THE SALE OF GOODS AND SUPPLY OF SERVICES BILL: A REVIEW AND ANALYSIS

G. M. Golding*

INTRODUCTION

When formulating the Sale of Goods and Supply of Services Bill, the parliamentary draftsman depended to a large extent on three British statutes; the Misrepresentation Act, 1967; the Supply of Goods (Implied Terms) Act, 1973; and the Unfair Contract Terms Act, 1977. One, therefore, has an immediate reaction of déjà vu. It is of course not unusual for the Oireachtas, in the field of black-letter law, to lean heavily on Westminster. Neither is it reprehensible. On the contrary, it is desirable for our law to approximate to that of Britain, to facilitate trade, to learn from the Reports of the British Law Reform Commission, to take British judicial precedents into account and, being a member State of the European Community, to harmonise our law with that of our neighbours. There is another reason why the reader will find the Bill familiar. It is a replica (with considerable drafting improvements) of the Consumer Protection Bill, 1977, initiated by the last administration, and which suffered the same fate as that Government. To confound confusion, a Private Members' Bill bearing the same title ("Consumer Protection") was introduced only weeks before the Sale of Goods and Supply of Services Bill, 1978 (by Deputies O'Toole, Bruton and Kelly). It went the way of most such Private Members' Bills in this country, and was pre-empted by the Sale of Goods and Supply of Services Bill, 1978.

One important matter must not be glossed over. Our Bill goes further than the British Act of 1973 in that it embraces the supply of services. However, it does not extend nearly so far as the Misrepresentation Act, 1967 and the Unfair Contract Terms Act, 1977.

The Bill's far-reaching changes in the law reflect the development of society and commercial usage from 1893 to the present day. Its provisions may therefore only be appreciated in its historical and social perspective. The 1893 Act reflected the 19th century Age of Mercantilism. The 1978 Bill reflects the movement in favour of the consumer. No longer are contracts to be presumed, as in the day of *laissez-faire*, to be freely negotiated by the parties. That fiction, in relation to the

*The author is lecturer in Business Law at University College, Dublin.

sale of goods, hire-purchase and the supply of services, is finally laid to rest. It is at long last recognised that the consumer is in a weak bargaining position, often bound by standard form contracts (or "contracts of adhesion"). In such cases the consumer had to take or leave the contract as it was proffered. Often, standard form contracts deprived him of his rights, whether statutory or common law. Deputy O'Toole, in the Second Stage of the debate on the Bill, referred to Plato: "[He] stated that merchants must be compelled to remain within the city for ten days following a sale and during this time a purchaser who is informed of the seller's address may have a sale cancelled. The only comment I wish to make is that Plato would have made an admirable Director of Consumer Affairs or Minister of State. Even twenty-three centuries later consumers here have not the rights which Plato said should be conferred on [them]. At last this Bill seeks to catch up with Plato."[1]

The kernel of the 1893 Act is to be found in sections 12–15, dealing with implied terms. The Act gave the buyer of goods certain implied rights which would apply even though not expressly stated in a contract. A great inroad was thus made into the old principle of *caveat emptor.* The implied terms related to full title to the goods, quiet possession, freedom from encumbrances, merchantable quality and, lastly, fitness for purpose (similarly, section 9 of the Hire-Purchase Act, 1946). But, reflecting the 19th century market philosophy, the 1893 Act allowed the parties freedom of contract – and thus freedom to contract out of these implied terms (Not so the 1946 Act).

The 1978 Bill provides that the statutory implied conditions and warranties relating to clear title, quiet possession and freedom from encumbrances will no longer be automatically avoided by the circumstances of a contract by exclusion clauses. It amends the law relating to the implied terms of fitness for purpose and merchantable quality – which it re-defines – in such a way as to cover any purpose which the buyer may indicate and his attention must be drawn to defects. In short, the 1978 Bill removes the freedom under the 1893 Act to negative or vary rights and duties,[2] except in cases where the buyer is also acting in the course of a business and the waiver provision (exclusion clause) is fair and reasonable.

THE CONSUMER

For the first time in Irish law the "consumer" is recognised and defined (He does not figure as such in the Consumer Information Act, 1978). A party to a contract "deals as consumer" if (a) he does not make the contract in the course of business and, (b) the other party does and, (c) the goods or services involved are of a type ordinarily supplied for private use or consumption. It is for those claiming that a party does not "deal as consumer" to show that he does not do so.[3]

There are not many references in the Bill to dealings "as consumer," but they are vital, and are as follows:

1. When dealing with a consumer, it shall be an offence for a person in the course of business to purport to delimit the consumer's rights flowing from the implied terms.[4]

2. Where goods are sold to a buyer dealing as consumer and the sale is funded by a finance house, which pays the seller, the finance house shall be deemed to be a party to the sale. Liability in respect of the transaction is joint and several.[5] This calls for pause for thought. It is fair that, in a hire-purchase agreement, the finance house should be liable (for example, in respect of defective goods) to the hirer. But what of a transaction involving the use of a credit card? It appears to be caught by this provision. One wonders whether this is indeed the intention of the legislature. A serious flaw appears to exist in these provisions, and may be said to run throughout the Bill. The Bill does not apply to the *leasing* of goods. It is common practice now for goods of every description to be leased, rather than let on hire-purchase. Such leases are obviously not sales of goods; neither are they caught by the definition of a hire-purchase agreement.[6] More and more goods, both for business and domestic use, are now leased, rather than let out on hire-purchase.[7] Being totally uncontrolled by law, exclusion clauses as invidious as any ever used are to be found in such leases. Consider the following, extracted from the standard form of leasing agreement currently being used by a well-known Dublin finance house:—

> "The lessee hereby expressly releases the lessor from any legal obligation or liability arising by reason of any defect in the goods, whether latent or patent, or from their unsuitability for any particular purpose, and agrees to keep the lessor fully indemnified against any claim for damages by any third party by reason of any such defect whether latent or patent.
>
> "Further the lessee hereby expressly agrees that the delivery of the goods has been made by the lessor without any condition or warranty as to fitness for a particular purpose, and all conditions and warranties, whether statutory or otherwise, in relation to the goods are expressly excluded, and the lessor shall be under no legal obligation whatsoever in relation thereto."

It is not too late for the Bill to be re-drawn to provide control for leases of goods, of a like nature to the control of sales of goods, hire-purchase transactions and the supply of services.

3. A buyer who is a consumer, even when compelled to treat a breach of condition as a breach of warranty, will still have the power of rescission if the seller fails to remedy the breach.[8]

4. Where the buyer deals as consumer, any term excluding section 13 (implied term as to sale by description), 14 (fitness for purpose), or 15 (sale by sample) of the Act of 1893 shall be void.[9]

5. Where a hirer deals as consumer, any term excluding section 27 (letting by description), 28 (fitness for purpose), or 29 (letting by sample) of the 1978 Bill shall be void.[10]

6. When goods are let under a hire-purchase agreement to a hirer dealing as consumer, any person who negotiated the agreement shall be deemed to be a party to it.[11] This is another inroad into the doctrine of privity. Thus, a dealer who introduces a customer to a finance house will be deemed to be a party to the resulting hire-purchase agreement. The vexed question as to whether or not such a dealer is acting as agent for the finance company or for the hirer is thus settled. In *Mercantile Credit Co. Ltd.* v. *Hamblin,*[12] Pearson, L. J. said. "There is no rule of law that in a hire-purchase transaction the dealer never is, or always is, acting as agent for the finance company or as agent for the customer". On the other hand, Lord Denning and Donovan, L. J. in *Financings Ltd.* v. *Stimson*[13] considered the dealer in fact and in law to be the agent for many purposes of the finance company. Lord Wilberforce, in *Branwhite* v. *Worcester Works Finance,*[14] said that the question could not be resolved "without reference to the general mercantile structure within which they arise, or, if one prefers the expression, to mercantile reality".

7. Where the recipient of a service deals as consumer, any term excluding section 36 of the 1978 Bill (implied terms relating to necessary skill, supplied with due skill, care and diligence, materials, if any, to be sound and reasonably fit) must be specifically brought to the recipient's attention.[15]

OFFENCES

The Bill creates new criminal offences for breach of certain of its provisions. That the infringements of private rights which arise as a result of voluntary commercial transactions should be subject to penal sanctions is not an innovation in juristic thought. Consider, for example, those offences provided for by the Companies Act, 1963 and by the Weights and Measures legislation. A person guilty of an offence under the Bill shall be liable on summary conviction to a fine not exceeding £500 or, at the discrimination of the court, to imprisonment for a term not exceeding six months, or to both fine and imprisonment. On conviction on indictment, the fine has a ceiling of £10,000 or imprisonment for a term not exceeding two years, or both. Where the offence is com-

mitted by a body corporate or an unincorporated association, the director, manager, secretary, management committee member or any other similar officer shall be liable.[16]

The offences are as follow:–

1. For a business seller to issue any written statement – by notice, label, inscription or otherwise – that a right conferred by sections 12–15 of the 1893 Act is restricted or excluded, or to sell goods bearing such a statement.[17]

2. For a motor vehicle dealer to sell a vehicle which is not road-worthy or to fail to provide a certificate of road-worthiness (except where it is not to be used on the road in its present condition and this is agreed in writing by the parties).[18]

3. For the seller of goods who fails to set out the minimum information to be specified in any "guarantee" which might accompany the goods.[19]

4. For a person to seek payment for the delivery of unsolicited goods, without reasonable cause to believe that he has a right to payment in the course of business.[20]

5. For a person to demand payment by way of charge for an entry in a directory "relating to . . . trade or business" unless resulting from a signed order.[21] It is curious that this section is so narrowly drawn. Why should it not also be an offence to demand payment for an entry in, for example, a non-trade directory such as "Who's Who"? Mr. B. Desmond, T.D. in the debate on the Second Stage of the Bill, commented "[It] is amazing how gullible business people will flash a cheque for £10, £15, or £50 to those so-called directory compilers with profuse thanks for having their illustrious names included in a directory which might have a circulation of 1,500, 500 or a couple of hundred . . . There has [sic] been at least two cases here where the directories did not even exist . . . "[22]

6. For a person to fail to include certain particulars in relation to specified classes of contracts or guarantees, such particulars and classes to be nominated by Ministerial Order.[23]

7. For a person to make use of a standard form contract for the supply of a specified service, without giving notice to the public as to whether he is, or is not, willing to contract on other terms. Again, the services involved are to be specified by Ministerial Order.[24] Why, it must be asked, is this offence limited to contracts for the supply of services? Surely standard form contracts are open to similar abuses in cases of sales of goods and hire-purchase transactions?

8. For a seller of goods or supplier of services to make use of any printed contract, guarantee or other specified class of document unless printed in a minimum size typeface, to be prescribed by Ministerial Order.[25]

DELEGATED LEGISLATION

It will have been noted that the Bill leaves many matters to be dealt with by way of Ministerial Order. To a large extent the Bill remains to be fleshed-out by the Minister for Industry, Commerce and Energy. All such Orders must be tabled in both Houses of the Oireactas, and approved by each House. The Minister may (by Order) revoke or amend such Orders.[26] Thus far, only those which are backed by sanctions have been mentioned. The following are all the provisions which will have to await implementation by way of delegated legislation:–

1. In certain contracts for the sale of goods there shall be an implied warranty that spare parts and an adequate aftersale service shall be provided by the seller for such period and in such circumstances as are stated in the offer for sale or representations made by way of advertisements or otherwise. The Minister, after consultation with interested parties, may by Order define these contracts for the sale of such goods.[27]

2. Except in the cases where there is no implied term as to the sale of motor vehicles free from defects (such as to render them a danger to the public), the seller, in the course of business, shall be obliged to certify that a motor vehicle is free from such defects. The Minister may, "by regulations", prescribe further matters to be included in the certificate.[28] Is there any significance in the reference to "regulations" in this section, rather than "Order"? If so, it would appear that these "regulations" need not be tabled in the Oireachtas.

3. In the case of a contract for the sale of goods or of hire-purchase "entered into by a person in the course of a business elsewhere than at his place of business . . . or in other specified circumstances, there shall be a specified period within which the customer shall be entitled to withdraw his acceptance of the contract". The Minister is, by Order, to provide conditions relating to the "cooling-off" period.[29] Section 4 of the 1893 Act should not be overlooked in this context. To enforce the contract, it requires a note or memorandum in writing, signed by the party to be charged – in the case of the sale of goods worth £10 or more. Thus in *Russell & Baird Ltd.* v. *Hoban*[30] the absence of such a memorandum enured to the buyer's benefit. Likewise, section 3 of the Hire-Purchase Act, 1946 requires a written memorandum (though quite different in form). Under Article 100 of the Treaty of Rome, the EEC Commission has prepared a draft Directive[31] for the protection of the consumer in respect of contracts which have been negotiated away from business premises.[32] The Ministerial Order [33] will no doubt

comply with that Directive. Indeed, "there is every reason to extend the period for reflection to *all* hire-purchase agreements, whether made at the front door or at the trader's business premises. It is notorious that certain classes of people assume liabilities under numerous hire-purchase agreements and then find the load too heavy to bear."[34]

4. The Minister may make an Order, following such consultation as he considers necessary, requiring certain particulars to be included in specified contracts for sale of goods or supply of services.[35]

5. Likewise, where standard form contracts are used in connection with the supply of services, he who proffers one may be required by Order to give notice to the public as to whether he is or is not willing to contract on any other terms.[36]

6. The Minister may by Order provide for the size of typeface to be used in printed forms of contract.[37]

7. The Minister may by Order provide that certain classes of contracts for sale of goods and supply of services must be evidenced in writing, and unenforceable if not.[38] Reference has already been made to the operation of section 4 of the 1893 Act. It has been abolished in Britain.[39] As noted, it seems to work beneficially, for both consumer and business contracts.

8. The Minister is empowered to confer on the Director of Consumer Affairs (appointed pursuant to the Consumer Information Act, 1978) wide functions in relation to the 1978 Bill: (a) to keep relevant commercial practices under general review; (b) to carry out examinations of such practices; (c) to request persons engaged in activities contrary to the Bill to desist from them: (d) to prosecute summary proceedings for offences under the Bill; and, (e) to confer on the Director of Consumer Affairs "such other functions" as the Minister "considers appropriate".[40]

However, the Minister may not make the Order referred to[41] without first consulting with the Minister for Finance.[42] This restriction only applies where the Order would affect business carried on under a banking licence,[43] or any business exempted from holding such licence.[44] The following are exempted from holding such a licence: the Agricultural Credit Coropration Ltd., the Industrial Credit Co. Ltd., the Post Office Savings Bank, trustee savings banks under the Trustee Savings Banks Acts, 1863 to 1965, building societies, industrial and provident societies, friendly societies, credit unions, investment trust companies, and managers under unit trust schemes.

IMPLIED TERMS

These may be conveniently treated in connection with (1) Sale of Goods (Part II of the Bill), (2) Hire-Purchase (Part III of the Bill) and (3) Supply of Services (Part IV of the Bill).

(1) Sale of Goods (Part II of the Bill).

Sections 12–15 of the 1893 Act are reproduced, with some vital and some minor amendments, in a Table to section 10 of the 1978 Bill. Section 12 of the Table replaces with modifications subsections (2) and (3) of section 12 of the 1893 Act. So far as the warranty of freedom from encumbrances is concerned, the provisions of section 12(3) of the 1893 Act were expressed *in futuro*, so that breach of warranty probably depended on the assertion of a charge or encumbrance by claim or demand of a third party. The wording of the new provision indicates that the warranty is broken by the mere existence of the charge or encumbrance at any time from the date of the contract until the time when the property is to pass. Further, any charge or encumbrance will now have to be disclosed or known to the buyer *before* the contract is made. Actual knowledge of the charge or encumbrance would appear to be required, since the doctrine of constructive notice does not apply in commercial transactions. The new provision will at least mitigate the severity of the operation of "retention of title" clauses, as in *Romalpa Aluminium Industrie Vassen B.V.* v. *Romalpa Aluminium Ltd.*,[45] and *In re Interview Ltd.*[46]

A subsequent English case, *Monsanto Ltd.* v. *Bond Worth Ltd.*,[47] may have solved some of the problems created by retention of title clauses. Monsanto had amended its terms of sale to Bond Worth, to retain what it called the "beneficial and equitable interest" in the goods which were the subject of the contract. Slade, J. held that this was an attempt to create a trust but did not succeed because a trust was "fundamentally inconsistent" with Bond Worth's freedom under the contract to deal with the goods freely and for its own benefit. If therefore a trust had not been created, the only effect of the term would be to create an equitable charge. But in that event, Monsanto should have registered such charge.[48] Since it had not done so, Monsanto's claim to the goods, or the proceeds of the sale of them, failed. As Mr. Raymond Sears, Q.C., counsel for Monsanto, put it: "This knocks *Romalpa* for six".[49]

Returning to the warranty for quiet possession, the wording of the present provision confirms the construction adopted by Lord Greene, M. R. in *Mason* v. *Burningham*[50] in preference to that adopted by Atkin, L. J. in *Niblett* v. *Confectioners' Materials Co. Ltd.*[51] In *Mason* v. *Burningham*, B purchased a typewriter from S for £20 and subsequently spent £11 on having it repaired. It was then discovered that the typewriter was in fact "stolen goods" and B had to return it to the owner. B sought to recover the £11 as well as the £20 on the ground

that there had been a breach of warranty of quiet possession. It was found that the repairs were "the ordinary and natural thing" for her to have done, and thus her claim succeeded. Lord Greene, M. R. rejected the argument advanced on behalf of S that the warranty did not apply to disturbance of possession by the true owner, by analogy with the *title paramount* principle of conveyancing law.[52]

Section 12(2) of the Table is entirely new. It is designed to deal with the situation where it is clear that the seller is purporting to sell only a limited title. Section 12 of the 1893 Act formerly provided that the conditions and warranties it contained were to be implied "unless the circumstances of the contract are such as to show a different intention". The 1978 Bill prohibits their exclusion or modification, but nevertheless permits a contract for the sale of a limited title (inspired, again, by *Romalpa*[53] and *Interview*).[54] Even so, the warranties of freedom from encumbrances and quiet possession are still to be implied.

The implied condition that the goods shall correspond with their description (1893 Act, section 13) is clarified. The Bill places beyond doubt that there may still be a sale by description where the goods, being exposed for hire or sale, are selected by the buyer, for example in a self-service shop. As a result of this amendment and of judicial interpretation of section 13 of the 1893 Act the only sales which will not now be by description are those which are sales of specific goods *as such,* without any reference (express of implied) to a description.[55]

The general rule of *caveat emptor* found in section 14 of the 1893 Act is preserved and a number of significant changes relating to merchantable quality (section 13(2), 1893 Act) are made. First, there is now no requirement that the goods should be bought "by description". Thus all sales, even of specific goods as such, are potentially subject to the new version of section 14(2). Secondly, the corresponding provision in the 1893 Act required that the goods should be bought from a seller "who deals in goods of that description" (see *Christopher Hill Ltd.* v. *Ashington Piggeries Ltd.*).[56] Non-business sales are still excluded, but the requirement that "the seller sells goods in the course of a business" is less narrowly confined. It will extend to cases where the seller sells goods of a kind in which he has not previoulsy dealt. It will also extend to cases where he sells goods of a kind in which he does not ordinarily deal, for example, when an accountant sells off a typewriter from his office.

Thirdly, the words "whether he be the manufacturer or not" have been excised, so making it clear (as was the interpretation under the previous law) that the subsection does not apply to manufactured goods. The new subsection refers to "the goods supplied under the contract" which will embrace containers for the goods,[57] and also, goods additional to

the contract goods which would render the contract goods unmerchantable by their presence.[58]

As in section 14 of the 1893 Act, there are two exceptions to the implied condition as to merchantable quality. Section 14(2) (a) of the Table is new: there is no implied condition "as regards defects specifically drawn to the buyer's attention before the contract is made". The second exception (section 14(2) (b)) reproduces the original, in changed language. A mere opportunity to examine the goods before the contract is made will not defeat the implication of the condition as to merchantable quality; and the substitution of the words "*that* examination" for the former "*such* examination" indicates that the condition will only be excluded in respect of defects which should have been revealed by the actual examination made, and not those which would have been revealed by a reasonable or thorough examination if the examination is only cursory or partial.[59]

Section 14(3) of the Table is a major innovation giving a re-definition of "merchantable quality", as follows:—

> "Goods are of merchantable quality if they are fit for the purpose or purposes for which goods of that kind are commonly bought *and as durable* as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances, and any reference in this Act to unmerchantable goods shall be construed accordingly."

With the exception of the emphasised phrase ("and as durable") this definition otherwise is equivalent to that set out in section 62(1A) of the British 1973 Act. It is based on a *dictum* of Dixon, J. in *Australian Knitting Mills* v. *Grant*[60] as approved by a majority of the House of Lords in *Henry Kendall & Sons* v. *William Lillico & Sons Ltd.*[61] Accordingly, it would seem highly probable that the courts will seek guidance from the pre-1973 British precedents as to its interpretation.

The Bill being of a codifying nature, it is well established that reference to earlier cases may be justified if it is sought to show that particular words had acquired a particular technical meaning (per Lord Herschell in *Bank of England* v. *Vagliano Bros.*[62] This observation holds good, of course, for all the new provisions in the Bill which consolidate judge-made law). However, the reference to *durability* appears to be entirely new. According to the Whincup Report[63] only the Ontario Law Reform Commission proposed the "novel requirement" of durability. "The new law would impose an implied warranty that the goods should be durable for a reasonable length of time having regard to all the circumstances of the sale".[64] Professor Whincup stated that "in England this point has already been established by the case of *Bartlett* v. *Sidney*

Marcus Ltd.",[65] but the word "durable" does not appear in that judgment. Lord Denning, M. R. did comment on the extent to which section 14(2) of the 1893 Act could be applied to sales of second-hand goods. He said that,[66]

> "The article may be of some use though not entirely efficient use for the purpose. It may not be in perfect condition but yet it is in usable condition. It is then, I think, merchantable."

The question therefore seems to be, is "usable" to be equated with "durable"? The National Consumer Advisory Council[67] recommended "that to be merchantable goods should be usable and durable for all normal purposes. . ." The meaning which the courts will ascribe to "durable" can only be a matter for speculation. The Concise Oxford Dictionary's definition would appear to be far too wide for all practical purposes: "lasting, not transitory; resisting wear, decay, etc." Deputy O'Toole indicated the difficulty:—[68]

> "President Roosevelt said, 'The spend, spend, spend mentality results in thrift becoming a dirty word.' It seems to me that this is even more true to-day. Thrift has become a dirty word because of pressures by highly sophisticated and psychological advertising campaigns and sales techniques, by social pressures and by a weakness in human nature to keep up with the Joneses. All of this leads to the production of less durable goods because the manufacturing industries see this as an opportunity to keep producing such goods. I presume the mathematical term 'infinity' comes in here and we may reach the stage where a product will not be durable at all. It appears this is what is happening. The paradox is that society seems to be demanding this even though it has come about by pressure from people highly skilled in the arts of persuasion."

The Bill qualifies the implication of durability by adding "as it is reasonable to expect. . .", and presumably the courts will have recourse to the reasonable man, the man on the Clapham omnibus (or rather, the bus to An Lár). But, as Deputy O'Toole pointed out, society now seems to be demanding less durable goods. What is durable for the goose may not be so for the gander. Here the courts will be faced with a dilemma.

Section 14(3) of the Table in the 1978 Bill replaces the former subsection (1) of section 14 of the 1893 Act (fitness for purpose). There are five changes:

(1) The subsection substitutes for the words "and the goods are of a description which it is in the course of the seller's business to supply" the wider phrase "where the seller sells goods in the course of business";[69]

(2) The subsection confirms the interpretation placed on section 14(1) of the 1893 Act that the "particular purpose" may be a purpose for which such goods are commonly supplied.[70]

(3) The requirement of reliance on the seller's skill or judgment is made more objective, but is expressed by way of exception. Apparently the buyer need not expressly allege in his pleading that the purpose was made known so as to show, as was the fact, that he relied on the seller's skill or judgment; rather, it is for the seller to raise by way of defence the plea that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill or judgment.

(4) The subsection refers to "the goods supplied under the contract".

(5) There is now no proviso in respect of the sale of specific goods under a patent or trade name. In some circumstances, a sale of this nature might still indicate that it was unreasonable for the buyer to rely on the seller's skill or judgment.

The 1978 Bill's equivalents to the 1893 Act's sections 12–14 conclude with a new subsection. It deals with the situation where there is a sale by a person who in the course of business is acting for another, for example, an auctioneer. The fact that the principal is a private seller does not relieve the principal from liability in respect of the implied terms, except where the buyer knows this, or reasonable steps are taken to bring it to his notice before the contract is made.

The next new implied term relates to spare parts and an adequate after-sale service (section 12 of the Table to the 1978 Bill).[71] It is restricted to "such period and in such circumstances as are stated in an offer, description or advertisement by the seller or on behalf of the manufacturer or on his own behalf". This appears to be cast in such wide terms as would permit a seller or manufacturer to reduce the aftersale and spare parts service to a minimum. However, it will come into operation only by enabling Ministerial Order, and after consultation with interested parties.

The final implied term is the controversial provision that in every sale of a motor vehicle (except where the buyer is a dealer) there shall be an implied condition of freedom from defect, at time of delivery, which would render the vehicle a danger to the public.[72] This term can be excluded from the contract by the parties agreeing that the vehicle is not intended for use in the condition in which it is sold, and a document stating this and signed by both parties is given to the buyer prior to delivery. Such agreement must be fair and reasonable. Where the sale is concluded by the seller in the course of business, a certificate to this effect must be delivered to the buyer. The Minister may by regulations prescribe further matters to be included in the certificate.

This provision whittles away yet more of the doctrine of privity. A person lawfully using the vehicle who suffers loss as a result of a breach of the condition of freedom from defects may maintain an action for damages against the seller "as if he were the buyer".

It may be anticipated that this provision will probably give rise to difficulties. For example, in the last case, will the buyer have a remedy in addition to the third party? If so, the section does not limit his remedy to an action for personal injuries. Neither does it limit the buyer's right of action in any way. On the face of it, therefore, it would appear that both the buyer and the third party could sue. More dramatically, in the case of a chain of private sales following a sale in the course of business, it appears as though each subsequent buyer has a right of action against the original dealer/seller *and* each intermediate seller. Another problem is the implied condition that the vehicle is free from the defined defect *at the time of delivery.*[73] How is this to be proved at some time perhaps remote from that date? And for how long will the condition continue to be of effect?

Finally, the defect must be of a nature which would render the vehicle a "danger to the public". Who is to determine whether a given defect is of such a kind? And in what way must it be made manifest before it becomes actionable?

(2) Hire-Purchase Agreements (Part III of the Bill)

Section 9 of the Hire-Purchase Act, 1946 is repealed and replaced by sections 26, 27 and 28 which repeat, *mutatis mutandis,* the terms to be implied as in a sale of goods. The exception relating to the merchantability of second-hand goods contained in section 9(1) (d) of the 1946 Act therefore totally (and inexplicably) disappears. A new section[74] extends to hire-purchase transactions the implied terms in case of letting by sample (section 15 of the 1893 Act; unchanged).

Section 32, as has already been noted, provides for liability, both "Jointly with the owner and severally", of persons who conducted antecedent negotiations in the case of a hire-purchase transaction where the hirer is dealing as consumer. "Antecedent negotiations" is carefully defined in section 28. It catches representations and statements which amount to conditions or warranties made by any person in the course of business to induce the hirer to enter into the agreement.

The parallel in the context of the sale of goods appears to be found in section 14; it establishes the liability of finance houses paying the seller direct. This avoids the liability for banking credit, (as of course the lending bank does not pay the seller) but would appear to include transactions based on credit cards.

(3) **Supply of Services (Part IV of the Bill)**

"The limited and occasional nature of judicial intervention leaves the area of consumer rights largely uncharted, which in turn affects the consumer's ability to exercise any rights he may have. It is accordingly suggested that [the Act] should specify a number of general and particular obligations upon suppliers of services."[75] This has been broadly accepted in the Bill. Three implied terms are spelled out where the supplier is acting in the course of business:—[76]

(i) that the supplier has the necessary skill to render the service; (ii) that he will supply the service with due skill, care and diligence; and (iii) that, where materials are used, they will be sound and reasonably fit for the purpose for which they are required.

These are all innovations, and call for some comment. The immediate distinction between these and the terms implied in contracts for the sale of goods and hire-purchase is that the terms implied in a contract for the supply of services are not distinguishable as to whether they are conditions or warranties. Perhaps this may be as a result of the emergence of the innominate or complex term.[77] If so, however, why was the distinction not abolished in the cases of the terms implied in sale of goods and hire-purchase contracts? There is another possible reason. It may be thought that, the nature of a contract for services being what it is, there is no room for the dichotomy between conditions and warranties. Once there has been performance, the contract, it could be argued, is beyond repudiation. But what then of such cases as *Bettini* v. *Gye*?[78] And, if this is indeed the rationale behind the simple use of the category "terms", why could they not all have been defined as "warranties"? In any event, the doctrines of anticipatory breach and of fundamental breach can work so as to determine a contract for services in the same way as any other.[79]

Lastly, whatever the improbability for the repudiation of a "pure" contract for services due to breach of any of the implied terms, there is no reason why breach of a contract for work and materials should not be capable of repudiation. Further, it should be noted that the net cast by the three implied terms in service contracts is extremely wide. Doctors, lawyers, estate agents, accountants, building contractors and dentists all provide services in which these terms are implied. The old conundrum as to whether a contract is one for services and materials or one for sale of goods is now laid to rest.[80] It may of course be said that the terms would be implied anyway under the principle in *The Moorcock*.[81] But, again, the purpose of the Bill is not necessarily only to express new law but to codify the existing common law. It is only to be regretted that the time-honoured test of giving "business efficacy" to such contracts was not incorporated into this part of the Bill.

Similarly, it seems surprising that a specific implied term was not spelled out as to roadworthiness when a person in the business of repairing or servicing vehicles undertakes a periodic service of such a vehicle.[82] This would complement the similar provision as to freedom from defects in the case of the sale of a motor vehicle. In section 2, the interpretation clause of the Bill, it is made clear that "service" does not include "anything done under a contract of service". It will, therefore, become all the more important to be able to distinguish the contract of service (or contract of employment) from the contract for services (rendered by independent contractors). At the moment there seems to be no clear-cut definition.[83]

EXCLUSION CLAUSES

The essence of the Bill is to be found in section 22, which provides a new version of section 55 of the 1893 Act, as regards sales of goods. Any term excluding the provisions of section 12 (in the Table) dealing with implied stipulations as to title, shall be void. Where the buyer deals as consumer, any term shall be void which excludes all or any of the provisions of sections 13 (sale by description) 14 (implied terms as to quality and fitness) in the Table, and 15 (sale by sample) of the 1893 Act. Of course, similar provisions are to be found in section 31, relating to hire-purchase. They do not require further comment. In the other specified cases, the exclusion clause must pass the test of reasonableness. These other terms are as follow.

1. The condition that a motor vehicle is sold free from defects rendering it a danger to the public. It will be recalled that this may be excluded by agreement in writing, where the vehicle is not intended for use in the condition in which it is delivered. Such agreement must be fair and reasonable.[84]

2. The implied terms relating to hire-purchase agreements (contained in sections 27, 28 and 29) may be excluded where the hirer does not deal as a consumer. The exclusion clause must be fair and reasonable.[85]

3. Terms, express or implied, in contracts for the supply of services except where the recipient of the service deals as consumer, in which case the exclusion clause must be fair and reasonable.[86]

4. Terms excluding liability for misrepresentation shall have no effect, unless they are fair and reasonable.[87]

5. Any term excluding the provisions of sections 13 and 14 of the Table, and section 15 of the 1893 Act, shall be unenforceable if not fair and reasonable (and where the buyer does not deal as consumer).[88] This is the new version of section 55 of the 1893 Act.

To determine whether or not an exclusion clause is fair and reasonable, guidelines are set out in the Schedule to the Bill. They approximate to the guidelines set out in section 4 of the Supply of Goods (Implied Terms) Act, 1973. The burden of proof apparently lies on the party alleging that it would not be fair and reasonable to allow reliance on an exclusion clause. On the other hand, as already mentioned, it is for those claiming that a party does not 'deal as consumer' to show that he does not do so. The exclusion clause is to be tested with regard to one or other of the following criteria (which are epitomes of the tests set out in the Schedule):—

(1) The circumstances which were, or ought reasonably to have been, known to or in contemplation of the parties when the contract was made.

(2) Any of the following five matters which appear to be relevant:—

(a) The strength of the bargaining positions of the parties.

(b) Whether the "customer" received any inducement to agree to the term.

(c) Whether the "customer" knew or ought reasonably to have known of the existence and extent of the term.

(d) If the term depends on any condition, whether compliance with such condition was reasonable.

(e) Whether any goods involved were manufactured, processed or adapted to the special order of the "customer".

The word "customer" is used for the first time, and is not defined. Presumably it relates to a buyer, a hirer or the recipient of a service.

The test of reasonableness has already been presaged in the courts. Lord Denning in *Gillespie Brothers & Co. Ltd.* v. *Roy Bowles Transport Ltd. & Anor.*[89] said: "if you examine all the cases you will, I think, find that at bottom it is because the clause . . . is unreasonable, or is being applied unreasonably in the circumstances of the particular case".[90] In *Photo Productions Ltd.* v. *Securicor Transport Ltd.*[91] Lord Denning stated "Thus we reach, after long years, the principle which lies behind all our striving: the court will not allow a party to rely on an exemption or limitation clause in circumstances in which it could not be fair and reasonable to allow reliance on it; and, in considering whether it is fair and reasonable, the court will consider whether it was in a standard form, whether there was equality of bargaining power, the nature of the breach, and so forth".

Section 23, 35 and 38 of the 1978 Bill render evasion of the implied terms relating to sale of goods, hire-purchase and supply of services, respectively, nugatory by way of inclusion in a term of the contract which purports to stipulate that the law of some other country should apply. Thus, where the proper law of a non-international contract relating to these matters would otherwise be that of Ireland, the parties cannot avoid the application of the implied terms by a choice of law clause which substitutes the law of some other country.

Evasion by means of a secondary contract is excluded (section 22). One example of such a device would be a servicing agreement for a central heating system which exempts the installers from liability for installation faults.[92]

GUARANTEES

The provisions relating to "guarantees" are entirely new. They are contained in sections 15–19. The relevant provisions of the Unfair Contract Terms Act, 1977 are totally different in form, if not in effect.

A guarantee, as defined, must be in writing, supplied by a manufacturer or other supplier, not a retailer, and indicate that the supplier will "service, repair or otherwise deal with the goods following purchase". Six "terms of guarantee" are set out:–

1. The guarantee must be clearly legible and refer only to specific goods or to one category of goods.

2. It must state the name and address of the supplier.

3. It must state its duration.

4. It must state the procedure for presenting a claim.

5. It must state the scope of what the manufacturer or supplier undertakes to do.

6. It will be an offence for a seller to supply a guarantee which does not comply with these requirements.[93]

Where the seller supplies a guarantee, he becomes liable to the buyer for observance of its terms.[94] Rights under a guarantee must not curtail the buyer's statutory or common law rights.[95] The buyer may maintain an action against the supplier of the guarantee direct, as may any person acquiring title to the guarantee within its duration. Here are further infringements on the doctrine of privity. May it be assumed that the terms implied in contracts for services are implied in guarantees? It

would seem that this is not the case, because there is no contract between the supplier and the buyer. Why should such terms not be implied?

MISREPRESENTATION

Part V, dealing with misrepresentation, fits uncomfortably into the Bill. It could, and possibly should, have been the subject of a separate Act, not restricted to sale of goods, hire-purchase and supply of service. Indeed, the nomenclature of the Bill is eccentric: that part dealing with sale of goods may be cited as "the Sale of Goods Acts, 1893 & 1978" (section 9), and that part dealing with hire-purchase may be cited as "the Hire-Purchase Acts, 1946 to 1978".[96] The other Parts, therefore, are to be cited by the short title of the whole Bill, "Sale of Goods & Supply of Services Act, 1978."[97]

When reading Part V, it seems quite illogical that the law relating to misrepresentation should be amended insofar as it relates only to sale of goods, hire-purchase and supply of services. There seems to be no reason why such an amendment should not extend to embrace all contractual relationships. Such is the ambit of the Misrepresentation Act, 1967.

Taken as it stands, the main thrust of the reform is to provide a remedy in damages for innocent misrepresentation at the discretion of the court, while preserving the equitable remedy of rescission. Part V is almost a facsimile of the British 1967 Act, but the experience of its operation for more than a decade, and much academic and judicial comment, do not appear to have been noticed. For the sake of brevity, consider only some of the comments made by one academic commentator, the learned editor of Cheshire & Fifoot's *Law of Contract.*[98]

"An important example of the type of problem created by the Act [of 1967] is the meaning of the phrases 'after a misrepresentation has been made to him' (which occurs three times in sections [41 and 42]) and 'and misrepresentation made by him' (which occurs in section [43]). The Act does not define 'misrepresentation' and the question has been raised whether the words are apt to extend to situations where the law imposes a duty of disclosure.[99] It would seem reasonably clear that the Act extends to those cases where silence is treated as assertive conduct, as where it distorts a positive assertion made by the representor or where the representor fails to reveal that an earlier statement made by him is no longer true . . . similar difficulties may arise from the failure to define the meaning of 'rescission' in the Act."

Part V does not contain any statement of the test to be applied in assessing damages. The only direction is provided by section 42(3) which states:

> "damages may be awarded against a person under *subsection* (2) whether or not he is liable to damages under *subsection* (1), but where he is so liable any award under *subsection* (2) shall be taken into account in assessing his liability under *subsection* (1)."

This perhaps suggests that less may be recovered under subsection (2) than under subsection (1). It still leaves unresolved the tests to be applied.

The provision that "the misrepresentation has become a term of the contract" appears tautological. If it has become a term of the contract, and is breached, then a common law action for damages will lie. But it would seem that the effect is not so clear, and has been the subject of conflicting dicta: (see *Pennsylvania Shipping Co.* v. *Cie. Nationale de Navigation,*[100] and *Cie. Francaise des Chemins de Fer Paris-Orleans* v. *Leeston Shipping Co.*)[101] Under Part V, the right to rescind for misrepresentation survives the incorporation of the misrepresentation in the contract and may thus be exercised even where the misrepresentation is incorporated as a warranty. But in such a case the court might well exercise its discretion to award damages in lieu of rescission under section 42(2).

The alternative proviso, "the contract has been performed", reverses the rule in *Seddon* v. *North Eastern Salt Co. Ltd.*[102] and *Angel* v. *Jay,*[103] under which an executed contract could not be rescinded for innocent misrepresentation. Unfortunately, due to the limited scope of the Bill, the new provision will not apply generally; for example the old rule applies in all its severity to contracts for the disposition of an interest in land.

Section 43 avoids the effect of exclusion clauses intended to oust the operation of Part V. Of the British counterpart Cheshire & Fifoot state, "If there should be legislation dealing with the general problem of exemption clauses, section [43] offers a model to be avoided. Although it is clearly aimed both at clauses which exclude liability and at those which restrict remedies, it contains no definition of its ambit in either area. Yet it is well known that the line between clauses excluding and defining liability is very fine and such common commercial occurrences as non-cancellation or arbitration clauses would fall within the literal scope of [43 (b)]. These difficulties are well illustrated by *Overbrook Estates Ltd.* v. *Glencombe Properties Ltd.*"[104]

Curiously, section 4 of the Misrepresentation Act, 1967 amended sections 11(c) and 35 of the Sale of Goods Act, 1893. A like amendment is made by sections 10 and 20 of the 1978 Bill, not yet considered.

Section 10 of the 1978 Bill enacts a new version of section 11(c) of the 1893 act, omitting the words "or where the contract is for specific goods, the property in which has passed to the buyer". The effect of this is that the buyer of specific goods is no longer compelled to treat a breach of condition as a breach of warranty merely because the property in the goods has passed to him.

Section 20 of the 1978 Bill enacts a new version of section 35 of the 1893 Act, adding the words, "or, subject to section 34 of this Act". The result reverses the decision in *Hardy & Co.* v. *Hillerns & Fowler,*[105] so that a buyer will no longer be deemed to have accepted the goods by doing an act inconsistent with the ownership of the seller unless he has had an opportunity of examining the goods in accordance with section 34 of the 1893 Act.

MISCELLANEOUS

Part VI refers to several unrelated topics, most of which have already been noticed. Suffice it therefore to list them briefly.

Section 44: recipients of unsolicited goods may treat them as an unconditional gift.

Section 45: relates to directory entries.

Section 46: relates to invoices purporting to demand payment.

Section 47: provides the framework for introducing "cooling off" periods for certain contracts for goods and services.

Section 48: Persons offering specified goods and services shall give certain particulars in contracts, guarantees and related writings.

Section 49: Persons using standard form contracts must state whether another form would be acceptable.

Section 50: relates to minimum size typefaces for contracts, guarantees and related writings.

Section 51: Relates to contracts for specified goods and services to be in writing.

Section 52: Enables certain functions under the Bill to be conferred on the Director of Consumer Affairs.

Section 53: Requires the Minister to consult with the Minister for Finance in relation to matters which would affect business authorised by licence under the Central Bank Act, 1971.

Section 54: Amends the Consumer Information Act, 1978 so that the powers of prosecution referred to in that Act shall be for summary proceedings only.

In conclusion, abuse of two kinds of marketing practice should be mentioned as still awaiting legal control in Ireland: "pyramid selling", and trading stamps. The key feature of pyramid selling is the building up of a hierarchy of participants – the pyramid. The participant is required to pay off a sum of money, *unrealistically supposed* to be produced from the sale of stock by him, acquired from the promoter. In addition, the participant is given inducements to recruit additional participants. In theory, the more rapidly he achieves both, the higher he moves up the pyramid. But failure to sell the minimum quantity of goods and to recruit new participants means that the burden becomes too great. The failed participant then falls prey to legal action by the promoter for recovery of the amount due for the unsold stock. Deputy B. Desmond[106] referred to this practice:–

> "With vigilance on the part of the newspapers, the exposure given to some rip-off pyramid selling operations here, and indeed by some politicians who correctly raised the matter in this House, we thought that would have been an end to the affair. Unfortunately, in the past year a couple of new companies emerged and old ones have re-surfaced."

In England, pyramid selling was first controlled by the Fair Trading Act, 1973. Regulations[107] made under that Act make it an offence to solicit payments from participants in pyramid selling or similar schemes if they are induced to make payments by the prospect of benefiting from the recruitment of further participants. Further additional prohibitions on the objectionable usages of pyramid selling are contained in the regulations.[108]

Abuses have also been noted in connection with trading stamps. These were first controlled in England by the Trading Stamps Act, 1964 (section 4), now replaced by section 16 of the Supply of Goods (Implied Terms) Act, 1973. Pursuant to the latter, the warranties to be implied on redemption of trading stamps are assimilated to those conditions implied in a contract for the sale of goods under sections 12(1) and 14(2) of the 1893 Act (as amended by the 1973 Act). Such warranties are to be implied notwithstanding any terms to the contrary on which the redemption is made.

These British prototypes relating to pyramid selling and trading stamps might well have been incorporated into our Sale of Goods and Supply of Services Bill.