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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C. L. 217 of 1971

BETWEEN	ROBINSON & COMPANY LIMITED	PLAINTIFF
AND	CHRYSLER (U. K.) LIMITED	DEFENDANT

R. N. A. Henriques, Q.C. and J. A. Leo-Rhynie, Q.C., for plaintiff.

D. M. Muirhead, Q.C. and Mrs. Angella Hudson-Phillips for defendant.

6th, 7th, 9th, 10th, 13th, 17th November, 1978;
7th, 8th March, 1979; 11th, 13th June, 1979;
16th May, 1980; 30th March, 1981

~~Reasons for Judgment~~

WHITE, J.:

On the 16th May, 1980, I delivered oral judgment in this case, and I promised to give my reasons in writing at a later date. This I now do, conscious of the fact that much time has passed. Nevertheless, because of a desire to deal with all the issues as they presented to me, I would ask that the delay be not treated as merely dilatory.

The plaintiff, Robinson and Company Limited, was, up to the 25th day of October, 1969, the holder of an exclusive franchise for the distribution in Jamaica of certain makes of motor vehicles, manufactured by the defendant, Chrysler (U.K.) Limited. The defendant itself was successor to the rights and liabilities under a contract in writing dated the 1st day of August, 1966 (The August Agreement), made between the plaintiff and Rootes Motors Overseas Limited which was a wholly owned subsidiary of Rootes Motors Limited.

By letter dated the 27th December, 1967, Rootes Motors Limited informed the plaintiff that Rootes Motors Limited had acquired the business and assets of Rootes Motors Overseas Limited; and "has assumed full responsibilities for all debts, liabilities and contracts of Rootes Motors Overseas Limited." So that as from

the 1st January, 1968, all the Distributor Agreements of Rootes Motors Overseas Limited were transferred to Rootes Motors Limited.

As from the 1st July, 1968, a new organisational concept was circularised to Rootes dealers. This indicated that Rootes was now in the Chrysler Group, and with particular reference to the status of the plaintiff as a distributor of Rootes automotive products, it was pointed out that the new organisational concept "will not involve any change in our contractual arrangements for the time being." The foregoing information was conveyed in a circular dated 22nd July, 1968, on the letter-head of Rootes Motors Limited, and revealed that Chrysler International would, after the 1st July, 1968, "act on our behalf and assume complete responsibility for the Group's commercial policy dealings with your company, and for the co-ordination and supervision of our sales to you." By letter dated July 31, 1968, all Rootes' Dealers received a letter over the signature of M. D, Imus, Assistant Group Executive, Latin American Operations, confirming that the assumption of marketing responsibility by Chrysler International "is part of our plan to further increase our sales of Chrysler products throughout the world - and - to improve communications between you, our dealers, and our company." The letter added: "In the very near future you will receive detailed information from Mr. D. F. Schroeder, Director of Sales, as to the new organisational structure and operating procedures."

Mr. Schroeder himself wrote to Mr. R. E. Clarke of Stephenson's Motors Limited, London Road, Tunbridge Wells, Kent, the following letter bearing date October 8, 1968:

> " It has been brought to our attention that your negotiations with Messrs. Robinson and Company Limited, Kingston, Jamaica, are now at an advanced stage, and that you will be providing management support in effecting a reorganization as well as nominating three members of the Board.
>
> Whilst we appreciate that such changes will undoubtedly lead to a stronger organization, we do feel that you should know that we have yet

" to complete our market survey program in Jamaica, and cannot at this stage give any guarantee as to how any franchise realignments might affect Robinson and Company. We would however be most interested to hear of your plans, as such information will obviously be of assistance in formulating our own plans for this market. "

This letter was copied to Mr. G. Clarke, of Robinson and Company, Jamaica.

At this stage, I should identify more fully who Mr. R. E. Clarke is. He gave evidence that he had been associated with the automotive industry from 1931. At the time of giving his evidence, he was chairman of several companies including Puttocks' Holdings and the plaintiff. He assumed the latter position within the last 12 months previous to giving his evidence on the 13th November, 1978. He first became aware of Robinson and Company in 1968, when a Mr. Duggan of Wilkinson and Gaviller, the sole confirming house for Robinson and Company, suggested that the plaintiff required help in its management problems. After discussions with the directors of the plaintiff, Mr. Clarke provided the requisite management services through Puttocks' Holdings. In pursuance of this, Mr. Desmond Edgar Arthur came to Jamaica to carry out a feasibility study during September, October and November, 1968. Mr. Arthur, who had been involved in the automotive industry for 37 years, said that during those months he was engaged in an advisory capacity to Robinson's and as a consultant. At the time he was employed by Puttocks' Holdings of which Mr. R. E. Clarke was Chairman and Managing Director. They had been associated for about thirty years in business. Indeed, at the time of his giving evidence, Mr. Arthur was a Director of Stephenson's, Ladymead, Guildford, Surrey England. He was also Managing Director of Export Parts Express which handles the export of motor vehicle spare parts to Jamaica, among other countries.

Both Mr. Clarke and Mr. Arthur had seen the letters to which I have referred. They had been in constant and continuous communication after Mr. Arthur came to Jamaica. As a matter of fact,

the letter from Mr. Schoeder impressed on Mr. Clarke " the tenous nature of the Agency Agreement," which he said he saw for the first time after receiving Mr. Schoeder's letter. He was alerted to enquire how much notice the plaintiff would be given in the event that Rootes made any change in its franchise arrangements; he discovered that the period of notice was 60 days compared with the notice period of 12 months allowed by the other distributorship arrangements with which he was familior.

Concerned about this shorter period of notice, Mr. Clarke having im mind that the plaintiff had more than 60 days' supply of parts wrote to Mr. Schoeder on October 12, 1968, enquiring whether the letter of October 8, 1968 was "suggesting that for the time being Robinson's would be well-advised to run-down the stock of Rootes parts until they are carrying no more than 60 days supply?" Mr. Clarke explained in evidence that "I posed that question because it seemed to me to be commonsense that if agency might be terminiated in such a short time, the franchise holder should not be expected to keep stocks in excess of that period." He expressed himself as worried over the likely situation, "because if I did not get some kind of special arrangement with Rootes it seemed to me that Robinson's should reduce their stocks to be more commensurate with the notice period."

Outstandingly, both Mr. Clarke and Mr. Arthur were faced with the possibility of the termination of the franchise contained in the August Agreement, and it is not illogical to describe their resultant mood as one to prevent its termination considering that "the franchise was the lifeblood of Robinson's."

The question of the termination of the francise was heightened by the intelligence that consideration was being given to combining the distributorship of Rootes and Chrysler Products im Jamaica. In January, 1969 the plaintiff was distributing the Rootes products, and Motor Sales and Service was distributing

the Chrysler products. I was told by Mr. Arthur that on the 28th of that month, a team from Chrysler came to Jamaica to assess the relative arrangements by each of those distributors so that a decision regarding the combined franchise could be made. The necessary tour of inspection of the premises of the plaintiff was made, followed by a discussion of the future prospects in so far as Robinson and Company were concerned. It should be noted that the Chrysler team was headed by Mr. Imus, and he was accompanied by Mr. Schroeder and Mr. Hughes. Mr. Imus described himself as being, at that time, Vice-President, Chrysler International Latin American Operations. In that position, he had responsibility for dealers in Latin America, a region which includes the Caribbean, Puerto Rico, and Argentine and other Latin American countries. Mr. Schroeder was Director of Sales. It is clear that the inspection and subsequent discussions were the result of a dealer in representation study which had been prepared by Chrysler's Regional Office in late 1967. The study recommended only one Chrysler product francise distributor in Kingston, Jamaica. But there developed a divergence of views between the Marketing Staff and the staff of the Director of Sales as to which of the present distributors should be recommemded for the combined franchise.

This aspect of the matter was discussed by the Chrysler team with Mr. Arthur and Mr. Hirst, representing the plaintiff. Mr. Arthur had, by then, been appointed Managing Director of the plaintiff. At this meeting, the discussions conveyed the thinking of each side to the other. Because of the outstanding importance of this meeting, I propose to set out in detail as composite a picture as it is possible to develop from the evidence of Mr. Arthur and Mr. Imus, the only participant who gave evidence before me. I accept that naturally, the team from Robinson's did project their interest in becoming the selected didtributor under the combined

franchise. I accept that Mr. Imus pointed out that the existing facilities provided by Robinson's were inadequate; to which Mr. Arthur replied that the plaintiff was already at that time negotiating for alternate accommodation. It is clear that this factor of inadequacy of facilities was commonly and jointly recognised as vital to the resolution of the grant of a combined franchise for distributorship.

According to Mr. Arthur, Mr. Imus promised to give decision thereon within 28 days. Mr. Imus told me that his timing was projected to "as soon as possible;" a phrase which in my view, in its elasticity could be confined to two weeks or even extended to six months or longer, but Mr.Imus stated that under the circumstances it would not be earlier than 28 days. The decision which was solely Mr. Imus' to make, would need time to get agreement to the final decision between his sales, marketing, and legal staffs. He did not need to refer the matter to the Head Office - a factor which is important in determining what took place at the meeting of the 28th January, 1969.

Mr. Imus gave evidence that at the meeting, Mr. Arthur was concerned that if he ordered parts and vehicles and the decision on the combined franchise was adverse to Robinson's, the plaintiff would be stuck with them Accordingly, Mr. Arthur said that this was a major consideration which he expressed in the following terms: In view of the answers by Mr. Imus on the matter of the combined franchise, he considered that Robinson's should curtail further orders for parts and those in the pipeline should be halted. According to Mr. Arthur:-

> "Mr. Imus replied and said there would be no question of Robinson's being left with the parts, and requested that I continue in normal fashion placing orders for parts and not stopping those already in the pipeline. I made the point at that time that in view of his assurance I would continue in the normal fashion and allow the continauance of supplies."

Mr. Arthur gave evidence that he asked Mr. Imus about curtailing supplies because at the time of the meeting on 28th January, 1968, his company was carrying at least seven months' stock of Rootes parts. If this was the case, it would certainly be unwise and not in the interest of the plaintiff and its shareholders, that it should invest any money in Rootes parts. Furthermore, the time lag between ordering and supply or delivery would have to be taken into account. This was approximately six weeks, so that any new orders being placed at the time would arrive in Jamaica after the possible termination of the franchise, bearing in mind that the defendant need give only 60 days' notice of termination.

The account of Mr. Imus on this aspect is as follows: To his recollection, it was towards the end of the discussion which I accept lasted for two and one-half of three hours (per Mr. Arthur) - that Mr. Arthur expressed concern that Robinson's could be stuck with new vehicles and parts in the event of termination. Said Mr. Imus:

> " I assured Mr. Arthur that in the event of the termination, Chrysler would purchase under the term of the /August/ Agreement all new vehicles and current parts and that he should have no occasion to worry about that aspect of the matter. "

To the best of his knowledge, Mr. Imus said that it was not a part of the conversation or discussion that Robinson's would suffer "no loss in the event of termination." This denial is counter to the following evidence given by Mr. Arthur under cross-examination:

> " The discussion with Mr. Imus on 28th January, 1969, was re vehicles and parts with emphasis on parts. Not so that Imus in answer to my concern said, 'You need not be worried about that aspect of the matter,' that in the event of a termination Chrysler would repurchase under the terms of the contract all parts. He made no mention of contract at all; there was no discussion of the contract. I attended that meeting knowing the layman's appreciation of the meaning of term 'contract', and as I was being asked to continue ordering parts, I sought the Imus assurance that it would take all the parts. The Imus assurance was not in relation to current parts, assurance was re all the parts and that we would suffer no loss, My recollection is that the word 'current' was not mentioned. It was all the parts. Imus to my knowledge, did not mention 60 days although it was certainly at the back of my mind.

> I was concerned as to what would happen if Chrysler terminated franchise under the contract. I knew that Chrysler had the right not to purchase anything at all. And to protect my company, I wanted Chrysler to tell me then that they would repurchase parts and units, and not leave me high and dry with them. Imus gave me the assurance that on termination they would repurchase parts and units."

Although Mr. Arthur gave his acceptation of the wor's "suffer no loss", he did not say in evidence whether he enquired from Mr. Imus what he had in mind. However, it has to be considered by me whether, if those words were in fact used, Mr. Arthur's understanding was correct. That is to say:

> ".... in a situation when I was being asked to continue the order of parts and parts still continuing to arrive; and there is ovviously a considerable cost in bringing goods into a company, documenting them in stock records, clearing notes against orders. This is quite often complicated if the manufacturer supplies part only of the order. One should expect to take into account any over-head cost: storage, etc. Quite a considerable cost in that connection. I understand loss to refer to all these things."

It is note worthy that Mr. Imus, speaking from 41 years' experience in the motor vehicle industry, said that he did not disbelieve Mr. Arthur's expressed concern about being stuck with parts. And it would be a matter of commercial concern to him, placed similarly to Mr. Arthur. He expressed the frank appreciation of Mr. Arthur's position that on termination of the franchise, Robinson's would sustain a loss. He conceded that before he gave his assurance, Mr. Arthur indicated the likelihood of him not ordering any new vehicles and parts. Although he said that his assurance was given to encourage Mr. Arthur to continue ordering new vehicles and parts, Mr. Imus adamantly refuted the suggestion that the assurance was given to protect Robinson's against any loss in continuing to order vehicles and parts in the event of the agency being terminated. What is significant is that at the same meeting, Mr. Schoeder, as I accept, reiterated and endorsed Mr. Imus' assurance in no uncertain terms when he ordered Robinson's to "Keep the parts rolling. Don't worry about parts."

Considering that the relationship between the plaintiff and the defendant was governed entirely by the August Agreement, Mr. Arthur said he was endeavouring to secure and ensure for Robinson's that Chrysler repurchase cars and parts within the terms of the August Agreement. This declaration by Mr. Arthur adverts me to the August Agreement whereunder the defendant was not bound to repurchase the parts which were unsold and were still in stock at the termination of the franchise agreement. The question is: On the evidence, did the plaintiff get something more from the Assurance, bearing in mind that Mr. Imus said, "I gave an assurance that I expected them to act upon as businessmen. I did feel that my company was bound by the assurance I had given"? Was the Imus Assurance dependent upon, or connected with, or governed by, the August Agreement?

The provisions of the August Agreement, so far as relevant to the issues which I have to decide, are as follows:

" Clause 26: Service Parts:

> The DISTRIBUTOR and the COMPANY shall agree upon a minimum amount of Service Parts to be taken by the DISTRIBUTOR with its first order for Vehicles for stock. Subsequently, the DISTRIBUTORS' stock of Service Parts shall be increased to enable it to give proper and efficient service in The Territory and it is a condition of this Agreement that the DISTRIBUTOR shall at all times carry stocks of Service Parts adequate in the opinion of the COMPANY for the efficient servicing of Vehicles in the Territory. Furthermore, the DISTRIBUTOR shall arrange for all Dealers to hold similarly stocks of replacement parts proportionate to their respective areas.
>
> The DISTRIBUTOR shall annually or at such time as the COMPANY may require provide the COMPANY with a complete inventory in duplicate of its stock of Service Parts for the Vehicles showing the quality part number and name. "

" Clause 32 (C): Procedure on Termination -

> The COMPANY may within 14 days after termination of this Agreement serve a notice on the DISTRIBUTOR of its election to purchase any or all Vehicles and Service Parts unsold at the date of receipt of the notice at the nett landed cost to the DISTRIBUTOR and the DISTRIBUTOR shall make available such Vehicles and Service Parts to the COMPANY upon tender of payment therefor provided such payment is made within 30 days of the date of termination of this Agreement. "

The pleadings give a sharp focus to the questions which I have earlier raised. By the Amended Statement of Claim, the plaintiff avers:

> "19. Further, by an oral agreement made on the 27th or 28th January, 1969 between Messrs. M. D. Imus, D.F. Schoeder and W. Hughes acting on behalf of the Defendant, and Messrs. D. Arthur and Sydney Hirst acting on behalf of the Plaintiff, the Defendant agreed that in consideration of the plaintiff's continuing to order spare parts from the Defendant pending a decision by the Defendant as to whether the Plaintiff's Agency was to be continued or not, the Defendant would if they decided to discontinue the agency purchase from the Plaintiff its stock of current parts and vehicles if a decision was eventually made to terminate the agency.
>
> This oral agreement was confirmed in writing by the said M. D. Imus by letter dated 8th May, 1969 to Rodney Clarke Esq. who was acting on behalf of the Plaintiff.
>
> It was an implied term of the said agreement that a fair price should be paid for the said spare parts and vehicles.
>
> 20. The Plaintiff has performed its obligation under the said agreement.
>
> 21. The Defendant did in fact take a decision to terminate the Plaintiff's agency as herein-before alleged.
>
> 22. The Plaintiff has disposed of all the said vehicles in the normal course of trade but still has a large stock of current spare parts and the Defendant in breach of the said agreement referred to in paragraph nineteen hereof has refused to purchase the said spare parts despite repeated requests from the Plaintiff so to do."

Note should be taken of the fact that in the paragraphs preceding these heads of claim in the Statement of Claim, the plaintiff had contended that the defendant has wrongfully terminated the August Agreement. This contention was eventually rejected by the Court of Appeal, which held that failure to record the Power of Attorney under which termination was effected did not invalidate the notice of termination.

The course of pleading should also be catalogued. The Statement of Claim was filed in 1971. An appearance was entered on 9th, 1971, and defence was filed and delivered on the 27th day

of October, 1971. The Statement of Claim was amended pursuant to an order of Rowan Campbell J. (Ag.), on 5th August, 1973. Further and Better Particulars of the Statement of Claim were supplied on the 21st day of July, 1978.

Subsequently, an amended defence was filed and delivered on the 4th day of August, 1978. This was upon leave granted by the Honourable Chief Justice on the 11th day of July, 1978. This amended Defence set up new grounds of defence, and it has been a repetitious complaint by attorney-at-law for the paintiff that the matters lately pleaded in the Amended Defence were pleaded seven years after the events which necessitated this action!

I am cognisant that an amendment duly made with or without leave, takes effect, not from the date when the amendment is made, but from the date of the original document which it amends (The Supreme Court Practice 1970 notes to Order 20 rr 5 - 8). "Once pleadings are amended what stood before amendment is no longer material before the Court and no longer defines the issues to be tried," per Hodson L.J. in Warner v. Simpson [1959] 1 Q.B. at p.321.

The defence as amended is in the relevant paragraphs 14 - 17:

> "14. The Defendant admits that an understanding along the lines referred to in paragraph 19 of the Statement of Claim was made between the Plaintiff's and Defendant's representatives, but denies that the understanding constituted a valid and binding contract. The understanding was a mere expression of intention (on the part of the Defendant to exercise its option contained in paragraph 32(1) of the aforementioned August Agreement).
>
> 15. The Defendant further says that the alleged Agreement referred to in paragraph 19 of the Statement of Claim was not, in law, a valid contract, as it was not supported by valuable consideration in that the Plaintiff was obliged under the August Agreement and more particularly clause 26 thereof, to carry adequate stocks of service parts for the proper and effective servicing of vehicles.

15A. In the further alternative, the Defendant says that if, which is denied, the said alleged Agreement constituted a valid contract, the Defendant states that the essential terms thereof are governed by the said August Agreement and more particularly as set out in clause 32 (C) thereof.

15B. In the still further alternative the Defendant says that if which is denied, the said alleged Agreement constituted a valid contract, the obligations thereunder were discharged as the parties have acted in a manner inconsistent with the continuance of the contract.

15C. The Defendant will refer at the hearing of the Action to the said August Agreement for its full precise terms and legal effect thereof.

16. The Defendant denies the existence of the implied terms referred to im paragraph 19 of the Statement of Claim.

17. After the termination of the Plaintiff's Chrysler franchise as aforesaid, negotiations took place between the Defendant and the Plaintiff for the repurchase of new and used motor vehicles and parts and accessories in good and saleable condition. In particular, a specific offer was made to repurchase those items on the terms and conditions set out in a letter dated 24th September, 1969, and written to the Plaintiff by Norman L. Gray of Chyrsler International, S.A. This offer was not accepted, and the negotiations subsequently broke down."

The Plaintiff in its Reply joined issue, as follows:

"2. The Plaintiff denies that the understanding was an expression of intention on the part of the Defendant to exercise the option contained in Clause 32(C) of the August Agreement as alleged in paragraph 14 of the Amended Defence and says that the Defendant made a separate contract independent of the August Agreement which was in no way incorporated therein.

(a) The Plaintiff denies that the said Agreement alleged in paragraph 19 of the Statement of Claim was not supported by any valuable consideration as alleged in paragraph 15 of the Amended Defence and says that the said Agreement is supported by good and valid consideration in that the Plaintiff undertook to continue to actively push and promote the business of the Defendant in Jamaica, and not merely to conduct the business so as to satisfy the provisions of Clause 26 of the August Agreement, and the Plaintiff did in fact actively promote the business of the Defendant in Jamaica as a consequence of the Said Agreement.

(b) The Plaintiff further says that there was good and valuable consideration for the said Agreement as the Plaintiff rather than exerciseing its rights under Clause 31(b) of the August Agreement and bring the business relationship between the Plaintiff and the Defendant to an end, continued to carry on business with the Defendant despite the state of uncertainty as to whether or not the Plaintiff would be an agent for the Defendant, and that the Plaintiff in accordance with the said Agreement alleged in paragraph 19 of the Statement of Claim continued its business relationship with the Defendant and also to actively promote the business of the Defendant in Jamaica

(c) The Plaintiff denies that the said Agreement alleged in paragraph 19 of the Statement of Claim was in any way dependent upon or connected with or governed by the August Agreement as alleged in para graph 15(a) of the Amended Defence and repeats paragraph 2 thereof.

(d) The Plaintiff denies that it has ever acted in any way inconsistent with the continuance of the said Agreement as alleged in paragraph 15(b) of the Amended Defence or at all.

(e) The Plaintiff says that the Defendant at no time made a ny attempt to exercise the option conferred on it by Clause 32(c) of the August Agreement.

3. The Plaintiff repeats paragraph 19 of the Statement of Claim and says that the said Agreement referred to therein was a valid and binding contract and that all the terms of the said contract were either expressly agreed upon or are to implied by the sale of Goods Law Cap. 349 of the 1953 Revised Laws of Jamaica. The Plaintiff will rely inter a lia on the following Sections of the said Sale of Goods Law:-

(i) Section 9(2) as to price.

(ii) Section 19 Rule (1) as to passing of property.

(iii) Sections 27 and 28 as to delivery and payment.

(iv) Section 29(1) as to place of delivery.

4. As to paragraph 17 of the Defence the Plaintiff admits that a letter dated 24th September 1969 was written by Chrysler International S.A. to the Plaintiff and received by the Plaintiff but says:

(a) That the said letter was not written by the Defendant.

(b) That the said letter was an attempt by Chrysler International S.A. to arrange terms on which Chrysler International S.A. would purchase from the Plaintiff its stock of new unused vehicles and its stock of new saleable parts.

(c) That this attempt by Chrysler International S.A. placed the following unjustifiable limitation on the said purchase and that the same was not in accordance with the prior Agreement, between the Plaintiff and the Defendant:-

(i) The vehicles to be purchased were limited to vehicles shipped to the Plaintiff before 24th October 1969.

(ii) The parts and accessories to be purchased were limited to those shipped to the Plaintiff before 24th October 1969 and which had shown movement during the 12 month period from 1st August 1968 to 31st July 1969 and to such a quantity as represented a normal six month demand in Jamaica.

(d) That the price set out in the said letter was not a reasonable price in that it represented the actual cost to the Plaintiff of the said goods at the delivery door of a Kingston wharf leaving no margin for the Plaintiff's expenses in connection with the said goods.

(e) The said letter put forth an unreasonable term in that it required the Plaintiff to execute a full and general release in terms which were undisclosed at the time and unreasonable in the circumstances.

5. In the premises the Plaintiff says that it was justified in refusing the said terms set out in the letter dated 24th September, 1969.

6. On the 7th October 1969 the Plaintiff wrote a letter letter to Chrysler International S.A. setting out the terms which it considered represented a fair price for all the vehicles and parts which the Defendant was obliged to buy from the Plaintiff. The said terms contained in this letter were rejected by the Defendant.

7. Save as is herein before expressly admitted the Plaintiff denies each and every allegation contained in the Defence as if the same were herein set out and traversed seriatim."

The arguments propounded in support of the stated position of each party encourage a more detailed consideration of the evidence, starting with the fact that Mr. Arthur asserted that from December 1968, when he assumed full charge of the business of the plaintiff, to July 1969, when he returned to England, the sales of motor vehicles and parts by the plaintiff had improved. And certainly, up to the 28th of January, 1969, Mr. Arthur could state that considering the support of the staff the improved circumstances had been due to the fact that sales were running well, and were so up to the time of termination on the 26th October, 1969. Support for his unrefuted account is found in the letter dated 15th April, 1969, from Mr. R. E. Clarke to Mr. L. A. Townsend, Chairman of the Board, Chrysler Corporation that:

> " We have of course many times more than 60 days supply of Rootes parts, ane we have done a good job on unit sales since Sprostons gave the franchise up two years ago..... "

Again, in his letter dated 2nd September, 1969, to Mr. G. J. Ellison of Rootes Motors Limited, Mr. Clarke stressed that in the three years since taking up the franchise the plaintiff had not only "pushed sales from scratch at 370 per annum to the current rate of 548 per annum" but:

> " Taking on the Rootes franchise for Jamaica involved Robinson's in a substantial investment in premises stocks and staff: involving as it did approximately doubling the size of the business. "

In this letter too, Mr. Clarke points out that "we have stocks - ordered and maintained under guidance from your company as to what was required - totalling nearly £60,000."

As a matter of fact, for the six months ending 30th June, 1969, 306 vehicles had been sold: for the second six months of the year 1969, the units sold totalled 346,

With the projections of good business, it is quite clear that on the 28th day of January, 1969, the plaintiff would try to maintain the franchise, the operation of which had resulted in acceptable gross profits to the plaintiff. Said Mr. Arthur: "From the time it got the franchise, Robinson's was making sure that it did nothing to give the defendant a reason to terminate it. So much so that when Robinson's was confronted with a competing situation as to which of two distributors should get the Chryslery/Rootes franchise, it was being very careful to see that it did not lose the franchise." So that it is fair to say that having just got the franchise, the plaintiff could not contemplate termination. It stands to reason that should it lose the distributorship, the plaintiff would, notwithstanding, seek to reduce the resultant loss to as negligible a proportion as was compatible with their delicate situation. They would see how best they could salvage from that predicament, where they had been deprived of a considerable part of the substratum of their operations. It seems to me that it is in this light that the discussions and negotiations between the representatives of the plaintiff and the representatives of the defendant must be viewed. For the plaintiff, it was decidely a situation of uncertainties; for the defendant, the concern was to maintain an operation which in their undecided outlook was still worth maintaining so that there would be no lacuna in the demands of the supply and repair of its manufactured products on the Jamaica market. Looked at from that angle, I must also remind myself that this is a commercial transaction, in which both parties are deeply concerned to retain commercial viability with the object of underscoring its relative interests. So that, the evidence as I see it, is strongly indicative that the parties' representatives at all material times were thinking and discussing on two levels - termination of the franchise, and in the event, disposal of the parts. Let me quote from the evidence given by Mr. Imus:

" It was in Chrysler's interest to continue selling parts to Robinson's until termination - of mutual benefit to both Chrysler for Robinson's. Beneficial to Chrysler for Robinson's to continue in business for as long as possible until sole distributorship decided. My assurance, hopefully, was to ensure that there was continuation of business by Robinson's. Naturally, the whole exercise was to obviate customers' dissatisfaction until a dealer was appointed. "

Here, I am faced with the question of not only what was said during the meeting on the 28th January, 1969, but also with the virtue and efficacy of what was said. Given the admitted assurance by Mr. Imus, Mr. Muirhead argued that considering the wording of Clause 26 of the August Agreement, the plaintiff was doing no more that it had already undertaken to do. And the defendant was really exercising in advance, the option which was given to it by Clause 32(C). The defendant would not wait until after the agreement was terminated to indicate how it would exercise the option within 14 days after the termination of the franchise. According to Mr. Muirhead, if there were no Imus assurance, the obligation of the plaintiff would be unaffected, in that, it would have to maintain a normal supply of spare parts adequate to service the vehicles manufactured by the defendant and sold by the plaintiff in the territory of Jamaica.

It seems to me that this argument is not flawless. Firstly, it must overcome the precise language of Clause 32(C), which favourably to the defendant, allows the defendant to decide whether it would repurchase the parts, But such a decision was not exercisable until after termination. There would even at that time be no obligation to repurchase. It was a matter of discretion whether the defendant would serve a notice of its intention to repurchase.

The relevant terms of the August Agreement must not be construed as essentially an irrevocable offer by the plaintiff to the defendant of the Service Parts unsold at the date of the receipt of the notice. To this extent the plaintiff could not compel the

defendant to repurchase, but, if and when the defendant gave the requisite notice it would have become a conditional unilateral contract in the terms of Clause 32(C). This is worthwhile bearing in mind in the proper assessment of the submissions by Mr. Muirhead.

I find some support for, and exemplification of, this point of view in the report of the judgment in United Dominion Trust Commercial Limited v. Eagle Aircraft Service Ltd. (1968) 1 W.L.R. 74. There the facts for consideration were that an aircraft was sold to a finance company, and let on hirepurchase. The sellers undertook to repurchase if the hirepurchase agreement was terminated before the whole price was paid. The repurchase undertaking was linked with the hirepurchase agreement. The court held that the repurchase undertaking was a unilateral obligation which had not bind the sellers unless the specified conditions were fulfilled. So that the failure of the finance company to comply with the main condition precedent, that on termination of the hirepurchase agreement the finance company should call on the defendants to repurchase within a reasonable time of the termination, relieved the defendants of any obligation to repurchase the aircraft.

It is instructive, first of all, to take note of the remarks in the judgment of Lord Denning M.R. at p. 80 letters G - P, p. 81 letter C:

> " It has been shown, quite correctly, that the agreement to repurchase was not an ordinary bilateral contract. It was a unilateral contract of a kind which does not become binding on both sides until a condition precedent is performed. It is like a lease in which the lessee is given an option to renew the lease for a further term. Such a lessee usually covenants to keep the premises in repair during term and is given an option to renew if he gives notice before the end of the term and duly performs all the covenants to repair. He is not entitled to excuse himself by saying that the want of repair is trifling. The cases start with the judgment of Lord Westburn in Weston v. Collins (1865) 12 L.J. 4, and go on to the judgment of Jones L.J. in Finch v. (1876) 2 Ch. D. 319 C.A., which was followed in Hare v. Nicoll /1966/ 2 A.B. 130, and West County Cleans (Falmouth) Ltd. v. Saly /1966/ 1 W.L.R. 1485.
>
> In point of legal analysis, the grant of an option in such cases, is an irrevocable offer (being supported by consideration so that it cannot be revoked). In order to be turned into a binding contract, the offer must be

" accepted in exact compliance with its terms. The acceptance must correspond with the offer. "

Again at page 82 at letter E he reiterated:

" I think it plain that the obligation to repurchase never came into being unless the conditions precedent were fulfilled. "

A comment made more forceful by the words of the obligation "we will, when called upon to do so, forthwith repurchase from you the aircraft."

In this case, when Mr. Imus gave his assurance, notice of termination had not been given. One of the reasons for his assurance was because he wanted Robinson's to continue in business until he could make a decision, and in my view, he was therefore not making an election to purchase in the circumstances envisaged by the August Agreement. In reality his offer on 28th January, 1969, to repurchase was in anticipation of a probable reduction in stock because of the admitted uncertainty and indecision regarding termination, and was an attempt to forestall any damaging results to Chrysler's interests.

The hesitancy, as well as the undecided state of mind of the defendant's representatives was, in my view, a dominant factor in the thinking of both parties. Although the defendant's representatives had intimated the likelihood of the plaintiff not getting the combined franchise, no final decision had been taken up to the 28th day of January, 1969. This was still the position even up to the 15th April, 1969, when by letter, Mr. R. E. Clarke complained to Mr. L. A. Townsend, Chairman of the Board of Chrysler Corporation, inter alia, that "Robinson's were being kept on tenter-hooks by recurring by-weekly (sic) unkept promises of a definite decision on the failure of the Rootes agency."

Mr. Muirhead's argument raises a further consideration in that although both Mr. Arthur and Mr. Imus stated that they each had the August Agreement in mind, neither specifically brought it to the attention of the other. There was no discussion al all about

the terms of the August Agreement. But according to Mr. Arthur, it was within the terms of the August Agreement, that he sought to ensure that Chrysler repurchase the cars and the parts. Mr Imus himself, in examination-in-chief, stated that he was aware of the dealership agreement and he gave his assurance with regard to "purchase under the terms of the agreement. When I spoke of repurchase of all new vehicles and all current parts, I had in mind Clause 32(C) of the contract."

It is here that one finds a strong indication of what I described earlier as the two levels of the discussions and negotiations. The question of the repurchase of the parts by the defendant, did not, on my reading of the evidence, arise until after the enquiry by Mr. Arthur as to how long it would take before the defendant notified the plaintiff of the termination and also of the chances for Robinson's obtaining the new franchise. Eminently, a new franchise would have to be awarded, regardless of which of the existing franchise-holders acquired the combined franchise. In this event, the anxiety of Mr. Arthur is crystallised in this piece of evidence:

> " I knew that under the contract Chrysler had the right not to purchase anything at all. And to protect my company, I wanted Chrysler to tell me then that they would repurchase parts and units and not leave me high and dry with them. Imus gave me the assurance that on termination they would repurchase parts and units. "

I am not unmindful of the fact that these two experienced businessmen were aware of their rights, but to my mind in January 1969, they were discussing an entirely new situation, that is, the prospects of a combined franchise. This was not then a case of termination according to the contract. It was a situation calling for negotiations beneficial to each party, regardless of the respective rights under the Agreement. I must stress that the repurchase of parts, was not an obligation until the defendant elected to do so within 14 days after termination of the August Agreement. Interestingly, it seems to me that the plaintiff would not be able to sell the then available parts until after 14 days after termination, and if the defendant had not within that period of time

indicated by notice that it opted to repurchase the unsold parts.

The enquiry as to what was said on the 28th January, 1969, is assisted by the evidence provided by Mr. Imus' letter of May 8, 1969. This letter to Mr. Clarke was in reply to the points raised in the latter's letter to Mr. Townsend. In part his letter of May 8, 1969, reported:

> " We promised the Robinson management to resolve the problem /to have only one Chrysler products dealer in Kingston/ as soon as possible with minimum disruption of business. In this regard we encouraged Robinson to continue ordering parts and vehicles with the assurance we would repurchase all new vehicles and current parts if the decision was made in favour of Motor Sales and Service.
>
> Admittedly, it has taken longer to work out the details, on an equitable basis, than we had anticipated. Conversely, it has given your people time to liquidate obsolete inventories and used units. If they did not order new vehicles, or parts, it would seem they either did not understand completely our assurance for repurchase or they elected to wait for the final decisions. "

Mr. Arthur described this letter as reflecting accurately the assurance given by Mr. Imus on the 28th January, 1969. If this letter correctly records the agreement on parts reached between Robinson's and Chrysler, the conclusion cannot be avoided that Mr. Arthur's recollection of Mr. Imus' undertaking that Robinson's "would suffer no loss," is at first blush not sustained. On the other hand, the cross-examination of Mr. Imus elicited the admission that this letter of May 8, 1969, did not mention nor even refer to the August Agreement in so far as that was expressed in oral evidence as the confines for his assurance. He intended to bind his principals. It is not stated therein that the option was exercised in January, 1969. This, it seems to me, for one thing, erases effectively the notion that the Imus assurance was a mere understanding and nothing more than an expression of intention.

Although, as I have recounted, he denied that he did say that Robinson's would suffer no loss if they acted on the Imus Assurance, Mr. Imus did appreciate that if Robinson's did order parts and the franchise was terminated, they would sustain a loss without

an assurance from him. This appreciation as he "so understood the way the question was asked." To the following question: "Did you appreciate that without your assurance there was likelihood of him (Arthur) not ordering any new vehicles and parts?" Mr Imus replied: "He indicated that before I gave the assurance." Realising the inevitability of loss, it is understandable that Mr. Imus gave "his assurance to encourage him to continue ordering new vehicles and parts." However, he modified this by disclaiming that "I was not giving the assurance to protect Robinson's against any loss in continuing to order vehicles and parts if angency terminated." So much so, as he explained, the protection which he was giving Robinson's for ordering new vehicles and parts was that they would get back from Chrysler the same amount of money that they had paid for ordering new vehicles and parts. At the same time when he gave the assurance, appreciating as he did that to import parts into Jamaica involves such items as costs incurred for getting the goods from the wharf to the warehouse, and that certain dues and taxes have to be paid, Mr. Imus asserted that "when I gave the assurance in January, I intended to cover the protection of those costs that were included in the nett landed cost." For the time being, I will not deal with the controversy as to the nature of the costs involved, because I am at this juncture concerned to determine the substance of the assurance and so decide whether a valid contract, separate and apart from the August Agreement, was made in January 1969. Reverting to the letter of May 8, 1969, I compare it with paragraph 19 of the Statement of Claim in which the words "stock of current parts" appear. I note also the words "a large stock of current parts" in paragraph 22 of the Statement of Claim.

In these pleadings nothing is explicitly said about "suffering no loss" although upon consideration of the recollection of Mr. Arthur and Mr. Imus, it is not putting a strain on it to say that that was the effect of the conversation on January 28, 1969. Before I pass on, I would draw attention again to the terms of

Clause 32(C) of the August Agreement, whereby the option when exercised at the appropriate and proper time, that is, after termination, would be the election of the company to purchase "any or all vehicles and parts unsold at the date of the receipt of the notice at the nett landed cost to the Distributor which shall make available such Vehicles and Service Parts to the company upon tender of payment .... " This, to my mind, is an entirely different ground of repurchase from that recorded as the terms of the Imus Assurance, and is certainly an additional factor in the conclusion that the Imus Assurance was not part and parcel of the August Agreement. Here, I think one should draw a distinction between the intrinsic nature of such an Agreement vis-a-vis the Assurance, and the background of facts which gave rise to the Assurance which did not itself depend for its creation and implementation on the precise and exact terms and conditions of the August Agreement.

My finding that the Imus Assurance resulted in an agreement independent of the August Agreement is the non-acceptance of the strong view submitted by Mr. Muirhead that since each representative from his particular vantage point had agreed on the basic relevance of the August Agreement to the relationship between the principals, therefore, this proves that the Imus Agreement could not be an independent, collateral agreement, but rather it was an express term of the existing agreement, so that, according to Mr. Murihead, the Imus Assurance would become an express term of the August Agreement in the event of termination and in fact determining in advance, how the defendant would act under the August Agreement in the event of termination as regards the repurchase of cars and parts. He founded this proposition on the judgments in the case of J. Evans & Son v. Andrea Merzario [1976] 2 All E.R. 930. The headnote sets out the facts as follows:

> " The plaintiffs were importers of machines from Italy. Since about 1959 they had contracted with the defendants, who were forwarding agents, to make the transport arrangements for the carriage of goods to England. The course of dealing between the parties was on the standard

" conditions of the forwarding trade. Prior to 1967 the defendants had arranged for transportation of the goods in crates or trailers which were always shipped under deck because the machines were liable to rust if carried on deck. In 1967 the defendants proposed changing over to transportation in containers. In discussions on the matter between them and the plaintiffs, the defendants gave the plaintiffs an oral assurance that machines subsequently transported in containers would be shipped under deck. On the faith of that oral assurance, the plaintiffs agreed to the change over to container transport, accepted the defendant's new quotations for such transport and gave the defendants an order for the carriage of an inspection moulding machine in a container. Because of an oversight on the part of the defendants the container was shipped to England on deck. At the start of the voyage the ship met a swell which caused the container to fall off the deck and the machine was lost overboard. The printed standard conditions of the forwarding trade which were incorporated in the contract of carriage contained clauses which gave the defendants complete freedom in respect of the means and the procedure to be followed in the transportation of the goods, subject to any express written instructions given by the plaintiff, they exempted the defendants from liability for loss or damage to the goods unless the loss or damage occurred whilst the goods were in their actual custody and by reason of their wilful neglect or default, and limited the defendants liability for loss or damage to affixed amount. The plaintiffs claimed damages against the defendants for loss of the machine, alleging that the carriage of the container on deck had been a bteach of the contract of carriage. "

The defendants had argued that there was no contract between the parties that the containers should be carried under deck. In addition to this, the defendants sought to establish that even if there was such a contract, they relied on the printed terms and conditions to exempt them from any liability. In the process of rejecting the reliance on the condition, the Court of Appeal (Lord Denning, M.R., Roskill and Geoffrey Lane, L.JJ. had to pronounce on the relevance and effectiveness of the oral assurance. Each judgment stressed the binding nature of the oral assurance, which had been made in order to induce the plaintiff to agree to the transport of the goods in containers. And despite the fact that the plaintiff had accepted the quotations for the new changes for carrying the containers, and that Invoices were sent and the goods carried on the usual terms and conditions of the forwarding trade, the Court of Appeal held that the defendants could not rely on the

> " I can not accept counsel for the defendants' arguments that there was never a contract in writing) but with a contract which as I think was partly oral, partly in writing and partly by conduct. In such a case the court does not require to have recourse to lawyers' devices such as collateral oral warranty in order to seek to adduce evidence which would not otherwise be advisable. The court is entitled to look at and should look at all the evidence from start to finish in order to see what the bargain was that was struck between the parties. "

This alternative point of view was supported by Geoffery Lane, L.J. when he remarked on /the binding effect of the assurance. It was -

> " .. not a collateral contract in the sense of an oral agreement varying the terms of written contract. It was a new express term which was to be included thereafter in the contracts between the plaintiffs and the defendants for the carriage of machinery from Italy."

The immediate concern about the application of those dicta to the facts and circumstances of the instant case is firstly: the Evans case shows once more how the Courts deal with oral assurances on which the parties rely. Such assurances must be given some meaning and value in the terms of the contractual relationship, that as a general rule it is always a matter of construction, in the process of which the Court must perforce pay due regard to the considerable influence which the importance of the agreement has on the parties. Certainly, if one of them has acted on it the Court must give due weight to that, taking into account all the other circumstances of the case. As a matter of construction, if Mr. Muirhead is correct in his submission that I should be guided by the alternative grounds for decision in the Evans case he would be inviting me to construe a tautology - he did not say where in the August Agreement I should place the Imus Assurance ; nor did he argue whether it should replace Clause 32(C). Each of those considerations, together or alternatively, would be vital to the acceptance of his submissions. Additionally, he would necessarily, have to pay serious attention to the fact that in the Evans case, the course of dealing was an important factor. I quote the words of Geoffery Lane L.J. at page 936 letters c - d:

> " There is no dispute that the terms of the printed contract had by the time of this particular incident by the course of dealings become a part of each individual contract between the plaintiffs and the defendant in so far as they are apposite. There is equally no doubt that if they are to be applied to this new express term and applied literally they would render the term valueless to the plaintiffs. "

I point out that apart from the course of dealing being on the standard conditions of the forwarding trade, the printed standard conditions gave the forwarding agents complete freedom over the means and prodedure to be followed on the trnasportation of goods, subject to express written instructions. In the foregoing circumstances, I do not accept the submission that because there were no existing obligation in the Evans case by which the plaintiff was bound, in contrast to the instant case where the plaintiff was bound under an existing obligation of the August Agreement to maintain adequate stocks, to maintain proper maintenance of vehicles, and to carry out other obligations of the Agreement, therefore, the matter of principle can be easily resolved. As in Evans the state of mind of the parties at the time of assurance is a vital factor in resolving the matter of principle. There was a meeting of minds between the accredited representatives of the parties, and there was an expectation of the fulfilment of the promise explicitly made in the encouragement of the Imus Assurance. At the end of the meeting on the 28th January, 1969, both parties believed, and indeed, understood, that there was an agreement which would be carried out. Mr. Imus intended to bind his principals. He intended the plaintiff to act upon his assurance as businessmen.

In this light, it cannot be too often stressed, that the business efficacy of the assurance must not be illusory. In support of this I make no apologies for quoting the following words of Lord Denning, M.R. in the case of Mendelssohn v. Normand /1970/ 1 Q.B. 177 at pages 183 letter H - 184 letter B.

> " There are many cases in the books when a man has made, by word, of mouth, a promise or a representation of fact, on which the other party acts by entering into the contract. In all such cases the man is not allowed to repudiate his representation by reference to a printed condition, see Couchman v. Hill /1947/ KB 554; Curtis v. Chemical Cleaning and Dyeing Co. /1951/ 1 KB 805; and Hurling v. Eldy /1951/ 2 KB 739; nor is he allowed to go back on his promise by reliance on a written clause, see City of Westminister Properties (1934) Ltd. v. Mudd /1959/Ch. 129, 145 by Harman L.J. The reason is because the oral promise or representation has a decisive influence, on the transaction - it is the very thing which induces the other to contract - and it would be most unjust to allow the maker to go back on it. The printed condition is rejected because it is repugnant to the express oral promise or representation. As Devlin J. said in Firestone Tyre & Rubber Co. Ltd. v. Vokins & Co. Ltd. /1951/ 1 Lloyd's Report 33, 39; 'It is illusory to say 'we promise to do a thing, but we are not liable if we do not do it.' To avoid this illusion the law gives the oral promise priority over the printed clause.' "

In the circumstances of the instant case, the Imus Assurance was the decisive influence in the plaintiffs' continuance of the ordering of parts.

I find as a fact, that Mr. Imus did have authority on the 28th January, 1969, to bind the defendant, and nothing which took place after that, whether disclosed by correspondence, or adduced by the oral evidence, has released them from the obligations of the assurance then given. His encouragement to the plaintiff to continue to order parts and he would repurchase those parts which remained at the termination of the franchise to Robinson's was unqualified. It was a unilateral promise which was transformed into a binding contract by the plaintiff's ordering of parts between January, 1969, and July, 1969.

It must be remembered that this was a commercial agreement, and "In commercial agreements it will be presumed that the parties intend to create legal relations and make a contract. Although the courts will not make a contract for the parties where none exists, they will seek to uphold bargains made between businessmen wherever possible, recognising that they often record the most important agreements in crude and summary fashion, and will seek to construe

any documents fairly and broadly, without being too astute or subtle to find defects. If satisfied, that there was an ascertainable and determinate intention to contract the courts will strive to give effect to the intention, looking at the substance and not at the mere form": Hals. Laws of England (4th ed.) Vol 8 paragraph 269. Where the subject matter of the agreement is business relations, and there is a meeting of minds, an intention to agree, "the onus is on the party who asserts that no legal effect was intended, and the onus is a heavy one." per Megaw J in Edwards v. Skyways Ltd. [1964] 1 W.L.R. 494 at 500.

Because of the arguments which were submitted as to the ultimate outcome of the circumstances of this case I should underline the phrase "unilateral promise" with the words of Diplock L.J. in United Dominions Trust & (Commercial) Ltd. v. Eagle Aircraft Services Ltd [1968] 1 W.L.R. 74 at page 83 letter D - page 84 letter E. The learned Lord Justice is there discussing the juristic nature of unilateral contracts in which

> "one party, whom I will call "the promisor" undertakes to do or to refrain from doing something on his part if another party, "the promisee", does or refrains from doing something, but the promisee does not himself undertake to do or refrain from doing that thing. The commonest contracts of this kind in English Law are options for good consideration to buy or to sell or to grant or to take a lease, competitions for prizes, and such contracts as that discussed in Carlill Smoke Ball Co. [1892] 2 QB 484. A unilateral contract does not give rise to any immediate obligation on the part of either party to do or to refrain from doing anything except possibly an obligation on the part of the promisor to refrain from putting it out of his power to perform his undertaking in the future. This apart, a unilateral contract may never give rise to any obligation on the part of the promisor; it will only do so upon the occurrence of the event specified in the contract, viz, the doing (or refraining from doing) by the promisee of a particular thing. But it never gives rise to any obligation upon the promisee to bring about the event by doing or refraining from doing that particular thing.
>
> "Indeed, a unilateral contract of itself never gives rise to any obligation upon the promisee to do or refrain from doing anything. In its simplest form (for example "If you pay the

" entrance fee and win the race, I will pay you £100) no obligations upon the part of the promisee result from it all. But in its more complex and more usual form, as in an option the promisor's undertaking may be to enter into a synallagamatic contract with the promisee upon the occurance of the event specified in the unilateral contract, and in that case the event so specified must be, or at lease include, the communication by the promisee to the promisor of the promisee's acceptance of his obligations under the synallagamatic contract. By entering into the subsequent synallagamatic contract upon the occurrence of the specified event, the promisor discharges his obligation under the unilateral contract and accepts new obligations under the synallagamatic contract. Any obligations of the promisee arise, not on the unilateral contract, but out of the subsequent synallagamatic contract into which he was not obliged to enter but has chosen to do so.

"Two consequences follow from this. The first is that there is no room for any inquiry as to whether any act done by the promisee in purported performance of a unilateral contract amounts to a breach of warranty or a breach of condition on his part, for he is under no obligation to do or to refrain from doing any act at all. The second is that as respects the promisor, the initial enquiry is whether the event, which under the unilateral contract gives rise to obligations on the part of the promisor, has occurred. To that inquiry the answer can only be a simple 'yes' or 'no'. The event must be identified by its description but if what has occurred does not comply with that description, there is an end of the matter. It is not for the court to ascribe any different consequences to noncompliance with one part of the description of the event than to any other part if the parties by their contract have not done so. See the case about options Weston v. Collins 12 L.T. 4, 5; Hare v. Nichol /1966/ 2 QB 130.

"For the inquiry here is: 'What have the parties agreed to do?' - not what are the consequences of their having failed to do what they have agreed to do?' as it was in the Hong Kong Fir case /1962/ 2 QB 26. Such an inquiry cannot arise under a unilateral contract unless and until the event giving rise to the promisor's obligations has occurred.

"While, for simplicity in analysing the relevant differences in legal character, I have spoken of synallagamatic and unilateral of 'if' contracts it would be more accurate to speak of synallagamatic and unilateral obligations, for obligations of these two different kinds are often contained in a single agreement, as where a lease contains an option for renewal."

For completeness, I should repeat his Lordship's definition of contracts which are synallagamatic or bilateral. These are contracts in which -

> " each party undertakes to the other party to do or to refrain from doing something, and in the event of his failure to perform his undertaking, the law provides the other party with a remedy. The remedy of the other party may be limited to recovering monetary compensation for any loss which he has sustained as a result of the failure without relieving him from his own obligation to do that which he himself has undertaken to do and has not yet done or to continue to refrain from doing that which he himself has undertaken to refrain from doing. Or it may in addition, entitle him, if he so elects, to be released from any further obligation to do or to refrain from doing anything. The Hong Kong Fir case was concerned with the principles applicable in determining what kind of failure by one party to a synallagamatic contract to perform his undertaking releases the other party from an obligation, which ex hypothesi has already come into existence to continue to perform the undertaken given by him in the contract. The mutual obligations of parties to a synallagamatic contract may be subject to conditions precedent, that is to say, they may not arise until a prescribed event has occurred, but the event must not be one which one party can prevent from occurring, for if it is, it leaves that party free to decide whether or not he will enter into any obligations to the other party at all. The obligations under the contract lack that mutuality which is an essential characteristic of a synallagamatic contract. "

My finding of fact that the plaintiff did order vehicles and parts in reliance on the Imus Assurance was the acceptance of the unilateral nature of the promise by the defendant. This ordering of parts continued up to the 25th August, 1969, when notice of termination was given to the plaintiff. It cannot be overlooked that the plaintiff had been encouraged to continue to order parts in the normal pattern, and Mr. Arthur gave evidence that he maintained a normal pattern after the meeting on the 29th January, 1969. "The normal pattern" he described as involving expansion and development of the agency. An indication of what this meant in practical terms is provided by evidence of a meeting on the 29th February, 1969, between Messrs. Clarke and Arthur for the plaintiff and Mr. Schroeder for the defendant. At that meeting, two significant things occurred. First, during the discussion on the parts' situation, Mr. Schroeder confirmed to Mr. Clarke's specific enquiry, the undertaking given in January, and Mr. Schroeder himself reiterated the encouragement

printed conditions containing the exemption clause.

Observing that nothing was put into writing about the goods being carried under deck, Lord Denning, M.R. opined that "there was a plain breach of the oral promise by the forwarding agents." On the facts of the case he said ".... we are concerned with an assurance as to the future." He underlined the approach of the Courts -

> " ..... nowadays to collateral contracts. When a person gives a promise or an assurance to another intending that he should act on it by entering into a contract, we hold that it is binding. See Dick Bentley Productions Ltd. v. Harold Smith (Motors) Ltd. /1965/ 1 W.L.R. 623. That case was concerned with a representation of fact, but it applies also to promises as to the future. " (p. 933 letters d - e)

Roskill and Geoffery Lane, L.JJ. agreed that the appeal should be allowed for the reasons given by Lord Denning, M.R. At pp. 934 letter j - 935 letter a, Roskill, L.J. expressed his views in these words:

> " It seems to me as it seems to Lord Denning, M.R. absolutely plain that the plaintiffs thought that they had got an assurance from the defendants if the plaintiffs instead of using the trailers which had hitherto always been shipped under deck, were to allow the defendants to ship the plaintiffs' goods in containers, those containers, like the trailer before them, would be shipped under deck. The learned judge said that all the defendants gave was an assurance, they did not give a guarantee. The real question as I venture to think, is not whether one calls this an assurance or a guarantee, but whether that which was said amounted to an enforceable contractual promise by the defendants to the plaintiffs that any goods, thereafter entrusted by the plaintiffs to the defendants for carriage from Milan to the United Kingdom via Rotterdam and then by sea to England, would be shipped under deck. The matter was apparently argued before the learned judge on behalf of the plaintiffs on the basis that the defendants' promise (if any) was what the lawyers sometimes call a collateral oral warranty. That phrase is normally only applicable where the original promise was external to the main contract, the main contract being a contract in writing so that usually parol evidence cannot be given to contradict the terms of the written contract. The basic rule is clearly stated in the latest edition of Benjamin on Sale (9th edition 1974, para 742) to which I refer but will not repeat. But that doctrine, as it seems to me has no application where one is not concerned with a contract in writing (with respect,

that the plaintiff should continue to buy spare parts, making quite clear that the bona fides of the defendant was unquestionable with these words: "Remember you are dealing with a multinational corporation and not a backyard dealer." I am in no doubt that at that meeting Mr. Arthur brought to the attention of Mr. Schroeder that he then had on his desk an order for parts to the extent of £8,000 which in the normal course of procedure he would be placing. Mr. Arthur described Mr. Schroeder's reaction: "He seemed very pleased." It is instructive to note also that after hearing what Mr. Schroeder had said about the parts, Mr. Clarke felt that Robinson's had an arrangement which in the circumstances was the best it could get, considering that Mr. Schroeder told them to "Keep on ordering parts and Chrysler will see that you are not the loser." To this I will add that in April, 1969, Mr. Arthur had every reason to believe that agreement would have been honoured, and so there would have been no cause for concern about having more than 60 days supply of parts, "In the absence of the Imus Assurance I would have had grave concern regarding over 60 days supply. That's the reason why I raised it."

It becomes clear at this point that evaluation of the foregoing evidence must be cognisant of the thinking of each of the principals. Firstly, Mr. Imus wanted both Motor Sales and Service Limited and the plaintiff to continue in business until one was chosen for the combined franchise. This was one of the reasons why he encouraged the plaintiff to continue until he made a decision. He added: "It was in Chrysler's interest to continue selling parts to Robinson's until termination - of mutual benefit to both Chrysler and Robinson's." So there was the hope that he was thereby insuring Robinson's continuing in business and such would certainly be beneficial to Chrysler. For the elucidation of this position, I will quote Mr. Clarke's evidence as to the reasons why he thought, after speaking to Mr. Schroeder, that the arrangement confirmed by the letter was best for Robinson's as well as for

Rootes: "It seemed clear to me that if it was proving difficult for them to make up their mind between two rival firms, it was an essential requirement for them that negotiations could be carried on under conditions where Chrysler was not faced with a deadline. Were there to be such a deadline, Chrysler would have found itself negotiating from weakness because of the important requirement to maintain continuity of promotion and sale of their products on the island. Furthermore, I finally thought that whoever finally took the agency should have a proper full stock of parts already cardexed over two and a half years; rather than to have to do as Robinson's had had to do; which was to build up for the first year or so from scratch."

He elaborated on the point of view of Chrysler negotiating by a deadline and from weakness in this way: "Supposing either one of two circumstances; the first being that we cut down our parts supply to 60 days, and the second being that we gave 60 days' notice to Chrysler, then Chrysler/Rootes would be in the same position they had been two and half years previously - hawking their franchise around dealers who in consequence would have been more able to dictate their own terms, which might, for instance, have been the retention by the dealer of a rival distributorship which Chrysler would have preferred to see relinquished." This evidence I find is merely the reiteration and elaboration of the thoughts which Mr. Clarke had essayed in his letter dated 15th April, 1969, to Mr. L. A. Townsend that "it is in my opinion only a matter of weeks before the Puttocks Holdings' directors on the Robinson's board will feel it their duty to advise the company to close down voluntarily." This opinion was expressed because of the vacillation of the defendant. Such an event, he opined, would be disadvantageous to the Chrysler Corporation; "Because of the interruption of Rootes products (handling the largest share of your products in Jamaica, I believe) for the second time in about two years; and because it could weaken your negotiating position with Motor Sales.

The respective ratiocinations are not exclusive but complementary; expressing as they do, the thinking of men experienced in the automotive industry. Robinson's maintaining the status-quo was vital to the future operations of Chrysler in Jamaica, and it seems to me that when Mr. Imus gave his assurance he was then and there securing the interests of his principals, so that they would not suffer a loss. He firmly bound his company by an offer which was acted upon when the plaintiff ordered parts in reliance on the assurance. As Mr. Arthur pointed out, if he had not had the assurance he would not have continued the orders. "I was faced with a situation which meant that in January, 1969, I had adequate stocks. I maintained adequate stocks because of his assurance which is what I was obliged to do under the August Agreement." As he explained later, if Robinson's was to remain in the race for the franchise, he would not do anything to cause his stock of parts to fall below what he considered adequate for the January market.

The purchase of the parts subsequent to the Imus Assurance was the responsibility of Mr. Keith Tomlinson, who had been employed to Robinson's for over twenty years, and had worked in the spare parts department of the plaintiff for all those 20 years. At the time of giving evidence, he had been the manager of the Parts Department for the past 10 years and that department, he explained, was concerned with ordering spare parts not only for motor vehicles but was also concerned with agricultural as well as industrial equipment. He gave evidence about the purchase of certain Rootes parts from Sprostons, the immediately preceeding franchise-holders from Rootes. He was in charge of the purchase of these parts from Sprostons. It was a selective purchase which was effected on the basis of information gleaned from Sprostons' catalogue, cardex and master price list of Rootes. This was in 1966, when lists were compiled from the cardex system, indicating what items Robinson's would purchase, on the basis of all fast

moving items. The criterion for determining these was any item which had moved over a year period. Those parts the plaintiff took bearing in mind their application and the population of the units to which they were obliged to carry. These were selected applied. The plaintiff took over also parts which they from the parts catalogue covering the different items depending on which was crucial. Included in these were gear boxes and differentials, together with certain slower moving engine spare parts. All these parts purchased from Sprostons appeared on the 1966 Rootes Master Price List.

The value of the stock acquired in 1966 from Sprostons was £12,000; and, Mr. Tomlinson stated, at least 99 percent of those parts bought moved during the two and a half years when the plaintiff operated the Rootes dealership. Those parts were sold and recorded normally in the normal process of recording.

For the duration of the operation by the plaintiff of the Rootes franchise the stock of parts was maintained at a normal stocking level of approximately six to seven months. Certainly, this was so in the period January - August 1969. It was business as usual - goods ordered and delivered. The plaintiff during the tenure of the distributorship had to do basic coverage of the new Hunter range of cars in particular, viz, Hillman, Humber Seeptre, Sunbean, Rapier, Hillman Imp, as well as commercial units ranging from three quarter ton vans to 10 ton trucks. The plaintiff was obliged to stock parts for these vehicles, and this was in addition to the items which had been acquired from Sprostons. Between September, 1966, and September, 1969, 50% of the stock ordered from Rootes related to the new range of vehicles. The other 50% would relate to replacing stock which were taken over from Sprostons.

Supplementary to the fact of the purchases is the fact of value of the sales for the years 1967, 1968, 1969. These figures were supplied by Mr. Arthur, referred to Rootes parts only, and are at net sales value. From 1967, the relevant figure was £50,000; for 1969, it was £54,000 up to September, 1969, it was £66,000.

He went on to say that in 1967, the plaintiff spent £71,000 for the minium stock for four months. At that time, there was no record giving an indication of what the demand would be, but initially, prudently, more stock is taken than one necessarily requires. Analysing the given figures further, Mr. Arthur described 1968, as the establishing period during which the normal processing of stock would meet the demand. He said considerably more parts were sold in the year 1969. The actual purchases for eleven months of 1969, were £29,698.104. With a developing market, he told Mr. Muirhead, the plaintiff reduced the purchase of parts, but increased the sales of motor cars.

Conjoined with the foregoing is the information that the Jamaican market differs from the European market. It was Mr. Imus who confirmed that the life span of a motor vehicle varies widely between various countries. For instance, the life span of a motor vehicle in the United States of America is about seven years, whereas in Mexico they do not last as long as three years. There was evidence that vehicles are operated for a much longer period of time in Jamaica. Mr. Imus conceded that a car can be as old as seven years, and one cam still obtain parts for it.

The term "current parts" was defined by Mr. Imus by reference to the Master Price List, which does not necessarily mean parts which are being manufactured. Although parts are not being manufactured, they can be current if they appear on the Master Price List. Parts remain current on the Master Price List for a varying number of years - according to Mr. Tomlinson, ten years, Mr. Tomlinson gave this opinion as the result of his wide experience in the trade. Unless there is supersession of a part, or the manufacturers decide the selling rate of a particular item, if it does not achieve a given standard, it can be deleted. Those parts which appear in the Manuracturer's Master Price List are available for their units. Parts would be produced according to their selling rate.

This judgment must pay due note to the argument for the defendant that the conduct of the parties subsequent to the Imus Assurance shows that no contract had ever been entered into, or if so it is strong evidence of action inconsistent with the existence of such a contract. As I understand the general principle, an agreement cannot be construed in the light of the subsequent actions of the parties: see per Sir John Pennycuick in Bushwall Properties v. Vortex Properties [1976] All E.R. En. 283 at page 293 letter f. In the light of this general principle, I refer to firstly, the meetings of the 10th July, 1969, between Mr. Arthur and Mr. Hirst for the plaintiff, and Mr. Adamson and Mr. Hartman for the defendant. It was at this meeting that oral notice of termination was given by the defendant's representatives who promised to confirm the notice in writing. This oral notice was to take effect on the 14th October, 1969. More importantly, the question of parts was raised and this elicited from Mr. Hartman the promise that he would be arranging for a partsman to come to Jamaica immediately to look at the stock. He also said that if Motor Sales and Service did not take the parts "we (Chrysler) will take the parts." He solicited Mr. Arthur's advice as to a suitable location for storing the stock. Up to when Mr. Arthur left Jamaica in July, 1969, the partsman had not come to Jamaica. I do not think that this can be used to argue against the binding nature of the Imus Assurance, because I regard the promise by Mr. Hartman as being no more than the fulfilment of the undertaking given by Mr. Imus in January, 1969, and which I find to the knowledge of Chrysler had been acted upon by the plaintiff. It is striking that on the 11th July, 1969, when the same representatives met again, Mr. Hartman informed his counterparts for the plaintiff that his head office had confirmed what had been discussed in general terms the day before. Strikingly too, Mr. Arthur stated that he only expressed disappointment at losing the franchise. I do not accept that it was necessary for him to then mention the Imus Assurance because that

was never, in my view of the evidence, in any doubt or controversy.

The question of parts was again discussed on the 16th September, 1969. Although the question of parts was not the only matter discussed at this meeting, Mr. Adamson, representing the defendant, reported that Motor Sales and Service had no place to store them. This evoked from Mr. Clarke the protest that the franchise having been terminated, yet no proper arrangements had been made for the new franchise-holders properly to take on the franchise.

Previous to this by his letter dated 2nd September, 1969, to Mr. G. J. Ellison, Mr. Clarke had sought "to get something clarified at least in relation to the parts situation, where we have stocks - ordered and maintained under guidance from your company as to what was required, totalling nearly £60,000 at cost." This paragraph ante-dated his oral protest on the 16th September, 1969, and broached Mr. Clarke's concern that no proper arrangements had been made regarding the parts. The time for effective termination was fast approaching and the plaintiff was faced with an operation which entailed the procedure of removal of each part item from bins, counting, listing, pricing and packing, followed by the necessary delivery to some other place. In fact, Mr. Clarke could not see how this could effectively be done, where over 179,000 parts "equivalent to a landed cost today of $80,000" were involved. In his view, it could not have been done in less than three months. As it turned out, Mr. Tomlinson and his team were able to complete this substantial operation in six weeks.

Mr. Tomlinson had been assigned to do the removal of parts from the storage bins, to count them and pick out all the Rootes items. This exercise occupied a team of 12 persons over a period of six weeks. As part of the procedure the parts had to be identified and tagged, and the counting of the total of each item. Lists were prepared of the individual items, the quantity was recorded, and a box numbered assigned. After this, that list was

taken to the cardex, individual cards involved were extracted, put in numerical sequence, and from this the landed cost of each item was noted and extended to the total item by item and case by case.

At the meeting of the 16th September, 1969, Mr. Clarke also said that he told Mr. Adamson that an obsolesence check had been carried out and this showed the value at landed cost of those parts which had not moved for twelve months. Exhibit 2, a list of such parts in stock that had not moved in sales for one year, had previously been prepared. There was a discussion of whether the twelve months' test of obsolencence was not too severe, compared with the test of five years which Mr. Adamson suggested was a more suitable test.

On the following day, Mr. Adamson, according to Mr. Clarke's evidence, dictated an offer to buy not more than six months' supply of parts which had not moved in the last twelve months. Mr. Clarke described this as being no more than an expression of intention, and this whole offer was conditioned upon the signature by Robinson's of a special form of release satisfactory to Chrysler. Tentative it was, considering that Mr. Adamson was unable to say what the contents of the release would be. In his evidence, Mr. Clarke compared this offer with a much better contract which the plaintiff had. "We had had an undertaking to take our parts and stock and I did not see that the order just outlined had come near to that." His view was that Mr. Adamson was picking and choosing. "Our arrangement with Chrysler in Jamaica never said anything about only six months's supply on any one item." I was not told whether this thinking was conveyed to Mr. Adamson. But when he was cross-examined by Mr. Muirhead, Mr. Clarke further stated categorically that the Adamson offer was different from the Imus Assurance. Mr. Clarke could not recall having mentioned it to Mr. Adamson, on either the 16th or 17th September, 1969.

Mr. Muirhead indefatigably pressed the non-mention of the Imus Assurance during these meetings as showing that the parties treated it as if it never existed. He underscoredthis submission by the fact that Exhibit 2 had nothing to do with the Imus Assurance. Mr. Clarke did agree that this list was totally unconnected with, and totally irrelevant to, the Imus Assurance. It should not be forgotten that Exhibit 2 listed what is known in the trade as "parts ageing", and was the subject of discussion at the meetings although Mr. Clarke could not recall whether it was expressly prepared for the meeting. He said the list had been prepared in compliance with the request of Mr. Adamson for co-operation by the plaintiff.

From all the circumstances, it was urged for the defendant that clearly the plaintiff never at any time endeavoured, attempted or purported to act in a manner to show that they accepted or ever recognised the continuance of the Imus Assurance, With respect, it does seem to me that that contention is to avoid the impact of the evidence by Mr. Clarke that "Mr. Adamson had told us in previous meetings that he had been in touch with Motor Sales and Service about taking the parts. The indication about parts movement indicated the quality of our stock and it was only reasonable in my opinion that we should make the information available." There is also the reminder not only of the enquiry regarding the obsolescence check, which I have already mentioned, but also the request for a definition of the phrases"normal supply" and "current parts." To this enquiry, Mr. Adamson replied in respect of the first six months' supply as shown by the cardex system. In respect of the second, parts listed on the Master Price List.

I am of the opinion that all this discussion took place at a time when the plaintiff had already performed the acts which the defendant had encouraged it to perform. Let it be recognised and accepted as I do, that the offer was different from the Imus assurance, and in fact when that assurance was given, it was

given without any qualification as to age of stock, but would certainly derive its full force and effect from the customary validity and applicability of the Master Price List. This conclusion is underlined by the evidence of Mr. Imus when he stated that when he gave his assurance in 1969, "it concerned those parts which were on the Master Price List for 1969..... My assurance covered new parts which were on the Master Price List for 1969..... My assurance covered new parts which would be repurchased under the terms of the contract." If the terms of the affirmation by letter of May 8, 1969, mean anything, manifestly, the explanation by Mr. Imus of what his assurance embraced and, appearing to qualify the relevance of the Master Price List for 1969, is at variance with that letter, and that qualification is of the same nature as the attempt by Mr. Adamson to make what I categorise as a new offer, oblivious of the Imus assurance. Surely, the discussion in September 1969, can reasonably be regarded as a continuation of the discussion in July 1969, which themselves did not negate or even modify the relationship of the parties resulting from the transaction on the 28th January, 1969. As I have already said, the evidence conclusively discloses that the plaintiff did order the parts in pursuance of the reliance on the promise by Mr. Imus. In passing, I make the comment that not having heard any evidence from Mr. Adamson regarding these conversations I have had no recourse but to accept the evidence of Mr. Clarke as the true account thereof.

The meetings of the 16th and 17th September, 1969, were followed by a letter from the defendant bearing date 24th September, 1969, confirming the offer made in the conversations with Mr. Adamson. Mr. Henriques argued that the terms of this letter are totally inconsistent with an option under Clause 32(C) of the August Agreement having been exercised on the 28th January, 1969, and confirmed on the 8th May, 1969. He questioned whether,

if as contended, the option had been exercised in January 1969, it was really necessary after a notice of termination had been served to write in September 1969. He essayed that all that needed to have been done, the option having been exercised, was for delivery by the plaintiff and payment by the defendant. It cannot be gainsaid that to test these observations due regard must be paid to the declaration by Mr. Imus that he intended to bind Chrysler by his assurance. Then too there is nothing in the evidence to show that the letter of the 24th September 1969, was intended a change of direction from the position of January 1969, underscored by the letter of 8th May, 1969, and why, if in fact, Chrysler had changed their attitude. It is inconceivable that the letter over the signature of Norman L. Gray for Chrysler International S.A. did not receive the imprimatur of Mr. Imus, yet he was never asked about its relationship to his assurance. In other words, the defendant has put forward this letter to prove that there was no settled contract up to then and, therefore, the plaintiff cannot succeed. Certainly, the presence of Mr. Imus invited such an enquiry which might very well have resulted in my ready acceptance of the arguments on behalf of the defendant on this aspect of the case.

But Mr. Muirhead argued that the ordering of the parts was in performance of the obligations of the plaintiffs. This cannot in law amount to consideration, and therefore they have provided no consideration for the assurance upon which they seek to rely. This is because of the principle that performance of an act which one is legally bound to perform does not constitute consideration. This is the principle laid down by Lord Ellenborough in Stilk v. Myrick (1818) 2 Camp. R. 317, 170 E.R. 1168, N. P. It will be remembered that in that case in the course of a voyage some of the seamen deserted, and the captain of the ship not being able to find others to supply their place, promised to divide the wages which would have become due to them among the

remainder of the crew. It was held that this promise was void for want of consideration, because the plaintiff had promised to perform and did perform an existing duty by the subsisting contract. On the other hand, there is the case of Hartley and Ponsonby [1857] 7 E & B 872; 26 LJQB, 322; 119 E.R. 1471. A vessel, in consequence of the desertion of some of the seamen, was left short of hands in harbour before the voyage was completed. The master, to induce the remaining seamen to perform the rest of the voyage, promised to pay them a sum of money in addition to their wages. They accordingly performed the rest of the voyage with the diminished number of hands. On an action by one of the seamen against the master for the sum promised, the jury found that he made the agreement without coercion, for the best interest of the owners, that he could not have obtained additional hands at a reasonable price, and that it was unreasonable for so large a ship to proceed on the completion of the voyage with the diminished number of hands. It was held on this finding, which the court understood to mean it was unsafe so to proceed, that the plaintiff was entitled to recover as the seamen were not bound by their original contract of service, to proceed with the diminished number of hands; and their undertaking to do so was therefore a good consideration for the master's promise. Pollock on Contract (12th edition by P. H. Winfield at p. 143) cites this case as an authority to illustrate the proposition that

> " the doing or undertaking of any thing beyond what one is already bound to do, though of same kind and in the same transaction may be a good consideration."

In Cheshire and Fifoot - The Law of Contract (4th edition) at p. 77, the learned authors explain Stilk vs. Myrick as a case where the plaintiff was bound by an existing contractual duty to the defendant in that -

> "the crew were already bound by their contract to meet the normal emergencies of the voyage, and were doing no more than their duty in working the ship home. Had they exceeded their duty, or if the course of events by making the ship unseaworthy had relieve them from performance, the case would have been different."

This was the distinction from Hartley vs. Ponsonby. In the last named case -

> "the shortage of labour was so great as to make the further prosecution of the voyage exceptionally hazardous, and, by discharging the surviving members of the crew from their original obligation, left them free to enter into a new contract."

One only has to read the digest of cases set out in the English and Empire Digest, Volume 42, Shipping and Navigation, Pt. VII sub-section 7 - Extra Remuneration paragraphs 4553 - 4579 to understand the distinction and also the peculiar origin of the rule in Stilk vs. Myrick. What should not be overlooked is that the decision in Harris vs. Watson (1971) Peake 72, the predecessor of Stilk vs. Myrick, held that seamen are not entitled to claim extra wages in respect of services rendered in the course of the period of engagement, even though the master has agreed to pay them, was based on public policy. But in Stilk vs. Myrick, the decision was rested on the ground that it was void for want of consideration. I am of the view that the peculiar origin of the rule, that is, the conclusiveness of the articles precluding any extra remuneration, was for the protection and preservation of maritime commerce. This should not be lost sight of. Lord Kenyon thus stated the principle of public policy:

> " For if sailors were in all events to have their wages, and in times of danger entitled to insist on an extra charge on such a promise as this they would in many cases suffer a ship to sink unless the captain would pay any extravagant demand they might think proper to make. "

Implicit in these remarks is the rejection of any attitude which suggests coercion by the seaman of the master to pay the seaman higher wages than those agreed in the articles. When Lord Ellenborough decided Stilk vs. Myrick he approved the decision of Harris vs. Watson. As I have already pointed out, he

based this decision not on the ground of public policy, but on the ground of -

> " There was no consideration for the ulterior pay promised to the mariners who remained on the ship. Before they sailed from London they had undertaken to do all that they could under all the emergencies of the voyage. They had sold all their services till the voyage should be completed. "

It was immaterial whether the contract for extra wages in consideration of the seaman doing more than his ordinary share in navigating the ship was made during the voyage (Harris v. Watson), or was made on shore and the extra work was occasioned by the desertion of part of the crew. In this view Lord Ellenborough opined that -

> " .... desertion of a part of the crew is to be considered an emergency of the voyage as much as their death, and those who remain are bound by the terms of their original contract to exert themselves to the utmost to bring the ship in safety to their destined port. "

Lord Ellenborough distinguished desertion of part of the crew from the situation -

> " If they had been at liberty to quit the vessel at Cronstadt the case would have been quite different or if the captain had capriciously discharged the two men who were wanting, the others might not have been compellable to take the whole duty upon themselves, and their agreeing to do so might have been sufficient consideration for the promise of an advance of wages."

By these words Lord Ellenborough would appear to have compared a situation where the contract in the articles remained unabridged by any occurrence which is the inherent incidence of the contract of service by a seaman, with the opposite situation in which the seaman performs some service beyond the scope of the original contract. In 1785, the case of Yates v. Hall (1785) 1 T.R. 73; 99 E.R. 979 was decided. Put shortly, the decision was that a promise by a captain of s ahip on behalf of his owners, when the ship was captured to pay monthly wages to one of the sailors, in order to induce him to become a hostage, is binding on the owners although they abandon the ship and cargo. One is tempted to wonder at this decision since the obvious illegality at

the basis of the agreement between the master and the seaman would seem ipso facto to have vitiated the agreement to pay the wages. Notwithstanding this, I should mention another case Harris v. Carter (1854) 3 E&B 559; 118 E.R. 1251, in which Lord Campbell considered the following facts. Plaintiff a sailor, signed articles for a voyage to Melbourne and back. When the ship arrived at Melbourne several of the crew deserted. The captain, to induce the rest to remain, signed fresh articles with the plaintiff and others at the rate of £6 per month for the home voyage. When the vessel arrived home, the plaintiff sued the ship owner for work and labour. At the trial on the claim for the full amount including that under the fresh articles there was some evidence that at Melbourne the captain had consented to the discharge of some of the crew. The judge asked the jury if the plaintiff himself had been discharged before entering into the fresh articles. On their answering that he had not, the judge directed a non-suit. Lord Campbell on a motion for a new trial held that the non-suit was right. There was no evidence of any circumstances to free the plaintiff from his original contract, so as to enable him to give consideration for the fresh promise to him, or to authorise the captain to bind the owner by such a contract. Lord Campbell did not accept the submission of counsel for the plaintiff that when the master had at Melbourne consented to the discharge of some of the crew, he had thereby improperly increased the labours of the plaintiff and those who remained, and did their duty. This they had contended would form a consideration for the fresh promise. Said Lord Campbell at page 561 (1252) -

> " Had the plaintiff been relieved from the obligation which he had contracted towards the shipowners, he might have entered into a fresh contract, and under the circumstances the captain might have had authority to bind the owners by entering into a fresh agreement on their behalf with him. Had there been for instance an entire change of the voyage it might have been so. But here there were no circumstances of that kind. The voyage remained the same voyage for which the man had shipped. "

The learned judge also expressed his agreement with Lord Ellenborough's -

> " ... discarding the ground of public policy on which Lord Kenyon relied in Harris v. Watson, for I think it would be most mischievous to commerce if it were supposed that captains had power under such circumstances to bind their owners by a promise to pay more than was agreed for. "

I return to the report of Hartley v. Ponsonby (supra) decided in 1857, the judgments in which analyse that the factual framework was correctly outlined by the jury's verdict. Lord Campbell is reported at page 1373 to have said that since that finding was that it was dangerous to life for the ship to go to sea with so few hands -

> " It was not incumbent on the plaintiff to perform the work, and he was in the condition of a freeman. There was therefore a consideration for the contract, and the captain made it without coercion. This was therefore a voluntary agreement upon sufficient consideration. This decision will not conflict with any former decision. "

In the words of Coleridge J. -

> " I am of the same opinion and for the same reason I understand the finding of the jury to be that the ship was unseaworthy, and that, owing to the excessive labour which would be imposed, it was not reasonable to require the marines to go to sea if they were not bound to go, they were free to make a new contract; and the Master was justified in hiring them on the best terms. It maybe that the plaintiff took advantage of his position to make a hard bargain, but there was no duress. "

The view of Earle J. was consonant although he -

> "... was deeply impressed with the consequence of not holding the plaintiff to perform his original engagement."

Whether it was so dangerous for the seaman to continue the journey and its unreasonableness was a question for the jury.

In his concurring opinion Crompton J. accepted the jury's verdict that the arrangement between Master and Seaman was a free bargain. From the point of view of public policy he said:

> " ..... it would be very dangerous to lay down that under all the circumstances and at any risk to life seamen are bound to proceed on a voyage ... Where from a ship being short handed, it would be unsafe for the seaman to go to sea, they become free to make any new contract that they like. "

If I have appeared to dwell too long on the particulars of the aforementioned cases, I plead the necessity to observe upon them that the rule in Stilk v. Myrick is not an inflexible rule. That is to say, as is shown by the case of Hartley and Ponsonby and the dicta from the other cited cases. At this early stage, the rule was never applied where in the circumstances of the particular case it can be ascertained that although the original factual situation subsists yet there has been a change of emphasis because of an emergency. Furthermore, provided there is no coercion (overt or implied) by the one party of the other in this contingency, indicating that the one is taking advantage of the other, whereby the person allegedly disadvantaged has to concede, or accede to, the extravagant demands of the other, the rule was never applied. Especially if the parties, because of the contingency, are to all intents and purposes free to make the best contract they could. It is a question of fact.

A modern illustration of the strict application of the rule in Stilk v. Myrick is the case of Crooks Island Shipping Co. Ltd. v. Colson Builders Ltd. /1975/ 1 N.Z.L.R. 422. The rule was there applied in all its full force and effect. The defendant builders made a contract with the plaintiff for the shipment of material needed by the defendant to fulfil a contract. Freight was to be paid at a certain rate, but when the plaintiff company realised that loading would take longer than the twenty-four hours allowed for by it, it refused to hold back the ship to enable loading to be completed unless the defendant agreed to pay the extra $75.00 for every hour's delay. Because the materials were needed to start the building, the defendant agreed to the plaintiff's

demand. It was held that there was no consideration for the defendant's promise. To hold otherwise would deny a contracting party protection from extortion especially where performance is of special importance to him. Mahon, J. found that contrary to the evidence of the plaintiff there was no pre-existing agreement to pay an additional sum in addition to freight by way of compensation for the vessel staying a further day at the port of loading. It is noteworthy that the learned judge analysed the contract of affreightment as requiring the plaintiff to load at Portland a quantity of cement and an unspecified tonnage of other materials and plant. Freight for such cargo was assessable and payable at the schedule rates. Therefore, under the contract -

> " The extra cargo also produced further freight, and whatever may have been the expected time of performance of the plaintiff's obligation to load the cargo at Portland, the only consideration payable to it for loading cargo at Portland and its subsequent carriage was the payment of the scheduled freight by the defendant. When the plaintiff demanded payment over and above the scheduled freight for the loading and carriage of the cargo, it was thereby requiring from the defendant an affirmative contractual promise for which the consideration was the performance of the obligation which the plaintiff was already contractually bound to perform.
>
> "In my view, there was no consideration for the defendant's promise .... " (id. p. 434)

He turned attention to the -

> " The principle /as/ stated succinctly in Williston on Contracts (3rd ed.), Vol. 1, p. 532, where the learned author refers to the subsequent ancillary promise as the 'second agreement' and says: 'On principle, the second agreement is invalid for the performance by the recalcitrant contractor is no legal benefit to the promisee since he was already entitled to have the work done.' Also cited in Williston is Lingenfelder v. Wainwright Brewery Co. 18 SW 819 in which the following passage appears in the judgment of the Court:
>
> 'What we hold is that when a party merely does what he has already obligated himself to do, he cannot demand an additional compensation therefor, and although by taking advantage of the necessities of his adversary, he obtains a promise for more, the law will regard it as nudum pactum and will not lend its process to aid in the wrong (ibid 848).' "

This being the rationale of the rule, the contrary opinion of Denning, L.J., in Ward v. Bayham [1956] 3 All E.R. 318, is of interest. This was a case where the father of an illegitimate child gave an under-taking to the mother of the child to pay her for maintaining the child. It was a condition that the child should be well looked after and happy. This condition was fulfilled by the mother. In an action brought by her for £1 a week based on the father's undertaking, the argument centred around the point that there was no consideration for the promise by the father to pay £1 a week, because when she looked after the child, the mother was only doing that which she was legally bound to do, and that is no consideration in law. Although Denning, L.J., approached the case on the footing that in looking after the child the mother is only doing what she is legally bound to do, nevertheless, he said -

> " Even so, I think that there was sufficient consideration to support the promise. I have always thought a promise to perform an existing duty, or the performance of it, should be regarded as good consideration, because it is a benefit to the person to whom it is given. Take this very case. It is as much a benefit for the father to have the child looked after by the mother as by a neighbour. If he gets the benefit for which he stipulated he ought to honour his promise, and he ought not to avoid it by saying that the mother was herself under a duty to maintain the child. "

Mr. Muirhead pointed out that this expression of opinion is not a correct statement of the law. In fact, he said, the majority decision of Morris and Parker, L.JJ., as to the issue of consideration arising out of the letter from the father is preferable to the minority decision of Denning, L.J., when it is realised that that is based on the fact that the wife assumed her legal responsibilities after the child had been under the father's aegis for some time.

It is clear that Morris and Parker, L.JJ., found consideration to be in the condition which the father imposed and which went beyond the mother's duty. That view is amply summarised in the judgment of Morris, L.J., at p. 320 letters D - E :

> " It seems to me, therefore, that the father was saying, in effect: Irrespective of what may be the strict legal position, what I am asking you is that you shall prove that the child will be well looked after and be happy, and also that you must agree that the child is to be allowed to decide for herself whether or not she wishes to come and live with you. If those conditions were fulfilled the father was agreeable to pay. On these terms, which in fact became operative, the father agreed to pay £1 a week. In my judgment there was ample consideration there to be found for this promise, which I think was binding."

Here, Morris, L.J., had been considering the submission that there was a duty on the mother to support the child, that no affliation proceedings were in prospect or were contemplated, and that the effect of the arrangement that followed the letter, was that the father was merely agreeing to pay a bounty to the mother. I do not think that this is any different from the earlier view of Denning, L.J., at p. 319 at letter I:

> " I regard the father's promise in this case as what is sometimes called a unilateral contract, a promise in return for the mother's looking after the child. Once the mother embarked on the task of looking after the child, there was a binding contract. So long as she looked after the child, she would be entitled to £1 a week. "

The unanimous affirming of the decision of the County Court Judge by the Court of Appeal did not therefore in fact turn on the principle of the decision in Stilk v. Myrick, but on the substantial ground of the binding nature of the promise by the husband once the mother decided to carry out the stated conditions. Strikingly, Denning and Morris, L.JJ., in the long run, effectively side-stepped the principle, the mother being already legally bound. It was approached from the respective viewpoings that "even so" (per Denning, L.J.), and "Irrespective of what may be the strict legal position" (per Morris, L.J.), and by regarding the mechanism of the facts of the relationship as disclosed by the stated contract.

Denning, L.J., repeated his views in Williams v. Williams [1957] 1 All E.R. 305, where the matter in contention was an agree-

ment between a husband and his wife, who was in desertion, that she would maintain herself and indemnify the husband against debts incurred by her, and not to pledge his credit. The decision was that there was consideration for the husband's promise to pay her maintenance, since, although she was in desertion at the date of the agreement, yet she might offer to return and thus her right to maintenance was not forfeited but merely suspended by her desertion. Accordingly, the husband would have to honour his promise. At p. 307 letters A - C, Denning, L.J., said this:

> " Now, I agree that in promising to maintain herself whilst she was in desertion, the wife was only promising to do that which she was already bound to do. Nevertheless, a promise to perform an existing duty is, I think sufficient consideration to support a promise, so long as there is nothing in the transaction which is contrary to the public interest, "

He elaborated on this view in the following way:

> " Suppose that this agreement had never been made, and the wife had made no promise to maintian herself and did not do so, she might then have sought and received public assistance or have pledged her husband's credit with tradesmen, in which case the National Assistance Board might summoned him before the magistrates, or the tradesman might have sued him in the county court. It is true that he would have had an answer to these claims because she was in desertion but nevertheless he would be put to all the trouble, worry and expense of defending himself against them. By paying her 30s a week and taking the promise from her, that she will maintain herself and will not pledge his credit, he has an added safeguard to protect himself from all its worry, trouble and expense. That is a benefit to him which is good consideration for his promise to pay maintenance. That was the view which appealed to the county court judge, and I must say it appeals to me also. "

Neither Hodson, L.J., nor Morris, L.J., were disposed to found their concurring opinions that the husband's agreement to pay maintenance was enforceable and therefore he was liable to pay the arrears, on that reasoning by Denning, L.J. Instead, they agreed with the alternative ground propounded by Denning, L.J., that the desertion by the wife did not destroy her right to be maintained but only suspended it, considering that if she genuinely

offered to return, and the offer was rejected by her husband she could proceed against him for maintenance.

Relating both these cases to the question of consideration, it cannot be overlocked that the Court in each case did not deal frontally with the principle of Stilk v. Myrick but established their judgment on other grounds for consideration. Like in Hartley v. Ponsonby the judges found an act over and above the legal duty. As Mr. Henriques pointed out, what is significant is that in every situation, subsequent to Stilk v. Myrick, the courts have found a ground to avoid the consequences of Stilk v. Myrick. And this is especially so in commercial transactions. This was the course adopted by Mccatta J. in North Ocean Shipping Co. Ltd. v. Hyundai Construction Co. Ltd. and Another the Atlantic Baron /1978/ 3 All E.R. 1170. The case was concerned with a contract to build a ship. Builders Contracted to open a letter of credit as security for repayment of instalments of price if they failed to perform the contract. The currency - the United States dollar-of the contract was devalued after the payment of the first of five instalments of the price for building the ship. The builders thereupon claimed an increased price to cover the devaluation. The owners agreed to pay the increased price, the builders assuring the owners upon request that they would increase the letter of credit to correspond with the increased price. The owners paid the remaining four instalments plus the additional ten percent on each instalment without protest. They also accepted delivery of the ship without protest, although at one stage of the negotiations over the increased price they did not intend to affirm the agreement to pay the increased price. There was no evidence that if the owners had protested and withheld the final instalment, the builders would not have delivered the ship. In a claim by the owners to recover the excess over the original purchase price, the question raised was whether the promise by the builders to fulfil the existing contractual duty to build the ship was good consideration. Additionally, whether their promise to increase the letter of credit was good consideration or was merely

the fulfilment of an existing contractual duty.

Mocatta, J., according to the first head note, held that although the rule that a promise by one party to a contract to fulfil its existing contractual duty towards the other party did not constitute good consideration was still good law, so that the builders' original contractual duty to build the ship did not constitute good consideration for the agreement to pay the price increased by ten percent, the increase by the builders in the amount of their letter of credit was sufficient consideration on their part for the agreement since by agreeing to increase the letter of credit they had undertaken an additional obligation, or had rendered themselves liable to an increased detriment and were not mere fulfilling their contractual duty.

It should be noted that his discussion of what he compendiously called "the return letter of credit" led him, not without some doubt, to conclude that there was consideration for the new agreement. Immediately before this, he had stated:

> " I remain unconvinced, however, that by merely securing an increase in the instalments to be paid for ten percent the yard automatically became obliged to increase the return letter of credit pro tanto, and were therefore doing no more than undertaking in this respect to fulfil their existing contractual duty. I think that here they were undertaking an additional obligation or rendering themselves liable to a detriment. " (pp. 1176 letter J - 1177 letter C)

Since the conclusion of the arguments in this case, the judgment of the Judicial Committee of the Privy Council in Pao On and Others v. Lau Yun and Others [1979] 3 All E.R. 65 P.C. has come to hand. The plaintiffs had purchased shares in a company of which the defendants were majority shareholders. It was a condition of the written agreements relating thereto, that the plaintiffs promised not to sell the shares for a year. This restriction on the sale was to be compensated for by the defendants guaranteeing the price of the shares. But the plaintiffs realised that by giving the undertaking to postpone the sale of the shares they exposed

themselves to the risk that the price of shares might fall below the guaranteed price during the period of postponement. Therefore, by a subsidiary agreement, the defendants promised to indemnify the plaintiffs against the fall of the price of shares during the year the sale was restricted. The questions raised on the evidence were whether the antecedent promise not to sell the shares was sufficient consideration for the subsequent promise of indemnity, and whether the consideration for the subsequent promise of indemnity was invalidated on the ground of public policy if the promise of indemnity was secured by a threat to repudiate the existing contract or by abuse of a dominant bargaining power. True, it is that this case was concerned with the promise to perform or the performance of a pre-existing contractual obligation to a third party, which it reiterated can be valid consideration: see New Zealand Shipping Co. Ltd. v. A. M. Satterthwaite & Co. Ltd. /1974/ 1 All E.R. 1015. Lord Scarman in delivering the judgment of the board noted that:

> " Counsel for the defendants submits that the consideration is illegal as being against public policy. He submits that to secure a party's promise by a threat of repudiation of a pre-existing contractual obligation owed to another, can be, and in the circumstances of this case was, an abuse of the dominant bargaining position and so contrary to public policy. This, he submits, is so even though economic duress cannot be proved. "
> (p. 76 at letter C)

Although this submission had found favour with the majority of the Court of Appeal of Hongkong, their Lordships thought this was misconceived. There followed adiscussion of "the old seaman", cases of Harris v. Watson and Stilk v. Myrick upon which reliance had been placed. It is not inappropriate to comment that this reliance was an endeavour to apply these cases to a situation of a duty imposed by contract with a third party. The comments of Lord Scarman are as follows at p. 76 letter E to page 77 letter S:

> " In the seaman cases there were only two parties, the seaman and the captain (representing the owner). In Harris v. Watson the captain during the voyage, for which the plaintiff had contracted to serve as a seaman,

" promised him five guineas over and above his common wages if he would perform some extra work. Lord Kenyon thought that if the seaman's claim to be paid the five guineas was supported 'it would materially affect the navigation of the Kingdom.' He feared the prospect of seamen in times of danger insisting 'on an extra charge on such a promise,' and nonsuited the plaintiff. In Stilk v. Myrick, Lord Ellenborough also nonsuited the seaman. According to the report in Campbell (2 Camp 317) he said:

> 'I think Harris v. Watson was rightly decided but I doubt whether the ground of public policy, upon which Lord Kenyon is stated to have proceeded, be the true principle on which the decision is to be supported. Here I say the agreement is void for want of consideration.'

Espinasse, who appeared as junior counsel for the unsuccessful plaintiff in the case, reports the case somewhat differently. He reports (1809) 6 Esp. 129 at p. 130) Lord Ellenborough as saying that '... he recognised the principle of the case of Harris v. Watson as founded on just and proper policy.' But the report continues: 'When the defendant /sic - but surely the plaintiff is meant?/ entered on board the ship, he stipulated to do all the work his situation called upon him to do.' These cases, explicable as they are on the basis of absence of fresh consideration for the captain's promise are an unsure foundation for a rule of public policy invalidating contracts where, save for the rule, there would be valid consideration. "

The judgment of the board goes on to consider cases "where a pre-existing duty imposed by law is alleged to be valid consideration for a promise:

" One finds cases in which public policy has been held to invalidate the consideration . A promise to pay a sheriff in consideration of his performing his legal duty, a promise to pay for discharge from illegal arrest, are to be found in the books as promises which the law will not enforce. Yet such cases are also explicable on the ground that a person who promises to perform, or performs a duty imposed by law provides no consideration. In cases where the discharge of a duty imposed by law has been treated as valuable consideration, the courts have usually (but not invariably) found an act over and above, but consistent with, the duty imposed by law: see Williams v. Williams /1957/ 1 All E.R. 305, /1957/1 W.L.R. 148. It must be conceded that different judges have adopted differing approaches to such cases: contrast for example, Denning, L.J. with the view of the majority in Williams v. Williams. "

The judgment discusses a situation "where the pre-existing obligation is a contractual duty owed to a third party" where "some other ground of public policy must be relied on to invalidate the consideration (if otherwise legal). The defendants had submitted that the ground can be extortion by the abuse of a dominant position to threaten the repudiation of a contractual obligation. Interestingly, the judgment adverts to this application of public policy which has been developed in the American cases:

> " Beginning with the general rule that neither the performance of a duty nor the promise to render a performance already required by duty is a sufficient consideration the courts have (according to Corbin on Contracts (1963) Vol. IX Ch. 7, 5171) advanced to the view that 'the moral and economic elements in any case that involves the rule should be weighed by the court, and that the fact of preexisting legal duty should not be itself decisive.' "

As regards the relevance of public policy where the question is "whether, in a case where duress is not established, public policy may nevertheless invalidate the consideration if there has been a threat to repudiate a preexisting contractual obligation or an unfair use of a dominating bargaining position;" the Board uttered the significant remarks that -

> " Where businessmen are negotiating at arm's length it is unnecessary for the achievement of justice, and unhelpful in the development of the law, to invoke such a rule of public policy. It would also create anomaly. It is unnecessary because justice requires that men who have negotiated at arm's length be held to their bargains unless it can be shown that the consent was vitiated by fraud, mistake or duress. If a promise is induced by coercion of a man's will, the doctrine of duress suffices to do justice. The party coerced, if he chooses and acts in time, can avoid the contract. If there is no coercion, there can be no reason for avoiding the contract where there is shown to be a real consideration which is otherwise legal. " (pp 77 letter g - 78 letter a)

But note that these remarks were made in a case which had to consider what constitutes duress in a commercial contract - "commercial pressure is not enough there must be present some factor which could in law be regarded as a coercion of his will so as to

vitiate his consent." (p. 78 at letter f and p. 79 letters d - e) "It must be shown that the payment made or the contract entered into was not a voluntary act." Note also that North Ocean Shipping Co. Ltd. v. Hyundai Construction Co. Ltd. was itself a case of duress. Nevertheless, the court found a ground on which to evade the rule of no consideration where there is a promise to perform or there has been the performance of a pre-existing contractual duty.

In the instant case, there was no duress. Indeed, the August Agreement and the Imus Assurance were the outcome of negotiations between the Chrysler Group, one of the foremost dynamic automobile organisations in the world and which ranks as the fifth largest industrial concern in the world (see circular dated 22nd July, 1968), and H. E. Robinson and Co. Ltd - a franchise holder from that giant organisation which at all times was fighting to maintain its commercial viability by endeavouring to retain the franchise, the lifeblood of Robinson's. The circumstances in this case are not even slightly similar to those of Stilk v. Myrick when it can be said firstly, there must have been the need to protect the essentials of the original contract seeing that it was absolutely necessary that the ship should sail without risk or danger, which would delay or abort the journey. That decision was to obviate improper pressure being brought to bear on the Master. At p. 67 of Treitel on Contract (4th ed.) the learned author rounds off his discussion under the rubric "Duty imposed by contract with promisor" as follows:

> " The rule that performance of an existing duty is no consideration sometimes serves the useful purpose of protecting one contracting party from extortion by the other. But in other cases the demand for extra pay may be perfectly reasonable, e.g., if a contractor who has agreed to do excavating work unexpectedly strikes hard rock. The fact that some promises of this kind may be obtained by extortion is no ground for invalidating them all. It would be better if the validity of these promises depended not on the doctrine of consideration, but on the question whether the promisee had taken on considerable advantage of the promisor. " (see also Halsbury's Laws of England, Vol. 9 (4th ed.) at p. 201, para. 328)

To the earlier quoted words of Lord Scarman of how the

courts should approach the negotiations and contracts of businessmen. I would add this quotation from the judgment of Lord Wilberforce in Reardon Smith Line v. Hansen Jangen Ltd. [1976] 3 All E.R. 570, H.L. at page 574 letters c - f:

> " No contracts are made in a vacuum, there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as the surrounding circumstances but this phrase is imprecise, it can be illustrated but hardly defined. In a commercial contract, it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating. "

Again, at p. 575 letters c - f he opined:

> " What the court must do must be to place itself in thought in the same factual matrix as that in which the parties were ..... [and] recognise that in the search for the relevant background, there may be facts, which form part of the circumstances in which one or both may take no particular interest, their minds being addressed to or concentrated on other facts so that if asked they would assert that they did not have these facts in the forefront of their mind, but that will not prevent those facts from forming part of an objective setting in which the contract is to be construed. "

In giving effect to the intention of the parties in this case, and looking at the substance and not the form, I repeat that -

> " This is particularly the case where there is evidence that the parties have acted on the faith that certain agreed terms constitute a contract between them. " (Halsbury's Law of England (4th ed.) Vol. 9, p. 151, para. 269.)

On the moot point in this case, it may be helpful to dissect the factual matrix to discover whether there is any consideration for the Imus Assurance. According to Mr. Henriques, when "consideration" is looked at it is not that the parties were operating under the August Agreement, because an unforeseen situation had occurred for which the August Agreement contained no provision which could accommodate the respective commercial objectives of the parties thereto. Mr. Imus did not want to exercise his rights under the August Agreement, because it would not be advantageous to him, similarly, the plaintiff. So that a new agreement had to be arrived at to

accommodate both parties. This new agreement he analysed, conferred the following advantages on the defendant Chrysler:

The defendant company continued to sell parts and the plaintiff continued ordering parts, as if they were not in danger of losing the franchise. There was no disruption of business despite the state of uncertainty as to the fate of the franchise distributorship. This maintenance of the distributorship for Rootes products in Jamaica, was during the period when the defendant was making up its mind in respect of the Jamaican market, and consequently, it provided time for the defendant to negotiate the best possible terms for itself with respect to the Rootes franchise in Jamaica with the new distributor. In this regard, the undertaking by the plaintiff to continue ordering spare parts, and in fact, so ordering, provided time for the defendant to decide which of the two rival claimants should be heard.

On the other hand, the following considerations bear on the question whether the plaintiff suffered a detriment: Continuing to purchase parts and to incur expense which must result in a financial loss if the franchise was terminated. This meant continuing to maintain a level of stock which could not have been disposed of within the 60 days notice period of the August Agreement. This level of stock was maintained at six or seven months supply over and above the four months supply which the defendant belatedly stated in the Further and Better Particulars, was adequate for the Jamaica market. The plaintiff furthermore continued to maintain and promote the Rootes' products in Jamaica by spending time, effort and expense thereon at a time when there was uncertainty as to the future of the franchise and that they could stand to lose both financially and that their time and effort would have brought no benefit to them ultimately. Another detriment to the plaintiff was its continuing an undertaking to run the risk of sustaining severe financial loss, rather than taking the reasonable commercial decision of either reducing the stocks to 60 days supply, or closing down.

For his part, Mr. Muirhead argued that on the issue of consideration, it is important to bear in mind that the plaintiff had to discharge its overall obligations under the August Agreement to develop the territory of Jamaica. In pursuance thereof, the plaintiff was at all times obliged to carry stocks of service parts, so that the vehicles sold could be efficiently and properly serviced. He stressed that both at the time of the Imus Assurance and at the date of termination Robinson's maintained their stock of parts at their normal level of seven months' supply. Being thus already contractually bound, and Mr. Arthur's evidence disclosing that he had continued to order parts in the normal fashion, he was doing no more than what it was contractually obliged to do. Whether the plaintiff had five months or six months supply of stock, according to Mr. Muirhead, the evidence is that it was carrying an adequate stock of spare parts. He argued that in order for the plaintiff to succeed on the ground that it did over and above what it was contractually bound to do, the plaintiff must give consideration at the time when the agreement is being entered into. He conceded that the first time there was any definition of adequate stock of service parts was in the Further and Better Particulars of the Defence, when four months' supply was so stated. But peculiarly, Mr. Muirhead argued from this that when the evidence disclosed that it took four months for a stock order to be filled, this would seem to indicate that four months stock was inadequate because of the difficulty in replacing it under four months. A more important fact, according to this agreement, is that no other period apart from that of six or seven months operated on the mind of Mr. Arthur at the time of the assurance. I interpolate here the evidence given by Mr. Arthur under cross-examination:

> " I do not agree that four months' supply represents an adequate stock of service parts. I consider an adequate supply of service parts in Jamaica to be appropriately seven months. Under the distributorship, I did consider that seven months' supply of parts was adequate. That opinion was formed from intimate knowledge of business. That

> " was the level of service parts stock I found in 1968, and that was the level of stock I maintained until I left in July 1969 .... I would disagree with Chrysler's view that four months supply of parts is adequate. "

It is from this that it was further argued that since four months' supply never operated on the mind of Robinson's as likely to be adequate it cannot affect the issue of consideration, since they never considered nor were they ever advised that less than six to seven months' stock would or would have been considered adequate. Undoubtedly, is this so, because Robinson's cannot be considered to have assumed increased detriment or additional obligation, over and above what they considered adequate under the provisions of the August Agreement. The significance of this becomes clear upon consideration of Clause 26 of the August Agreement. Contrary to those provisions the defendant never communicated to the plaintiff what the defendant thought was an adequate stock of spare parts. This lack does not vitiate his argument, said Mr. Muirhead, because by maintaining the level of stocks which it set for itself, the plaintiff was not doing anything more in consideration of the Imus Assurance. The upshot of this argument is to conclude that no detriment has been suffered by Robinson's and so no consideration moves from the promises.

Admittedly, the analysis on each side has much to recommend it, but after much thought I am of the decided opinion that Mr. Henriques' examination of the factual matrix is well-grounded, and this, in view of the previous comments and the conclusions to which I have arrived not only on the facts but also on the law. So that I find that there was consideration for the Imus Assurance and that the defendant is therefore liable to the plaintiff for failing to purchase the spare parts which remained at the time of the termination of the contract.

By the Imus Assurance the parts to be purchased by the defendant are current parts which by definition are related to the Master Price List, the latest available issue of which was the 1971 Master Price List. It was commonly agreed that a part could remain current for a number of years. I have hitherto set out the evidence

on this point and it only now remains for me to state that I accept without qualification the evidence of Mr. Tomlinson, and that of Mr. Wayne Richardson that the parts which they discovered in the 1971 Master Price List would have been listed in the Master Price List for 1969. This, of course, is subject to the knowledge that there was no supersession list accompanying the available 1971 Master Price List, which would not have carried any items which had been superseded. As I understand it from Mr. Tomlinson, the supersession list is an integral part of the Master Price List, and would state an identical part as before, but with a new number. Speaking categorically, and from his wide experience, Mr. Tomlinson said:

> " .... without looking at the Master Price List for 1969, I can say that the parts in 1971 Master Price List appeared in 1969 Master Price List. I can commit myself thus on the ground that parts are current. I believe that any number on Exhibit 5 appears in the Master Price List. "

Exhibit 5 was the packing note listing the Rootes parts which were in stock in October, 1969, at the time of the termination of the distributorship. As he explained, the procedure of the exercise to discover this, Mr. Tomlinson and his staff took the list at random on a case basis, checked item by item against the 1971 Master Price List and thereupon discovered that 91% of the items checked still appeared in the 1971 Master Price List. The remaining 9% which was not traced would appear on the Supersession List. In more concrete terms, out of a total of 104 cases of parts, a sampling of 12 cases of varying quantities of line items per case was made; and after referring to the 1971 Master Price List to determine whether or not those line items listed from the section appeared on that Master Price List, the analysis showed that of a total of 1,464 line items from the 12 cases, 1,332 line items appeared on the 1971 Master Price List. So that, the course of checking disclosed that the 91% referred to above was representative of 9,777 Rootes parts which were included in the

1969 Master Price List.

All this is amply supported by the evidence of Mr. Arthur when he testified "of the stock which Robinson's had when distributorship terminated 90% of it was still current in 1971." In fact, he testified, at the material times, there was no obsolete stock in 1969, and in my view considering that the distributorship had been granted in 1966, there would not have been any likihood of redundant stock in 1969.

Instructively, in the letter signed by Norman L. Gray for Chrysler International S.A. and dated September 24, 1969, the defendant made an offer to "repurchase or cause to be repurchased all new Rootes motor vehicle parts and accessories in good and saleable condition, presently in your inventory and/or shipped to you by Rootes Motors Limited on or before 24 October 1969, subject to the following conditions: only those Rootes parts and accessories as abovementioned which have shown movement during the 12-month period from 1 August 1968 to 31 July 1969 and which represent the normal 6-month demand in Jamaica will be repurchased, the undersigned company having the right to inspect your inventory control and other records we deem necessary to verify said movement and demand." Apart from the fact that this is decidely contrary to the unqualified terms of the Imus Assurance, this new offer defines "a new part or accessory" as a part or accessory listed in the current Rootes Motors Limited Master Price List. I do not need to recount in any greater detail the evidence regarding the description of the stock as at the date of termination. Suffice it to say that I am satisfied that in all the circumstances as placed before me and about which I have given earnest consideration, I am satisfied that the procedure of checking as explained by Mr. Tomlinson and Mr. Richardson, was practical and reasonable. It was efficacious despite the submission by Mrs. Hudson-Phillips that on the basis of the evidence the plaintiff had not proved that the parts for which it claimed payment are the parts to which the Imus Assurance referred. I agree with

her that it is incumbent on the plaintiff to prove that the parts in respect of which it claimed are current parts within the accepted meaning of the phrase in the trade. The accepted meaning of the trade was given both by the witnesses for the plaintiff and the sole witness for the defence.

These bits of evidence inform that the concurrence of opinion is not remarkable, seeing that it is by persons who have been long engaged in the automotive trade. There is nothing in the evidence for the defendant apart from the letter of 24th September, 1969, from which I could say that the plaintiff and the defendant through their representatives were ever at loggerheads over the meaning of the term "current parts." The letter underlined the ambit of the term but sought to circumscribe it by the conditions proposed.

In fine, I reject the argument that the plaintiff has not proven the parts to be current parts. I do not accept that Mr. Tomlinson and Mr. Richardson and Mr. Arthur sought to mislead me in their evidence on the relevance of the Master Price List. While I found Mr. Imus a forthright witness in his approach to this case - his restatement of the binding nature of his assurance is in point - I was nevertheless not helped by any evidence or argument for the defendant by which I could be persuaded not to find as a fact that Mr. Tomlinson and Mr. Richardson engaged themselves and their staff in the checking and analysis which I earlier recounted. There being no evidence to counter the results of that exercise, I am led on the balance of probabilities to accept their evidence, and find as a fact that the goods, the subject matter of the Imus Assurance, were properly identified at the time of termination and fell within the acceptation of the term "current part."

It was the logical and natural outcome of the arguments for the defendant that there was no breach considering, inter alia, that the goods - "current parts" - were never offered to the defendants

the agents of the defendant - Mr. Adamson and Mr. Hartman - at various times after the service of the notice of termination made statements of settled intention as regards the sorting, transfer and storing of the parts, it is incomprehensible to me that it can be argued that the parts were not offered to them so that there was no refusal which would make the defendant liable. Certainly, they knew that there were parts ready for delivery to them. That much is clear from the evidence regarding their conduct, which I interpret in all the circumstances as a clear acceptance of the ascertainment and availability of the parts in question.

Hereupon, I conclude that this contract for the sale of unascertained goods has to be dealt with according to the dictates of s. 18 (5) (1) of the Sale of Goods Act. That section says -

> " Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made. "

There have been several judicial opinions as to how to determine whether there has been such an appropriation as would be in the contemplation of the parties and so be in compliance with the statutory formulation. I need only refer to two, the first of which is by Lord Loreburn L.C. in Badische Anikin Soda Fabric v. Hickson [1906] A.C. 419 at p. 421:

> " A contract to sell unascertained goods is not a complete sale, but a promise to sell. There must be added to it some act such as delivery or the appropriation of specific goods to the contract by the assent express or implied of both buyer and seller. Such appropriation will convert the executory agreement into a complete sale.
>
> " What actually happens need not involve any change either in the condition of the goods or in their location. They were the property of the seller before the appropriation; they become the property of the buyer as soon as they are appropriated and that is all. "

Again in Carlos Federspiel & Co. S.A. v. Charles Twigg & Co. Ltd. [1957] 1 Lloyd's Reports 240, at pp. 255 - 256. Pearson J. after a careful review of the relevant authorities discovered the following

principles:

" First, Rule 5 of sect 18 is one of the rules for ascertaining the intention of the parties as to the time at which the property is to pass to the buyer unless a different intention appears. Therefore, the element of common intention has always to be borne in mind. A mere setting apart or selection of the seller of the goods which he expects to use in performance of the contract is not enough. If that is all he can change his mind and use those goods in performance of some other contract and use some other goods in performance of the contract. To constitute an appropriation of the goods to the contract the parties must have had, an intention to attach the contract irrevocably to those goods, so that those goods and no others are the subject of the sale and become the property of the buyer.

Secondly, it is by the agreement of the parties that the appropriation, involving a change of ownership, is made although in some cases the buyer's assent to an appropriation by the seller is conferred in advance by the contract itself or otherwise.

Thirdly, an appropriation by the seller with the assent of the buyer may be said always to involve an actual or constructive delivery. If the seller retains possession, he does so as bailee for the buyer. There is a passage in Chalmers' Sale of Goods Act, 12th ed at p. 75 where it is said:

> 'In the second place, if the decisions be carefully examined it will be found that in every case where the property has been held to pass there has been an actual or constructive delivery of the goods to the buyer.'

"I think that is right, subject only to this possible qualification, that there may be after such constructive delivery an actual delivery still to be made by the seller under the contract. Of course, that is quite possible, because delivery is the transfer of possession, whereas appropriation transfers ownership. So there may be first an appropriation, constructive delivery, whereby the seller becomes bailee for the buyer, and then a subsequent actual delivery involving actual possession, and when I say that I have in mind in particular the two cases cited, namely, Aldridge v. Johnson (1857) 7 E & B 885, and Langton v. Higgins (1859) 4 H & N 402.

Fourthly, one has to remember Sect 20 of the Sale of Goods Act whereby the ownership and the risk are normally associated. Therefore, as it appears that there is reason for thinking, on the construction of the relevant documents, that the goods were, at all material times, at the seller's risk, that is prima facie an indication that the property had not passed to the buyer.

Fifthly, usually but not necessarily, the appropriating act is the last act to be performed by the seller. For instance, if delivery is to be taken by the buyer at the seller's premises and the seller has completed his part of the contract and has appropriated the goods when he has made the goods ready and has identified them and placed them in a position to be taken by the buyer and

> " has so informed the buyer, and if the buyer agrees to come and take them that is the assent to the appropriation. But if there is a further act an important and decisive act to be done by the seller, then there is prima facie evidence that probably the property does not pass until the final act is done.

On this score I extract the following passage which appears in Benjamin's Sale of Goods (1974) para 362, page 176:

> " Although the goods have been selected and identified by the seller, such acts as packing the goods labelling them with the buyer's name informing the buyer that they are ready for delivery, and even sending him an invoice describing the particular goods selected may not, unless expressly so agreed, deterimine irrevocably the election of the seller so as to pass the property by appropriation if the buyer has not subsequently assented thereto. "

I have to apply these principles to the particular facts of the instant case. I reiterate that the plaintiff had performed its obligations and was ready and willing to transfer the property in the goods - current parts - to the defendant. I hold that having done all the things which the evidence shows were done by Mr. Tomlinson and Mr. Richardson on behalf of the plaintiff in pursuance of the contract, and having received from the agents of the defendant several enquiries for a suitable place for storage of the parts, together with the promise that the defendant would take them if Motor Sales and Service did not, the plaintiff had appropriated these goods to the contract with the assent of the defendant. It is my further finding that the defendant neglected or refused to take delivery of those goods.

Consequently, I must consider what damages are payable to the plaintiff for the breach of the contract in this case. First of all, I must turn to assess the value of the goods. Mr. Henriques submitted that I should award a reasonable sum as the price of those goods. He argued that seeing that the Imus Assurance was a separate contract from the August Agreement, I should not be guided as to price by the formula of "nett landed cost" in that agreement. Rather, I should be guided by the terms of s. 9 (2) of the Sale of Goods Act which provides that where the price is not stipulated in

the contract nor left to be determined in an agreed manner or by the course of dealing between the parties, the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

On the other hand, the argument for the defendant as propounded by Mrs. Hudson-Phillips, was that consonant with the submission that the Imus Assurance became an express term and integral part of the August Agreement which was varied only to that extent, the proper standard of assessment is at "nett landed cost to the Distributor." The goods should be repurchased at that cost. I note in passing that the August Agreement does not define the term "nett landed cost," nor did Mr. Imus in his evidence imform me what was the defendant's understanding of the term. At the same time I will bear in mind the assertion of Mr. Arthur that at the time of the Imus Assurance the price which Robinson's expected to be paid was at nett landed cost plus a factor covering overhead costs. This expectation was made in the light of his declaration that Mr. Imus had agreed that Robinson's would suffer no loss.

In so far as the business of the plaintiff was concerned, I have to take into account the fact that whatever parts the plaintiff obtained were through the services of the confirming house of Wilson and Gaviller. The confirming house obtains the parts for the plaintiff and the suppliers - Rootes - look to them for payment. Mr. Arthur explained that the Rootes' invoices would first have been passed to Wilson and Gaviller. The invoices would bear the net f.o.b. value. Wilson and Gaviller then accept the charges and include them in their invoice to Robinson's. Also added are the port rates and wharfage commission of 2½%, cost insurance and freight charges. This then constitutes the c.i.f. figure which appears on the invoice sent by Rootes to Robinson's. In his evidence and by his understanding, Mr. Arthur defined "nett landed cost to the Distributor" as the F.o.b. costs, the cost of insurance, carriage freight and duty, wharfage and tax to which should be added a commission of 5% payable to the

confirming house for their part in the operation of exporting the parts from England to Jamaica. The commission paid to Wilson and Gaviller is a financial charge to Robinson's for the work they do in undertaking the purchase of the goods and for freight insurance and to arrange ultimate payment. He made it quite clear that this is not a cost of purchasing the parts but is an additional charge which Robinson's has chosen to undertake. Even so he considered this charge to be included in the term "nett landed cost" within the terms of Clause 32(C) of the August Agreement. Indeed, he added two other pieces of information, firstly, that at the time of the franchise Robinson's was making payment under E.C.G.D. cover (180 days financing) for which Wilson and Gaviller were responsible to Robinson's. Secondly, if Robinson's bought for cash they would still include those charges, even the commission of 2½%, as the administrative charges in the U.K. have to be paid.

As regards the actual commercial situation in Jamaica: it is permitted to a dealer to make a charge of 2½% on the landed cost which is to offset the cost of movement from the docks to the distributor's premises. Additionally, Jamaica law allows the distributor to add a markup of 100% on the parts which takes into account the factor of obsolescence. Mr. Tomlinson knew this to be so ever since he has been in the motor trade. Incidentally, he said that it is the practice that when taking over a distributorship or when giving up a distributorship, the motor vehicle parts are always bought or sold at landed cost. This was what he paid when he bought the parts from Sprostons. This was the value by which Exhibits 3 and 5 were prepared.

Other terms governing the dealing in parts were queried. For instance, "controlled retail price," the actual sale price including the markup of 100%; "Dealer net price" first mentioned in the latter date September 24, 1969, from the defendant to the plaintiff and therein defined as "the price appearing on the supplier invoices applicable to your purchase of the above vehicles

and parts." The defendant said then that the parts would be repurchased at "dealer net price" plus applicable ocean freight and insurance charges and applicable duties and dock-clearance." This American term Mr. Arthur would equate with the Nett landed cost, only if it is assumed that the words "dock clearance charges refer to dock duty charges at the London end and the Jamaica end, also Wharfage charges at London and Jamaica."

It is not necessary for me to spend time at all in analysis of these terms and others mentioned in the letter dated 7th October, 1969, being the reply by Mr. R. E. Clarke on behalf of the plaintiff to the defendants letter of 24th September, 1969. Suffice it that I have the acknowledgment of Mr. Imus that the distributor would incur out of pocket expenses. The possibility of loss to the plaintiff if there had been no Imus Assurance, and the plaintiff continued to order parts, was appreciated by Mr. Imus. However, as I have said before, his assurance was intended to cover the portion of those costs that were included in the nett landed cost, consequently, the part of the nett landed cost not included would be a loss to the plaintiff. Singularly, the letter of the 8th May, 1969, contained no such qualification or reservation and Mr. Imus' evidence did not inform me of what in his view is to be included in nett landed cost. It was his evidence, nevertheless, that the protection he was giving Robinson's for ordering new vehicles and parts was that they would get back from Chrysler the amount of money they had paid for ordering new vehicles and current parts.

Although I have found that Mr. Imus did not specifically state that the plaintiff would suffer no loss, nevertheless, in all the circumstances of the Imus Assurance I am satisfied that the measure of damages flowing from the neglect or refusal of the defendants to take the goods which had been appropriated to the contract, is such as would cause the plaintiff to be compensated, not only for the cost of the goods being imported into Jamaica, but also for loss of the income from the sale of those parts in the ordinary

course of business. Robinson's dealership in Rootes manufactured goods was progressing profitably. The nett landed cost of the goods at the time of termination was put at $86,812.22. To this must be added the factor of overhead costs, which Mr. Arthur expected would have been added to the nett landed cost of the goods at termination and according to the terms of the Imus Assurance. In my view this would give a reasonable price for the goods as they stood at termination.

This factor on the calculation by Mr. Arthur was 40%. He did not give details of how he arrived at this percentage which is at variance with the 50% markup that Mr. Clarke intimated to me was proper in the circumstances. On this aspect of the case Mr. Clarke stated that he did not do any markup on parts in 1968 or 1969. However, as a rough rule of thumb he thought it safe to assume that if the retail markup in an operation, which was more trade than retail sales, is halved, the breakdown point is reached for ascertaining profit and loss. Applying this general principle to Robinson's case he averred that the markup to break even proved to be over 60%. This figure he stated had been improved during the two years previous to his giving evidence. So that if one took the markup of 100%, allowed for a discount of 25% to certain trade customers, which discount was often the retail price - the price received from a trader entitled to such would be the equivalent of a 50% markup. I must say that on this point I will be guided by the percentage given by Mr. Arthur, he having been actually engaged in the day to day business of the plaintiff in Jamaica. So that a reasonable figure to add to the value of the parts $86,812.22 would be $34,724.88. This means that I find that a reasonable value to put on the aforesaid goods is $121,537.10.

Turning to the other items of special damages, I am particularly mindful of the arguments which Mrs. Hudson-Phillips pressed upon me regarding the proper approach to the assessment. Before dealing in detail with those arguments it is convenient at this stage to recall that the plaintiff did not proceed with the

indeterminate and amorphous claim for"General Supervision and Miscellaneous." I record also the mutual agreement that two claims upon the insurance company for goods which were stolen should be deducted from whatever damages might be awarded. Those sums are (a) $925.00, the claim for which was settled; (b) $10,814.52, which was still outstanding at the time of trial but in respect of which the assessors have recommended that the insurers pay a lesser sum. The total of this deduction is $11,739.52.

It was agreed that, saving the question of liability the following amounts were expended by the plaintiff:

(i)	Insurance premiums	$14,293.27
(ii)	Packing and Labour	$ 3,200.00
(iii)	101 Crates at $20 per crate ..	$ 2,020.00
(iv)	Forklift and Lorry hire ...	$ 2,000.00
(v)	Storage	$ 6,480.00

It was argued that the defendant should not be called upon to reimburse the plaintiff for these expenditure since once it is found that the property in the goods passed to the defendant the risk fell on them, and therefore there was no necessity for the plaintiff to spend those amounts; so all those expenditures should be borne by the plaintiff.

To maintain this argument is to ignore the terms of s. 37 of the Sale of Goods Act which emphasises a right of the seller who is ready and willing to deliver the goods. The words of the section are:

> " When the seller is ready and willing to deliver the goods and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge to take care and custody of the goods. "

To explain the effect of this section, I can do no better than to quote the following succinct commentary from Schmittoff:

"The Sale of Goods" (2nd. ed.) at pages 189 - 190:

> "Section 37 [of the Sale of Goods Act 1893] applies where the property in the goods has passed to the buyer (ss 17 - 19), but he fails to take delivery i.e. possession of them (s 62). In these cases the seller's principal remedy is an action for the price (s 49); section 37 allows him two additional claims, viz
>
> (1) in damages for any loss occasioned by the buyer's failure to take delivery of his property; and
>
> (2) for reasonable charges for the care and custody of the buyer's property. "

He contrasts that situation with that in which the property has not been transferred to the buyer, in which event the seller's principal remedy is an action for damages for non-acceptance, s.50; loss occasioned by the buyer's failure to take possession of the goods may be included into the calculation of damagds. The same applies where the seller sues for damages for nonacceptance as an alternative for the price (see also Benjamin's Sale of Goods - 1974 para. 1243, p. 607).

I should point out the sections of the Jamaica Sale of Goods Act which correspond to sections 49 and 50 of the Sale of Goods Act 1893. They are respectively, s. 48 and 49. Under s. 49 the measure of damages for nonacceptance is the estimated loss directly and naturally resulting in the ordinary course of events from the buyer's breach of contract. The agreed amounts are recoverable.

When I gave oral judgment in May 1980, it was on the basis of these agreed figures. I did not then and I do not now have any definitive figures of expenditures up to the date of judgment. Maybe the parties will consider this aspect of the matter and let me know in due course what figures are finally agreed.

It will be recalled that in Carlos Federspiel & Co. S.A. v. Charles Twigg & Co. Ltd. Pearson J. described the seller in possession as a bailee for the buyer. Benjamin's Sale of Goods 1974 in a discussion of the second proviso to s. 20 of the Sale of Goods Act 1893 (s. 21, Sales of Goods Act (Jamaica)), expresses the gollowing opinion in paragraph 417, page 197:

> "If the property has passed to the buyer under the contract of sale, but the seller remains in possession of the goods, it appears that he does so as bailee for reward, until the time for delivery has arrived. Not withstanding that the goods are at the buyer's risk, the seller must take reasonable care of the goods according to the circumstances of the particular case. "

That learned work further says at para. 418 p. 198 -

> " After the time for delivery has arrived, the duties of the seller as bailee of the goods is uncertain. Where the delay in delivery is due to the fault of the buyer the seller might be held to be either an involuntary or gratuitous bailee. If he is an involuntary bailee then it would appear that he will be liable only for deliberate injury to the goods or for gross negligence but not for ordinary negligence. If he is a gratuitous bailee, he will probably be under a duty to take reasonable care of the goods i.e. to treat them as a man of ordinary prudence would treat his own goods. Where s. 37 of the Act applies, he will be an involuntary bailee, otherwise it is submitted he is a gratuitous bailee. The position would then be an follows: (i) if the risk has passed to the buyer, and delay is due to the fault of the buyer the seller is still under a duty to take reasonable care of the goods; and (ii) if the risk remains with the seller, but delay in delivery is due to the fault of the buyer, the buyer must assume the risk of any loss which might not have occurred, but for such fault, yet the seller must still take reasonable care of the goods. Further, if the risk has passed to the buyer, but delivery is delayed due to the seller's fault, the seller must assume the risk of any loss which might not have occurred but for such fault, and in addition must take reasonable care of the goods. "

I would have thought therefore that it was perfectly proper in all the circumstances of this particular case for the plaintiff to have taken the steps he did in insuring the goods and providing for their secure storage, as well as packaging, concommittant with which was the inescapable hiring of forklift and labour.

As bailee of the goods of the defendant in the particular circumstances of this case, I find that it was reasonable for the plaintiff to employ such services as would economically meet the requisites of secure protection for the goods the subject matter of this action, from the year 1969. As regards what sum should be awarded for the engagement of the services of watchmen, I have to bear in mind the evidence of Mr. Richardson in which he set out how

he arrived at the figure claimed by the plaintiff under that head of special damages. I was told that the Rootes' goods were stored in the same building as other goods belonging to the plaintiff.

In more detail, Mr. Richardson said that for the period 1969 - 72, the goods of the plaintiff were stored at three locations at a total cost of $40,368.31. Of this amount $15,138.12 was allocated for storage at the South Camp Road site, one of three locations beforementioned. For the period November 1972 to November 1978, the total sum incurred for storage at the South Camp Road premises alone was $49,751.32. The value of the stock over the nine year period was $348,000; included in this total value of assets was the value of the spares at landed cost which was $86,812.00. This last figure was expressed as 25% of the base of the $348,000.00 stock. The formula therefore resulted in using the 25% to ascertain how much of the total cost of $64,689.14 over the nine year period could be appropriated to the services of the watchmen.

Mr. Richardson, did admit that naturally the watchmen were not engaged in watching the Rootes goods only, but in fact included other goods and the entire premises where the goods were stored. He also admitted that his computation would have been considerably reduced had he taken into account the value of the premises at South Camp Road and the structures thereon. The value of those structures was $80,000.00, taking into account the expenditure by the plaintiff of a new structure at a cost of $20,000.00.

Although Mr. Richardson's formula was dissected under cross-examinationm and he conceded its defects, viz, that he did not take into account the value of the structures, I do not wish to be tied down to the circumlocution of what the watchman was really watching. It is clear that no alternative formula was suggested either by the plaintiff or by the defendant, by which I could be guided. In the event, doing the best I can, I will make use of Mr. Richardson's formula with the added figure of the value of the structures which enables me to use a percentage of 20% of stock to base figure.

This therefore will make the award for this item of special damages to be $12,997.82.

Tabulated the damages will be as follows:

Price of Spare Parts	$86,812.22
Add 40% for overheads	34,724.88
	$121,537.10
Less claims on insurance company for losses	$ 11,740.03
	$109,797.07
Insurance Premium	$ 14,293.27
Packing and Labour	3,200.00
101 Crates at $20 per crate	2,020.00
Forklift and Lorry hire	2,000.00
Storage	6,480.00
Watchmen and security service	12,997.82
Asagreed at the trial I award	$150,788.16
interest at 10% from the date of the breach in 1969.	135,690.12
	$286,458.28

There will be judgment for the plaintiff in the sum of $286,458.28, with costs to be agreed or taxed.

On the 30th March, 1981, the learned attorneys-at-law for the parties informed me that in so far as the quantum of damages and interest were concerned, they had agreed to add $3,000.00 to bring the sums for the items of insurance, storage and watchmen up-to-date of the judgment. This would therefore increase the damages to $153,788.16.

The interest on that sum was calculated as follows:

(1) on the sum of $109,707.07

(a) 10% for 11½ years = $126,266.63

(b) on the sum of $40,999.09 at 10% for 5¼ years

= $ 23,569.87

Total $303,624.66

The figures so agreed are without prejudice, to further arguments re the liability of the defendant.

There will therefore be judgment for the plaintiff for the sum of $303,624.66. This is in Substitution of the judgment and announced on the 16th May, 1980. The plaintiff will have the costs of the action.

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printed conditions containing the exemption clause.

Observing that nothing was put into writing about the goods being carried under deck, Lord Denning, M.R. opined that "there was a plain breach of the oral promise by the forwarding agents." On the facts of the case he said ".... we are concerned with an assurance as to the future." He underlined the approach of the Courts -

> " ..... nowadays to collateral contracts. When a person gives a promise or an assurance to another intending that he should act on it by entering into a contract, we hold that it is binding. See Dick Bentley Productions Ltd. v. Harold Smith (Motors) Ltd. /1965/ 1 W.L.R. 623. That case was concerned with a representation of fact, but it applies also to promises as to the future. " (p. 933 letters d - e)

Roskill and Geoffery Lane, L.JJ. agreed that the appeal should be allowed for the reasons given by Lord Denning, M.R. At pp. 934 letter j - 935 letter a, Roskill, L.J. expressed his views in these words:

> " It seems to me as it seems to Lord Denning, M.R. absolutely plain that the plaintiffs thought that they had got an assurance from the defendants if the plaintiffs instead of using the trailers which had hitherto always been shipped under deck, were to allow the defendants to ship the plaintiffs' goods in containers, those containers, like the trailer before them, would be shipped under deck. The learned judge said that all the defendants gave was an assurance, they did not give a guarantee. The real question as I venture to think, is not whether one calls this an assurance or a guarantee, but whether that which was said amounted to an enforceable contractual promise by the defendants to the plaintiffs that any goods, thereafter entrusted by the plaintiffs to the defendants for carriage from Milan to the United Kingdom via Rotterdam and then by sea to England, would be shipped under deck. The matter was apparently argued before the learned judge on behalf of the plaintiffs on the basis that the defendants' promise (if any) was what the lawyers sometimes call a collateral oral warranty. That phrase is normally only applicable where the original promise was external to the main contract, the main contract being a contract in writing so that usually parol evidence cannot be given to contradict the terms of the written contract. The basic rule is clearly stated in the latest edition of Benjamin on Sale (9th edition 1974, para 742) to which I refer but will not repeat. But that doctrine, as it seems to me has no application where one is not concerned with a contract in writing (with respect,