for some degree of regularity does not, however, involve that a one-off adventure in the nature of trade, carried through with a view to profit, would not fall within section 1(1) because such a transaction would itself constitute a trade."

Lord Keith then held that the requisite degree of regularity had not been established on the facts of *Davies v. Sumner* because a normal practice of buying and disposing of cars had not yet been established at the time of the alleged offence. He pointed out for good measure that the disposal of the car was not a disposal of stock in trade of the business, but he clearly was not holding that only a disposal of stock in trade could be a disposal in the course of a trade or business.

Lord Keith emphasised the need for some degree of regularity, and he found pointers to this in the primary purpose and long title of the Trade Descriptions Act 1968. I find pointers to a similar need for regularity under the Act of 1977, where matters merely incidental to the carrying on of a business are concerned, both in the words which I would emphasise, "in the course of" in the phrase "in the course of a business" and in the concept, or legislative purpose, which must underlie the dichotomy under the Act of 1977 between those who deal as consumers and those who deal otherwise than as consumers.

This reasoning leads to the conclusion that, in the Act of 1977 also, the words "in the course of business" are not used in what Lord Keith called "the broadest sense." I also find helpful the phrase used by Lord Parker C.J. and quoted by Lord Keith, "an integral part of the business carried on." The reconciliation between that phrase and the need for some degree of regularity is, as I see it, as follows: there are some transactions which are clearly integral parts of the businesses concerned, and these should be held to have been carried out in the course of those businesses; this would cover, apart from much else, the instance of a one-off adventure in the nature of trade, where the transaction itself

A would constitute a trade or business. There are other transactions, however, such as the purchase of the car in the present case, which are at highest only incidental to the carrying on of the relevant business; here a degree of regularity is required before it can be said that they are an integral part of the business carried on, and so entered into in the course of that business.

Applying the test thus indicated to the facts of the present case, I B have no doubt that the requisite degree of regularity is not made out on the facts. Mr. Bell's evidence that the car was the second or third vehicle acquired on credit terms was in my judgment and in the context of this case not enough. Accordingly, I agree with the judge that, in entering into the conditional sale agreement with the defendants, the company was "dealing as consumer." The defendants' condition 2(a) is C thus inapplicable and the defendants are not absolved from liability under section 14(3).

There is a different approach which I would wish to leave open for a future case since it was not argued before us. If the company had never been incorporated and Mr. Bell had bought the car personally for personal (or domestic) and business use, it would, I apprehend, have been difficult to argue that he had not been dealing as a consumer in D buying the car. On facts such as those of the present case it would seem anomalous and in some measure disquieting if a different result were reached if the car was bought by a company for the personal and business use of its two directors. It occurs to me that in such circumstances it could well be appropriate to pierce the corporate veil and look at the realities of the situation as in *D.H.N. Food Distributors* E *Ltd. v. Tower Hamlets London Borough Council* [1976] 1 W.L.R. 852; see especially the comments of Lord Denning M.R., at p. 860, and Goff L.J., at p. 861.

It follows that it is unnecessary to decide whether, if the company had been dealing otherwise than as a consumer, the defendants' condition 2(a) excluding all liability under, inter alia, section 14(3) F satisfied the requirement of reasonableness. It is urged that it does not, because in these tripartite transactions the defendants are working with dealers of their choice, and whom they have approved, such as the third party, and have obvious rights of recourse against the dealer in the event of the defendants being held liable to a purchaser. It was submitted that the defendants had therefore no need for the protection of such a stringent condition as condition 2(a) and it was unreasonable G to impose it. This question has, however, to be considered on the hypothesis that the company was dealing otherwise than as consumer, i.e., was making the contract in the course of business. In such a case Parliament has, by the scheme of the statute, envisaged that it may be reasonable for a party to exclude liability under section 14 of the Sale of Goods Act; it cannot be said that as a matter of customer protection any H exclusion is per se unreasonable. The requirement of reasonableness is defined in section 11 of the Act of 1977 and the onus of establishing that it is satisfied is on the defendants; it requires that the term, sc. condition 2(a), shall have been a fair and reasonable one to be included in the contract having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made, and with particular regard to the matters specified in schedule 2 of the Act of 1977.

The most obviously important facts are: (1) that the company was ex hypothesi dealing in the course of business and Mr. Bell was not devoid of commercial experience; and (2) that, even though they would have recourse against the third party, the defendants had never themselves had possession of or inspected the car. In view of these factors, I would in all the circumstances have agreed with the judge, had it been necessary to decide the point, that the "reasonableness" test was satisfied in relation to condition 2(a).

In the upshot, however, for the reasons which I have given, and which are substantially the same as those of the judge on the points which he decided in favour of the company, I would dismiss this appeal.

NEILL L.J. The conditional sale agreement between R. & B. Custom Brokers Co. Ltd. (the company) and United Dominions Trust Ltd., the defendants, was made on 3 November 1984. It has been accepted that the contract between the defendants and the third party was made on the same date. There is no evidence to explain why so long a period elapsed between the date when the company first took delivery of the car (21 September) and the date of the agreement. As a result the company had the use of the car for about six weeks without payment; on the other hand, the company was in a position to observe any defects in the car before the agreement was made.

As the agreement between the company and the defendants was made in November 1984, it was governed by the provisions as to implied terms about quality or fitness set out in paragraph 5 of Schedule 1 to the Sale of Goods Act 1979, unless those provisions were excluded by the express terms of the agreement. I shall have to consider later the question whether the statutory implied terms were successfully excluded.

The relevant terms are to be found in section 14 of the Act of 1979 in the form in which that section took effect in relation to contracts made between 18 May 1973 and 19 May 1985. So far as is relevant, the section was in these terms:

> "(1) Except as provided by this section and section 15 below . . . there is no implied condition or warranty about the quality or fitness for any particular purpose of goods supplied under a contract of sale. (2) Where the seller sells goods in the course of a business, there is an implied condition that the goods supplied under the contract are of merchantable quality, except that there is no such condition . . . (*b*) if the buyer examines the goods before the contract is made, as regards defects which that examination ought to reveal. (3) Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known to the seller any particular purpose for which the goods are being bought, there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the seller's skill or judgment. (6) Goods of any kind are of merchantable quality within the meaning of subsection (2) above 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. (7) In the application of subsection (3) above to an agreement for

A the sale of goods under which the purchase price or part of it is payable by instalments any reference to the seller includes a reference to the person by whom any antecedent negotiations are conducted; . . ."

At the trial and before this court it was argued on behalf of the company that reliance could be placed on the condition to be implied B under section 14(2). The judge rejected this argument in these words:

"the buyer had possession of the car for about six weeks before they entered into the contract with the defendants and the defective condition of the roof had indeed been revealed to them some three weeks before that contract was concluded. Mr. Farber, for the plaintiff, submitted that the condition was still to be implied unless C examination revealed that the defect had reached such a stage as to make the car unmerchantable. I do not accept that submission and in my judgment the clear meaning of the statute is that the condition of merchantable quality was not to be implied where the buyer has examined the goods and he has seen or ought to have seen the defects complained of. In these circumstances he cannot complain if he fails to appreciate their consequences." D

Like Dillon L.J., I do not find it necessary to reach a final conclusion on this part of the case. The evidence is not clear as to precisely when the defects in the roof first came to light or as to what an examination at that time ought to have revealed. I am not at present persuaded, however, that the condition under section 14(2) is excluded if at the E time the contract is made the buyer is reasonably of the opinion that the defect can be, and will be, rectified quite easily at no cost to himself. In the present case, though there is no evidence as to the date when it was arranged that the car should go in for repair, it seems likely that the arrangement was made before the agreement with the defendants was concluded on Saturday 3 November 1984. The car in fact went into the garage on Monday 5 November.

F I turn therefore to the implied condition that the car was to be reasonably fit for the purpose of being driven on the roads in England. The judge held that it was not so fit and there is no appeal against this finding. It was argued on behalf of the third party (who is the effective appellant because it had had to indemnify the defendants) and on behalf of the defendants, however, that this condition was excluded by the G concluding words of section 14(3). Thus it was submitted that, as the company had discovered the defect in the roof before the agreement was made, it did not rely, or could not reasonably rely, on the skill or judgment of the defendants or the third party. I am unable to accept this submission. "The circumstances" existing at the time of the agreement included the fact that the company was clearly anticipating that the roof was going to be repaired in the near future. As I have H already noticed, it is likely that the arrangements for the car to go into the garage were made before Saturday 3 November.

Accordingly, I am satisfied that the judge was correct to conclude that, unless excluded by the express terms of the agreement, the sale of this car was subject to the condition to be implied under section 14(3).

I come next to the express terms, and in particular to clause 2 of the agreement between the company and the defendants. [His Lordship read clause 2(a) and continued:] Clause 2(a) is in wide terms and prima

facie is apt to exclude any implied conditions or warranties. But, as the agreement itself makes clear, a buyer's statutory rights are not affected if he deals as a consumer within the meaning of section 12 of the Unfair Contract Terms Act 1977: see section 6(2).

It is necessary therefore to examine section 12 of the Act of 1977. [His Lordship set out section 12 and continued:] By section 14 of the Act of 1977 "business" is defined as including "a profession and the activities of any government or local or public authority," but there is no definition in the Act of the phrase "in the course of a business."

It can be strongly argued that, where a person or company, being in "business" within the statutory definition, buys goods for the purposes of that business, the contract is made by him or it "in the course of a business." Indeed, in the case of a company it can be said that the contract would be ultra vires if it were not made "in the course of a business."

On this analysis a professional man or a company which buys a carpet for the office makes the contract of purchase "in the course of a business." Furthermore, this construction of "deals as consumer" (section 12) and of "a person dealing as consumer" (section 6(2)) would appear to be in conformity with the expression "in consumer use" in section 5.

Thus section 5(2)(*a*) provides:

> "goods are to be regarded as 'in consumer use' when a person is using them, or has them in his possession or use, otherwise than exclusively for the purposes of a business . . ."

It therefore seems clear that, in the example I have taken of the professional man or company buying a carpet for the office, the carpet, if it proved defective, would not be regarded as "in consumer use."

On the other hand, it is necessary to bear in mind that the phrase "in the course of a business" or similar phrases are to be found in other statutes dealing with the protection of consumers generally. I can take three examples.

(1) "Sells goods in the course of a business:" Sale of Goods Act 1979, section 14(2) and (3). These words were introduced by the Supply of Goods (Implied Terms) Act 1973: see section 3.

(2) "Any person who, in the course of a trade or business,—(*a*) applies a false trade description to any goods; or (*b*) supplies or offers to supply any goods to which a false trade description is applied; shall, subject to the provisions of this Act, be guilty of an offence:" Trade Descriptions Act 1968, section 1(1).

(3) "In a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill:" Supply of Goods and Services Act 1982, section 13. The phrase "in the course of a business" is also to be found in section 4 of this Act.

Guidance as to the proper construction of the words "in the course of a trade or business" in section 1(1) of the Trade Descriptions Act 1968 was given by the House of Lords in *Davies v. Sumner* [1984] 1 W.L.R. 1301. In that case a self-employed courier bought a car in June 1980 which he used almost exclusively for his business of transporting films and other material for a television company. In July 1981 he offered the car to a dealer in part exchange for the purchase of a new one. By then the car had travelled 118,100 miles, but the five-digit

A odometer recorded only 18,100, and the appearance of the car was consistent with that reading. The defendant did not disclose the true mileage to the dealer, and on the part exchange he obtained a credit appropriate to the mileage on the odometer. He was convicted by the justices of an offence contrary to section 1(1)(*a*) of the Trade Descriptions Act 1968.

B The Divisional Court allowed his appeal on the ground that the false description had not been applied by him in the course of a trade or business and on an appeal by the prosecutor to the House of Lords the appeal was dismissed.

In the course of his speech, with which the other members of the House agreed, Lord Keith of Kinkel considered the earlier case of *Havering London Borough Council v. Stevenson* [1970] 1 W.L.R. 1375,

C where the defendant, who carried on a car hire business, had a usual practice of selling the cars employed in it every two years. He sold them at the current trade price and paid the proceeds into the business for the purpose of buying new cars.

In relation to one such sale he falsely represented to the purchaser of the car that the mileage it had travelled was substantially less than was

D actually the case. A charge against him under section 1(1)(*b*) of the Trade Descriptions Act 1968 was dismissed by the justices but an appeal by the prosecutor by way of case stated was allowed by the Divisional Court. In referring to this decision Lord Keith said [1984] 1 W.L.R. 1301, 1305–1306:

> "This decision, the correctness of which was not challenged by Mr.
> E Somerset Jones for the respondent, vouches the proposition that in certain circumstances the sale of certain goods may, within the meaning of the Act, be in the course of a trade or business, notwithstanding that the trade or business of the defendant does not consist in dealing for profit in goods of that, or indeed any other, description.
>
> "Any disposal of a chattel held for the purposes of a business
> F may, in a certain sense, be said to have been in the course of that business, irrespective of whether the chattel was acquired with a view to resale or for consumption or as a capital asset. But in my opinion section 1(1) of the Act is not intended to cast such a wide net as this. The expression 'in the course of a trade or business' in the context of an Act having consumer protection as its primary
> G purpose conveys the concept of some degree of regularity, and it is to be observed that the long title to the Act refers to 'misdescriptions of goods, services, accommodation and facilities provided in the course of trade.' Lord Parker C.J. in the *Havering* case [1970] 1 W.L.R. 1375 clearly considered that the expression was not used in the broadest sense. The reason why the transaction there in issue
> H was caught was that in his view it was 'an integral part of the business carried on as a car hire firm.' That would not cover the sporadic selling off of pieces of equipment which were no longer required for the purposes of a business. The vital feature of the *Havering* case appears to have been, in Lord Parker's view, that the defendant's business *as part of its normal practice* bought and disposed of cars. The need for some degree of regularity does not, however, involve that a one-off adventure in the nature of trade,

carried through with a view to profit, would not fall within section 1(1) because such a transaction would itself constitute a trade.

"In the present case it was sought to be inferred that the respondent, covering as he did such a large regular mileage, was likely to have occasion to sell his car at regular intervals, so that he too would have a normal practice of buying and disposing of cars. It is sufficient to say that such a normal practice had not yet been established at the time of the alleged offence. The respondent might well revert to hiring a car, as he had done previously. Further the respondent's car was a piece of equipment he used for providing his courier service. It was not something he exploited as stock in trade, which is what the defendant was in substance doing with his cars in the *Havering* case [1970] 1 W.L.R. 1375. Where a person carries on the business of hiring out some description of goods to the public and has a practice of selling off those that are no longer in good enough condition, clearly the latter goods are offered or supplied in the course of his business within the meaning of section 1(1). But the occasional sale of some worn out piece of shop equipment would not fall within the enactment."

It is of course true that section 1(1) of the Trade Descriptions Act 1968 creates a criminal offence, whereas the other sections to which I have referred create no more than obligations in the civil law. Nevertheless, it would be unsatisfactory in my view if, when dealing with broadly similar legislation, the courts were not to adopt a consistent construction of the same or similar phrases.

Accordingly, in relation to a seller of goods or a supplier of services, I consider that the court should follow the guidance given by Lord Keith in *Davies v. Sumner*. Furthermore, as the words "in the course of a business" are used both in section 12(1)(*a*) and in section 12(1)(*b*) of the Act of 1977 and as the party referred to in section 12(1)(*b*) will be the seller or supplier of the goods, it seems to me that the same construction of the words "in the course of a business" must be adopted for both paragraphs, and that therefore the *Davies v. Sumner* test should be used for construing section 12(1)(*a*).

In the present case Mr. Bell gave evidence on behalf of the company that the car was only the second or third vehicle acquired on credit terms. It follows, therefore, that no pattern of regular purchases had been established for this business, nor can it be suggested that this transaction was an adventure in the nature of trade. I am therefore satisfied that in relation to the purchase of this car the company was dealing as consumer within the meaning of section 12 of the Act of 1977.

In these circumstances it is unnecessary to consider whether the exclusion clause in the conditional sale agreement would have satisfied the requirement of reasonableness according to the test contained in section 11 of and Schedule 2 to the Act of 1977. The evidence in this case as to the date when and the precise circumstances in which the conditional sale agreement was signed is unclear. I do not consider I can express any useful opinion on this aspect of the case.

Nevertheless, for the reasons given by Dillon L.J. and for the reasons which I have endeavoured to outline, I too would dismiss this appeal.

Appeal dismissed with costs for plaintiff company.
No order as to defendants' costs.
Leave to appeal refused.

Solicitors: Judge & Priestley, Bromley; Santers, Barking; Sechiari, Clark & Mitchell, Barnet.

R. C. W.

[COURT OF APPEAL]

*REGINA v. BIRMINGHAM CITY JUVENILE COURT, *Ex parte* BIRMINGHAM CITY COUNCIL

1987 Aug. 6, 7

Dillon, Stephen Brown and Neill L.JJ.

Children and Young Persons—Care proceedings—Interim care order—Local authority applying for further interim care order—Application opposed—Juvenile court refusing to hear evidence—Application decided on representations—Whether court obliged to hear evidence—Children and Young Persons Act 1969 (c. 54), s. 2(10) (as amended by Mental Health (Amendment) Act 1982 (c. 51), s. 65(1), Sch. 3, para. 44)[1]*—Magistrates' Courts (Children and Young Persons) Rules 1970 (S.I. 1970 No. 1792 (L. 32)), r. 14B (as inserted by Magistrates' Courts (Children and Young Persons) (Amendment) Rules 1976 (S.I. 1976 No. 1769 (L. 34)), r. 2, Sch., para. 5 and amended by Magistrates' Courts (Children and Young Persons) (Amendment) Rules 1984 (S.I. 1984 No. 567 (L. 3)), r. 2, Sch., para. 3)*[2]

The local authority instituted proceedings for a care order in respect of a child under section 1 of the Children and Young Persons Act 1969. The proceedings were adjourned on four occasions, and twice interim care orders for 28 days were made, by consent, under section 2(10) of the Act of 1969 without any evidence being adduced. The local authority applied for a fifth adjournment, in order to make further investigations, and, when the juvenile court granted that application, the local authority applied for a further interim care order. The child's mother opposed the making of such an order, and the local authority sought to call four witnesses in support of its application. The juvenile court refused to hear any evidence and decided to determine the application on representations only. Having heard the representations of the local authority and the mother, the court refused to make any interim care order. The local

[1] Children and Young Persons Act 1969 (as amended), s. 2(10): see post, p. 343F.
[2] Magistrates' Courts (Children and Young Persons) Rules 1970 (as amended), r. 14B: see post, p. 344F–H.