SALE OF GOODS CONTRACTS AND THE REQUIREMENT OF FITNESS FOR PURPOSE IN THE SALE OF GOODS ACT 1908

BY JOEL MANYAM*

I. INTRODUCTION

In general terms, the law of Contract is a set of rules designed to give legal effect to private bargains. Parties are free to contract on any matter they choose and on any terms they prefer, subject only to any limitations imposed by statute or by common law rules of public policy. The law recognises the paramountcy of this freedom of choice as to promises made in that, once parties have exercised their choice of reaching an agreement, the law may be used to enforce the agreement so reached, subject to the limitations mentioned.

While the law of Contract articulates principles applicable to contracts generally, there are special types of contract for which special rules have been developed. In respect of contracts of sale, the law has evolved whereby recognition is given to special rules that apply, depending on the subject of the sale contract or the types of parties involved. Thus, in respect of contracts for the sale and purchase of land, the Contracts Enforcement Act 1956 and related rules apply. The development of consumer protection legislation such as the Consumer Guarantees Act 1993 is designed to provide special rules in contracts for the sale of goods and services to consumers. The 1993 Act further restricts the notion of freedom of contract in that parties to consumer sales cannot contract out of the Act.[1] There is also the Fair Trading Act 1986, which seeks to impose standards in respect of goods and services which are contractually supplied to consumers.

Contracts for the sale of goods are another specialist form of contract, involving commercial transactions between parties assumed as having relatively equal bargaining strengths. The nature of sale of goods contracts was cogently articulated by the respected Canadian author, Fridman, who opined that:

> Sale is a species of contract. Although many of the rules of contract are of general application to sale, particular rules apply to sales of particular types of property. Hence the law of sale of goods must be carefully distinguished from the law dealing

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1 Consumer Guarantees Act 1993, s 43.

> with the sale of land, the assignment of leasehold interests, negotiability, and the assignment of choses in action. It is important to do this since, on the one hand, only the contract of sale of goods is subject to the provisions of the Sale of Goods Act, and, on the other hand, rules of the common law or equity, and special statutes applicable to special kinds of contract of sale, assignment, negotiability, and certain other dispositions of owners of goods, may not apply to a contract of sale of goods unless and until they have been specifically stated to do so by some statute or judicial decision.[2]

Essentially, Fridman validly makes the point that, although sale of goods is a species of contract, there are some particular rules that apply to contracts of sale of goods in contrast to other types of contracts of sale such as contracts for the sale of land. Fridman refers to the Sale of Goods Act as regulating sale of goods contracts. Its equivalent in New Zealand is the Sale of Goods Act 1908 ("SGA 1908").

In this article I shall examine the nature of the SGA 1908 and the way in which it has been interpreted by the courts. In particular, I shall focus on the interpretation of the Act in a recent decision of the Privy Council, *Hamilton v Papakura District Council* ("*Hamilton*").[3] Against the background of the law relating to fitness for purpose, I shall analyse this decision and assess its impact on the law in this area.

II. NATURE OF SGA 1908

The New Zealand Act is a replica of the English Sale of Goods Act 1893 ("SGA 1893").[4] It follows that an examination of the history of the English Act would shed light on the rationale for the New Zealand Act.

Sir Mackenzie D Chalmers, who was responsible for drafting the SGA 1893,[5] was of the view that the nature of the 1893 Act was not to

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2 Fridman, G H L, *Sale of Goods in Canada* (1995) 9.

3 [2002] 3 NZLR 308, upholding the Court of Appeal in *Hamilton v Papakura District Council* [2000] 1 NZLR 265, which in turn upheld the High Court in *Hamilton v Papakura District Council*, Auckland, CP 391/95, 10 September 1998.

4 New Zealand's Bills of Exchange Act 1908, the Partnership Act 1908 and the Marine Insurance Act 1908 are identical to the legislation of the United Kingdom.

5 Ferguson, "Legal Ideology and Commercial Interests: The Social Origins of the Commercial Law Codes" 4(1) British Journal of Law and Society 18. The same was also true of the Bills of Exchange Act 1882. Chalmers said: "Still in drafting the Bills of Exchange Bill, my aim was to reproduce as exactly as possible the existing law, whether it seemed good, bad or indifferent in its effects" ("An Experiment in

revolutionise the common law rules, nor to change in any way the rules that had thus far developed. The enactment of the Act was "not to reform the actual terms of the law but to 'reform' their shape and organization".[6] The Act therefore represented "the effect of decided cases and established principles".[7]

Although the SGA 1893 was referred to as a Code,[8] it was not a comprehensive code in that it did not contain all the rules on sale of goods and therefore did not obviate the need to resort to the common law. Lord Diplock, in his dissenting opinion in *Ashington Piggeries v Christopher Hill ("Ashington")*, lucidly articulated the nature and scope of the Sale of Goods Act when he opined as follows:

> But the exposition contained in the Act is only partial. It does not seek to codify the general law of contract of England or Scotland. It assumes the existence as a basic principle of the English law of contract that, subject to any limitations imposed by statute or by common law rules of public policy, parties to contracts have freedom of choice not only as to what each will mutually promise to do but also as to what each is willing to accept as the consequences of the performance or non-performance of those promises so far as those consequences affect any other party to the contract. The paramountcy of this freedom of choice as to promises made in contracts for the sale of goods is acknowledged by s 55 of the Act [equivalent to s 56 of the SGA 1908]. The provisions of the Act [Sale of Goods Act] are in the main confined to statements of what promises are to be implied on the part of the buyer and the seller in respect of matters on which the contract is silent and to statements of the consequences of performance or non-performance of promises, whether expressed or implied, where the contract does not state what those consequences are to be.[9]

Codification" (1886) 2 LQR 125, 126). See also Chalmers, "Codification of Mercantile Law" (1903) 19 LQR 10, 14.

6 Ferguson, ibid, at 21 and 31.

7 Chalmers, supra note 5, at 130. This was also described by Diamond as seeking "to reproduce the existing law, to translate case-law into statute-law without radical change" ("Codification of the Law of Contract" 31(4) Modern Law Review 361, 372).

8 Diamond, ibid, at 369. Lord Diplock in *Ashington Piggeries v Christopher Hill* [1971] 1 All ER 847, 881, observed: "In the form in which the Bill was originally drafted by Sir Mackenzie Chalmers that Act was intended to state the common law rules relating to the sale of goods as they had been developed by judicial decision up to 1889".

9 Supra note 8, at 881-882.

In fact the English Act in section 61(2), a provision identical to section 60(2) in the New Zealand Act,[10] specifically provided a savings provision. Particular rules of the common law of contract would nonetheless continue to have application insofar as they were not inconsistent with the express provision of the Sale of Goods Act. Specific reference is made to the common law rules pertaining to the law of principal and agent, and the effect of fraud, misrepresentation, duress, mistake or other invalidating cause.

The effect of this savings provision, to the extent that it also applies to equitable rules, has been the subject of discussion. In particular, there has been debate as to whether equitable rules have any application under the Sale of Goods legislation. The issue of whether equitable proprietary interests and remedies can be pursued in the context of sale of goods can assume significance in a number of instances, including those where a buyer or seller needs to resort to equitable remedies such as specific performance or an injunction.

The English Court of Appeal decision in *Re Wait*[11] has often been relied upon as suggesting a very strict and indeed literal approach to this question, that equitable rules have no application under the Sale of Goods Act. Atkin LJ acknowledged that the Act had been passed at a time when the principles of equity and equitable remedies were recognised and given effect to in all English Courts. Further, the particular remedy of specific performance had been specifically referred to in section 52 of the SGA 1893. Atkin LJ also expressed the view that he considered it futile if the SGA, which was "intended for commercial men to have created an elaborate structure of rules dealing with the rights of law", also allowed to subsist within it equitable rights which were inconsistent with the Act's provisions.[12] Atkin LJ's concluding observations, which have been relied on as excluding equitable rules from having any application under the Act, were as follows:

> But the mere sale or agreement to sell or acts in pursuance of such a contract mentioned in the Act will only produce the legal effects which the Act states.[13]

However, it is worth noting that these observations by Aitkin LJ were obiter and Aitkin LJ expressly stated that he was not deciding the point. Lord

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10 S 60(2) SGA 1908 is equivalent to s 57(1), Canadian Sale of Goods Act RSO 1990.

11 [1926] All ER 433.

12 Ibid , at 446.

13 Ibid.

Brandon in *The Aliakmon*[14] expressed extreme doubt on whether equitable interests in goods could either be created or found to exist within the confines of an ordinary contract of sale. In his view, the SGA 1893 was a complete code in respect of contracts for the sale of goods. However Lord Brandon found it unnecessary to decide the point.

In the earlier decision of *United Scientific Holdings v Burnley District Council*,[15] the House of Lords was of the clear view that there was no reason to distinguish between legal and equitable rules. Lord Diplock expressed the position as follows:

> to perpetuate a dichotomy between rules of equity and rules of common law which it was a major purpose of the Supreme Court of Judicature Act 1873 to do away with, is, in my view, conducive to erroneous conclusions as to the ways in which the law of England has developed in the last 100 years.[16]

While the question for the purposes of English law does not appear to have been decided, the Privy Council[17] in a decision on appeal from New Zealand's Court of Appeal,[18] appears to have recognised that equitable rights can subsist alongside the SGA 1908. The issue in *Re Goldcorp Exchange Ltd* was whether the respondents, who had purchased bullion for future delivery on terms that they were purchasing "non-allocated metal" which would be stored and insured free of charge by the company, had acquired proprietary rights to the bullion. Lord Mustill, in delivering the advice of the Board, held that the respondents obtained no form of proprietary interest, whether legal or equitable, simply by virtue of the contract of sale as it was not known to what goods the title related. In a specific reference to Atkin LJ's comments in *Re Wait*, the Privy Council noted that they pointed "unequivocally to the conclusion that under a simple contract for the sale of unascertained goods no equitable title can pass merely by virtue of the sale". Lord Mustill further observed that, even if the creation of a separate and sufficient stock would have given the non-allocated purchases some kind of proprietary interest, there was no such separate and sufficient stock in existence. It followed that the Board would have been disposed to making a finding that either a legal or equitable proprietary interest existed if there had been some means of knowing to which, if any, of the non-allocated sales a particular purchase by the company was related.

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14 [1986] 2 All ER 145.

15 [1977] 2 All ER 62.

16 Ibid, at 68.

17 *Re Goldcorp Exchange Limited (in receivership)* [1994] 2 All ER 806.

18 *Liggett v Kensington* [1993] 1 NZLR 257.

The significance of the savings provisions in section 60(2) of the SGA 1908 is of more than academic interest. The specific reference in section 60(2) to the law of agency, for example, can arise when considering the application of the implied term under section 16(a). If, under the implied term embodied in section 16(a), a buyer is required to make known to the seller the particular purpose for which the goods are required, so as to show reliance on the seller's skill and judgment, the law of agency would appear to have direct application. This could apply, for example, if an employee of the buyer impliedly made known the particular purpose to either the seller or to an agent of the seller.[19]

III. INTERPRETATION OF SGA 1908

The Act is not a complete code as the provisions of section 60(2) illustrate. Further, as highlighted by Fridman,[20] if sale of goods is a species of contract, it follows that the Act operates in the context of contract law, which in New Zealand is based on an amalgam of the common law and numerous statutes.[21] This being the context in which the SGA 1908 finds itself operating, the question arises as to how the Act ought to be interpreted and meaningful effect given to its specific provisions.

The approach to the interpretation of a codifying Act was alluded to by Lord Halsbury in *Bank of England v Vagliano Brothers.*[22] He opined as follows:

> I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it

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19 The implied term was in issue in *Hamilton v Papakura District Council* [2002] 3 NZLR 308. However, the impact of the law of agency as contained in the savings provision of s 60(2) was not considered in regard to the implied communication by the agent of the buyer to an agent of the seller. Contrast this with the position in *Hardwick Game Farm v SAPPA* [1969] 2 AC 31, 104 where Lord Guest held that the particular purpose specified in s 16(a) had been made known to SAPPA's representative.

20 Supra note 2.

21 These include the Minors' Contracts Act 1969, the Illegal Contracts Act 1970, the Contractual Mistakes Act 1977, the Contractual Remedies Act 1979, and the Contracts (Privity) Act 1982.

22 [1891] AC 107.

> unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.
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> If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions ....[23]

While the Act contains a number of implied conditions such as in relation to title[24] and sales by sample[25], those contained in sections 15 and 16 assume central importance in the context of sale of goods law. They are arguably the provisions most heavily relied on, particularly when the issue becomes one of the sale and purchase of defective goods.

The implied conditions embodied in sections 15 and 16 represent an erosion of the common law doctrine of *caveat emptor* (buyer beware).[26] The doctrine in essence is that the seller, in supplying goods required by the buyer, takes no responsibility for their quality or essential character. Where the implied conditions in the Act cannot be successfully invoked by a buyer, the doctrine of *caveat emptor* is not displaced and continues to have application.[27]

The statutory wording of these two provisions is instructive. Section 15 provides that, where there is a contract of sale of goods by description, there is an implied term that the goods will correspond with the description. By contrast, the opening words of section 16 are an enactment of *caveat emptor*[28] in that "there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of

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23 Ibid, at 144-145.

24 Section 14, SGA 1908.

25 Section 17(2), SGA 1908.

26 Atiyah, P S, The Sale of Goods (10 ed, 2001) 137 commented: "In England the implied terms as to quality and fitness in sections 13-15 of the 1893 Act represented an important step in the abandonment of the original common law rule of caveat emptor. The common law had itself largely modified the rigours of this rule by 1893, but in several important respects the Act went further than the courts ever did before it was passed".

27 *Cominco Limited v Westinghouse Can Limited* (1981) 127 DLR (3d) 544, 561.

28 In *Grant v Australian Knitting Mills Limited* [1936] 85, 98, Lord Wright said that the equivalent of s 16 "begins by a general enunciation of the old rule of caveat emptor and proceeds to state by way of exception the two implied conditions".

sale except as follows: ...".[29] However, section 16 then provides implied terms that goods must be reasonably fit for the purpose the buyer requires of them and meet a standard of quality. The net effect is that there is a strong sense that *caveat venditor* (seller beware) prevails over *caveat emptor.* There does not appear to be any difference in effect between section 15 and section 16, merely because section 16 contains in its opening words a denial of the existence of any warranty or condition as to quality or fitness for purpose.

Chalmers commented that a codifying bill such as the Sale of Goods Bill in the first instance reproduced the existing law, however defective.[30] The question therefore arises whether it can be safely accepted that the enactment of sections 15 and 16 has determined that *caveat venditor* prevails over *caveat emptor*, or whether the courts can continue to decide whether the correct balance has been struck by the implied terms.

There are some dicta suggesting the latter view. In the House of Lords' decision in *Ashington*, Lord Diplock in a dissenting opinion appeared to express the view that, despite the content of the statutory provisions, it was still open to the courts to make policy decisions about where the appropriate balance between *caveat emptor* and *caveat venditor* should lie. Lord Diplock stated:

> The choice depends largely on ones personal view as to whether the swing of the pendulum since 1893 from caveat emptor to caveat venditor has now gone far enough and ought to be arrested, or whether it should be given a further impetus, albeit a minor one, on its current course. For my part I would have been in favour of arresting it; but I recognize that a decision to the contrary is simply one of policy and, as it commends itself to the majority of your Lordships, I accept it with good grace as now forming part of the law of contracts for the sale of goods.[31]

Later, in the House of Lords' decision in *Slater v Finning Limited*, Lord Steyn, in delivering his concurring view that the buyer had not complied

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29 In *Hardwick Game Farm v SAPPA*, supra note 19, at 92, Lord Morris of Borth-y-Gest commented on the effect of these opening words in s 16(a) by saying: "In general there is no implied warranty or condition as to the quality of goods which are supplied under a contract of sale nor as to their fitness for any particular purpose".

30 Chalmers, supra note 5, at 128. In *Ashington Piggeries v Christopher Hill*, supra note 8, at 881, Lord Diplock stated: "In the form in which the Bill was originally drafted by Sir Mackenzie Chalmers that Act was intended to state the common law rules relating to the sale of goods as they had been developed by judicial decision up to 1889".

31 Supra note 8, at 888.

with the conditions required for invoking the implied conditions in the equivalent of section 16(a), opined:

> Outside the field of private sales the shift from caveat emptor to caveat venditor in relation to the implied condition of fitness for purpose has been a notable feature of the development of our commercial law. But to uphold the present claim would be to allow caveat venditor to run riot.[32]

It could also be argued that the effect of the New Zealand Court of Appeal and Privy Council majority opinions in *Hamilton*,[33] which found against the buyer in respect of the implied condition in section 16(a), was to reinforce the perception of a shift in the positioning of the dividing line from *caveat venditor* to *caveat emptor.*

However, the more logical and preferred view, as a matter of strict law, seems to be that which is expressed in numerous judicial dicta suggesting that the SGA 1908 has in its implied terms determined where the balance lies. In reference to the effect of the enactment of the SGA on the buyer and sellers' rights, Cozens-Hardy MR, in *Bristol Tramways etc Carriage Co Limited v Fiat Motors Limited*, observed:

> but insofar as there is an express statutory enactment, that alone must be looked at and *must govern the rights of the parties*, even though the section may to some extent have altered the prior common law.[34]

Lord Morris of Both-y-Gest, in *Hardwick Game Farm v SAPPA ("Hardwick")*,[35] seemed to suggest that directions on sale of goods law are provided in the Act and that the question was simply whether the words of the section could be applied to the facts of any given case:

> The Act of 1893 was an Act for codifying the law relating to the sale of goods. If its provisions are clear it should be possible to reach a decision by reference only to the facts that arise in some particular situation. The law as it evolved before 1893 is revealed by a study of a number of notable decisions. The law since 1893 is in terms of the statute. Many of the reported cases since 1893 are seen when analysed to be

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32 [1997] AC 473, 488.

33 Supra note 3.

34 [1910] 2 KB 831, 836 (emphasis added). Also note identical comments in *Abbot and Co v Wolsey* [1895] 2 QB 97, 99, *Wimble Sons and Co v Rossenberg & Sons* [1913] 3 KB 743, 762, and *Laurie & Morewood v Dudin & Sons* [1926] 1KB 223, 234 – 235.

35 Supra note 19, at 92.

> no more than decisions on the facts of a case as to whether the words of the section applied. I therefore limit my citations.[36]

In the same case, Lord Wilberforce was more direct when he commented:

> These two subsections ... [ss 14(1) and 14(2) of the UK SGA 1893: corresponding with section 16(a) and (b) in the SGA 1908] state exceptions to the general rule supposed to exist at common law, of caveat emptor a rule of which little now remains ... The words in which these simple situations, and their legal consequences are described are plain, untechnical words; they are contained in an Act which is supposed (and generally thought with success) to codify this branch of our law. It should be possible to apply them directly to the given situation without the use of fact to fact analogies and fact from fact distinctions drawn from reported cases.[37]

For the purposes of New Zealand law, specifically as regards section 16(a), the position was well articulated by Thomas J in *Bullock and Co Limited v Matthews.*[38] Thomas J spoke of the Act as being reflective of policy that had determined the formula for loss distribution between buyers and sellers:

> Section 16(a) applies irrespective of fault. It is a loss distribution or allocation provision as between buyers and sellers and reflects the legislature's policy as to who should bear unexpected losses. In general terms, where the purpose for which the goods are to be used is known to the seller and the buyer looks to the seller for the requisite expertise in ensuring that the goods are fit for the purpose for which they are supplied, the loss is to fall on the seller.[39]

The issue of whether the respective positions of the buyer and seller are as determined by the implied conditions in the Act, rather than by some formula outside the Act, is an important one for those engaged in commerce. Professor Goode observed that the contract of sale was by far the most common type of contract and that "in commercial dealings traders are not

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36 Ibid, at 91-92.

37 Ibid, at 123.

38 Unreported, CA 265/98, 18 December 1998. In *Cammell Laird & Co v The Manganese Bronze and Brass Co* [1934] AC 402, 418, Lord Macmillan observed in respect of s 14(1) of the UK Sale of Goods Act 1893 that: "That section contains what is left of the rule of caveat emptor, but the exceptions have made large inroads upon it".

39 Ibid, at 5. In *Matthews v Bullock and Co Limited*, unreported, HC, Wanganui, CP 19/93, 19 December 1997, Gallen J expressed a concurring view: "as was emphasized in the *Ashington* case the purpose of the legislation [SGA 1908] was not to determine fault, but where the loss should fall" (at 40).

interested in goods as such, only in the profit that can be made, or the loss that can be avoided, by re-selling them".[40] It would thus appear that buyers and sellers, and more particularly their advisors, in sale of goods contracts, need certainty in the application of the SGA 1908.[41]

Despite this deep yearning for certainty, there now appears grave doubt in New Zealand as to the correct state of the law of fitness for purpose, contained in section 16(a) of the SGA 1908, as a result of the Privy Council decision in *Hamilton*.[42] This decision has affected sale of goods law as regards the correct application of section 16(a) and also the law of agency which section 60(2) seeks to preserve in the context of the Act.

IV. *HAMILTON V PAPAKURA DISTRICT COUNCIL*

In order to grasp the law now applicable pursuant to *Hamilton* and the implications for sale of goods law in New Zealand, the facts which led to the decision need to be traversed.[43]

Mr and Mrs Hamilton hydroponically cultivated "Evita" cherry tomatoes in glass houses at three properties in Papakura, South Auckland. At two of the properties, the water used was from the town water supply. This supply was in turn sourced from the bulk water supplier Water Care Services Limited (Watercare) which was the second defendant in the proceedings. The tomato crop at these two properties began showing symptoms of damage, including leaf curling and burning, with such symptoms worsening over time. No such symptoms were evident on the crop at the third property which did not use the town water supply.

The Hamiltons issued proceedings against the Council and Watercare, claiming damages in contract, negligence, nuisance and the principle in *Rylands v Fletcher*.[44] They alleged that the town water supply provided by Papakura District Council ("PDC") was contaminated with herbicide residues at concentrations which proved harmful to the tomato plants. In the

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40 Goode, R, *Commercial Law* (2 ed, 1995) 193.

41 In *The Aliakmon*, supra note 14, at 155, Lord Brandon opined: "Yet certainty of the law is of the utmost importance, especially ... in commercial matters".

42 Supra note 3.

43 For a fuller account of the facts, see Lendrum, "Fitness for Purpose, Cherry Tomatoes and the Privy Council" (2003) 31 *Australian Business Law Review* 54; and Brown, "The Swing of the Pendulum from Caveat Venditor to Caveat Emptor" (2000) 116 LQR 537.

44 (1868) LR 3 HL 330.

Court of Appeal the emphasis was on the herbicide, triclopyr, which was the active ingredient in a weed spray used for controlling gorse in the water supply catchment.

There being several causes of action, it was understandable that over half of the Court of Appeal judgment was devoted to a discussion of the causation of the plaintiff's loss. Seventeen paragraphs were devoted to the claim in contract specifically in respect of sale of goods and particularly in relation to the law on section 16(a).

The Court of Appeal's application of the law on section 16(a), and its endorsement by the Privy Council, raises concerns about how the provision will be applied in New Zealand in the future. It would appear that what had hitherto been accepted as well-established law on section 16(a) has been significantly changed as a consequence of the decisions in *Hamilton*. It is the nature and extent of this change that must now be examined in order to ascertain its legal validity.

As an important preliminary matter, it needs to be recognised that the provision in section 16(a) assumes relevance because the parties were acknowledged as having entered a contractual relationship[45] in respect of the supply of water.[46] The relationship being contractual, it would follow that the seller ought to have been free not to contract if the terms appeared too onerous or, even if it did contract as happened to be the case, it could have expressly disclaimed responsibility[47] for the quality of the water. A third

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45 The Court of Appeal in *Hamilton v PDC*, supra note 3, at 271, noted: "It was accepted that its [the Council's] relationship with individual customers is contractual, though overlaid with statutory obligations".

46 The product, namely water, being assumed to be goods.

47 The majority Privy Council opinion acknowledged that PDC could have "undoubtedly .... said, as it did to the rose grower and to other users in Drury, that it could not give that undertaking [as to the quality of water above the drinking standard]" (supra note 3, at 320). The position of the Council concerning water quality was that it purchased it in bulk from Watercare after it had been taken from the reservoir and passed through the filter station and when there was no practical way in which it could be further treated. This is perhaps what led Williams J to observe that "Papakura District is literally only a conduit for the conveyance of water from the bulk supplier to users and can do nothing to alter the quality of that water once it is within its reticulation system" (supra note 3, at 161 (HC)). In such circumstances the only practical step for the Council should have been either to elect not to supply or expressly to disclaim responsibility for the quality of the water above the drinking standard (supra note 3, at 278 (CA)).

alternative would have been for the seller to have incorporated different terms on which it would contractually agree to supply the goods. Much emphasis appears to have been placed in the Privy Council majority opinion on the fact that the seller had only one product to supply[48] and was subject to statutory obligations to be a supplier of water.[49] The implication of this is that the nature of the good supplied, namely one quality standard for all water supplied and the statutory obligation to supply, must necessarily affect the rigour with which the implied condition ought to be interpreted. In such circumstances the buyer loses any protection designed to be provided by the condition, and, perhaps more disturbingly, needs to comply with section 16(a) at a standard far higher than the law had required up until this decision.

Pursuant to *Hamilton*, there appear to be at least two standards governing the application of section 16(a). If this is so, this represents a "knock-out blow"[50] to the law on section 16(a). First, where a seller can plead special conditions in relation to the circumstances of the supply, a much higher threshold needs to be met by a buyer seeking to invoke section 16(a). Secondly, in the case of a seller who cannot plead such special conditions, the ordinary protection for a buyer under section 16(a) applies, as had been accepted up until the decision in *Hamilton*. This co-existence of two different standards seems untenable. The position must be one standard and one standard alone. This standard is that, where a seller irrespective of any extenuating circumstances regarding supply decides to contract for the supply of a good without disclaiming responsibility for it, such seller must be taken to have fully embraced the onerous terms inherent in the supply, and accept liability where it falls as determined by section 16(a). To accept any lesser standard would be to emasculate seriously the effect of section 16(a), as clearly occurred in Hamilton, and cannot be correct as a matter of sound law. Such an important provision should not be left vulnerable to the vagaries of judicial attempts to resurrect *caveat emptor*.

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48 Ibid, at 319 (PC).

49 Ibid, at 320, where it is observed: "There can be no assumption of reliance still less an acceptance of responsibility, by a supplier who is under a statutory duty to supply to a multiplicity of customers when conforming to the drinking water standard".

50 Per Lord Denning MR, *Teheran–Europe Co Limited v ST Belton (Tractors) Ltd* [1968] 2 All ER 886, 890, referring to a passage in Lord Reid's speech in *Kendall v Lillico* [1969] 2 AC 31, 81.

V. LAW ON FITNESS FOR PURPOSE

In order to invoke the protection afforded by section 16(a), three requirements need to be satisfied.[51] First, a buyer needs either expressly or impliedly to make known to the seller the particular purpose for which the goods are required. Secondly, the purpose needs to be made known by the buyer so as to show that it relied on the seller's skill or judgment regarding the fitness of the goods for that purpose. Thirdly, the goods need to be of a description which it is in the course of the seller's business to supply. If all these three conditions are met, there is an implied condition that the goods are reasonably fit for the buyer's purpose. On the facts in *Hamilton*, there was no contention that the third requirement had in fact been met.[52] The legal argument relates to the first two requirements.

1. Making Known Particular Purpose

In respect of this requirement, there was contention as to what was required in order implicitly to make known a buyer's purpose and as to how particular a buyer's purpose must be in order to qualify as being "particular" for the purposes of the statutory wording.

If, as the Hamiltons argued, they had never expressly made known their purpose but had done so only impliedly, the question arises as to why their argument before both the Court of Appeal and Privy Council was roundly rejected on the ground that it was not expressly made known? It appears that the Courts' finding was completely at odds with what had allegedly occurred. There is another aspect of law having a direct bearing on the question of implicitly making a buyer's purpose known that may have been ignored, despite the provisions of section 60(2) of the SGA 1908. If this subsection preserves the law of agency as far as sale of goods contracts are concerned, was it not sufficient that an agent of the buyer had implicitly made known the buyer's purpose for the goods? The decisions in *Hamilton* appear to be of the view that, unless the buyer in its own person does not communicate the purpose, the purpose has not been made known. The repercussions of this are disturbing for the commercial environment where many sale of goods contracts involve corporates which cannot act on their own, but rely heavily on their agents to conduct normal commercial

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51 Supra note 3, at 317, 325 (PC). See also Lord Reid in *Kendall v Lillico*, supra note 50, at 79 as to s 14(1) of the UK SGA 1893 which corresponds precisely with s 16(a).

52 Supra note 3, at 325 (PC).

transactions on their behalf.[53] In order to appreciate what occurred, it is imperative to reaffirm what the statute states, what the law allows as implicit, and what occurred on the facts. It needs to be considered whether what happened on the facts amounted to the purpose being made implicitly known in accordance with the law as had been thus far established.

In the early New Zealand case of *Taylor v Combined Buyers Ltd*, Salmond J commented on the first aspect of implicitly making the purpose known by saying that "it is not necessary for the buyer expressly to communicate to the seller the fact that he desires the goods".[54] *Taylor* was in fact referred to in the High Court decision of Williams J in *Hamilton*.[55]

However, both the Court of Appeal and Privy Council majority opinions in *Hamilton* referred to two very persuasive decisions of the House of Lords in *Hardwick*[56] and *Ashington*.[57] In fact it would not be inaccurate to observe that the argument in *Hamilton* before the Court of Appeal directly entailed the application of the principles of these two House of Lords decisions to the facts in *Hamilton*. These decisions need to be examined for they involved the articulation and application of the legal test under the English equivalent of section 16(a).

In *Hardwick*, Hardwick bred pheasants and partridges and had bought feeding stuffs for its stock from Suffolk Agricultural and Poultry Producers Association ("SAPPA") for many years. SAPPA carried on business as compounders and sellers of feeding stuffs for pheasants and partridges and their chicks. Quantities of SAPPA's meal supplied to Hardwick were fed to its pheasants resulting in their death. The cause of death was the chemical "aflatoxin" in the Brazilian groundnut meat extractions used in compounding the foodstuffs. SAPPA bought its supplies of the groundnut meat extractions from Lillico and Grimsdale who were third parties to the proceedings. Lillico and Grimsdale in turn bought their supplies from

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53 It was for these reasons that Waterfall was a Director of Grimsdale, McLeod an agent of Kendall and Brown a representative or agent of Lillico in *Hardwick Game Farm v SAPPA*, supra note 19, at 125.

54 [1924] NZLR 627, 628. The decision in *Taylor v Combined Buyers Ltd* has been referred to as "a very careful judgment" in Atiyah, supra note 26, at 141.

55 Supra note 3, at 151 (HC).

56 Supra note 19. For a more detailed discussion of *Hardwick Game Farm*, see Davies, "Merchantability and Fitness For Purpose: Implied Conditions of the Sale of Goods Act 1893" (1969) 85 LQR 74.

57 Supra note 8. For a fuller discussion of this decision see Patient, "Ruminating on Mink Food" (1971) 34 Modern Law Review 557.

Kendall and Holland Colombo who were brought in as fourth parties in the action.

The question arose as to whether the equivalent of section 16(a) applied, namely, whether Grimsdale had relied on the skill and judgment of Kendall and whether SAPPA had relied on the skill and judgment of Grimsdale. Lord Reid observed that "[i]t is certainly not necessary in many cases that the buyer should state his purpose expressly",[58] thereby confirming the statutory position. However, his more significant observations were in relation to the approach that ought to be taken when considering whether section 16(a) had application. Lord Reid commented as follows:

> In order to bring this subsection [section 14(1) of the UK SGA 1893 equivalent to section 16(a) of SGA 1908] into operation it is not necessary to show that the parties consciously applied their minds to the question. It is enough that a reasonable seller in the shoes of Kendall would have realized that he was inviting Grimsdale to rely on his skill and judgment and that is what I think in fact Kendall was doing.[59]

Lord Morris of Borth-y-Gest more comprehensively examined the issue of making known the buyer's purpose. He examined the issue first as between SAPPA and the third defendants, Grimsdale and Lillico, and secondly in relation to the third and fourth parties respectively. Lord Morris agreed with Havers J's first instance finding that SAPPA had made it known to Lillico that their purpose in buying the meal was in order to compound it into feeding stuffs for various kinds of poultry and pigs. In respect of the issue between the third and fourth parties, Lord Morris agreed with the finding of Havers J that "the buyers impliedly made known their purpose in buying".[60] However, it is worth noting further comments by Lord Morris on making known the particular purpose, when he indicated agreement with the finding of Havers J. This was that the requirement of implicitly making the purpose known can be met if the seller comes to know of the buyer's purpose from a source independent of the buyer. Lord Morris' comments to this effect were as follows:

> I think it is implicit from these passages that the learned judge was holding not merely that the sellers knew the particular purpose but that the buyers either expressly or impliedly had made known the purpose.[61]

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58 Supra note 19, at 81.

59 Ibid, at 84.

60 Ibid, at 93.

61 Ibid, at 92.

The above comments clearly intimate that the requirement for a buyer to make known its purpose to the seller is one which is broadly interpreted and consistent with Lord Reid's earlier and more general comments. In other words, section 16(a) tends to be given a wide construction and, for it to apply, it is not necessary that the parties consciously applied their minds.[62] Lord Morris' view suggests that the buyer would have met this requirement if the seller obtains knowledge of the purpose through means employed entirely by the seller or if such is obtained by the seller through independent third parties. A seller could obtain such knowledge of a particular buyer's purpose entirely on his own independent account, if for example there are a number of buyers purchasing the same product from the same seller for identical or similar purposes. In respect of one buyer, the seller may have been specifically told the purpose for which the particular buyer required the goods. It would follow that the seller having been informed of the purpose by one of a number of buyers using the same product for identical or similar uses, each subsequent buyer need not repeat in "parrot-like" fashion their individual particular purposes, identical though all these may be. It would appear that this may have been the context Lord Pearce had in mind when he said that "[t]here is no need for a buyer formally to 'make known' that which is already known".[63]

In *Ashington*, Lord Guest also commented on the requirement to "make known" being met without the buyer needing to have taken any action to make known its purpose to the seller. He said that "[i]f the seller knows the purpose for which the buyer requires the goods, then no express intimation by the buyer is necessary", and it will be implied.[64] In other words, in the view of Lord Guest, the requirement to "make known" had been met where the third party knew, quite independently of any action by the buyer, that herring meal was required so as to feed to mink. Lord Guest opined that herring meal which the third party supplied was an international commodity which throughout the world had been used as animal feeding stuff. In the period 1957-1961, when mink in Norway were fed herring meal but no causal link had been established between the disease suffered by mink and the herring meal they were fed, this was sufficient to have placed the third party on notice that herring meal was being used as a food for mink. Lord Guest opined:

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62 Ibid, at 79. This was a view also expressed by Lord Wilberforce in *Ashington Piggeries v Christopher Hill*, supra note 8, at 877.

63 Supra note 19, at 115.

64 Supra note 8, at 862.

> But the fact that herring meal was being fed to mink must have been known to the third party who was so heavily involved in the sale of that commodity. Mr Volness [one of the witnesses for the third party] admitted that they knew that from 1957 Norwegian mink farmers were feeding herring meal to mink. It is apparent from a correspondence dated in November 1960 and produced by the third party, that herring meal was being pushed in Norway as a suitable food for mink. Mr Volness said there was no reason why herring meal should not be fed to mink.[65]

His Lordship also made reference to the Nordic Handbook on Mink Rearing which stated that herring meal could be used for feeding of mink. Further, there was reference to an article in the Fur Trade Journal of Canada which stated that herring meal could be a nutritionally valuable food for mink.[66]

From these sources of information, quite independent of any buyer input, knowledge of the buyer's purpose was imputed to the seller. It followed that the buyer was not required to appraise the seller of similar use of herring meal in Great Britain. As Lord Guest observed, "[i]f the third party had knowledge that herring meal was being fed to mink in Norway and elsewhere I see no reason why it was necessary for the respondents to prove use in Great Britain".[67]

Viscount Dilhorne in *Ashington* also echoed the view that to "make known" included the case of a seller being put on notice of the buyer's purpose from independent third party sources of information. His instructive comments were that:

> If Norwegian herring meal was fed to mink in Norway, and the third party was aware of this, then the third party should have contemplated that its use for food for mink in the United Kingdom was not unlikely.[68]

However, Viscount Dilhorne appeared to go further by saying that the requirement to "make known" would also be met where the third party ought to have known that herring meal was being fed to mink. In this regard he made reference to conferences held between the third party and the Norwegian Fur Farmers Marketing Association and the Institute of Poultry and Fur Bearing Animals, with the object of securing the sale of herring meal as a feed for mink in Norway. Viscount Dilhorne agreed with the finding of the judge at first instance that it was accordingly inconceivable

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65 Ibid, at 863.

66 Ibid.

67 Ibid.

68 Ibid, at 870.

that the third party did not become aware that herring meal was fed to mink by Norwegian farmers. The two witnesses for the third party were aware of this and Milmo J at first instance found that the third party, "must have known of this practice".[69]

So, in essence, Viscount Dilhorne adopted the view that the statutory test of "makes known"' by implication can also be met where a seller either, as a matter of fact or as a matter of imputed knowledge, ought to have become aware of the buyer's purpose. Such actual or imputed knowledge would have been evidenced by the buyer as a direct consequence of circumstances quite unrelated to any attempts by the buyer to "make known" the purpose, but which nonetheless brought home or "made known" to the seller the buyer's purpose for the goods.

Lord Wilberforce in *Ashington* also agreed with the first instance finding that the buyer's purpose had been made known to the seller. This was because the third party seller, as a result of experiences in Norway, knew of the practice of feeding herring meal to mink.[70] Lord Wilberforce expressed full agreement with aspects on which the trial judge had relied and which clearly supported the finding that the seller was aware or ought to have become aware of the buyer's purpose as a result of information from sources independent of and indeed extraneous to the buyer. He expressed the position as follows:

> the findings of fact of the trial judge ... were supported by the impression made on him by the two Norwegian witnesses in the witness box, by some important letters written by the third party in late 1960 on the subject of the herring meal and its potentiality as mink food, and by the general probabilities of the case, the fact that there were numerous mink..... farms in Norway to which herring meal had been fed. In my opinion, we must reinstate the judge's conclusion, that feeding to mink was a normal user in 1961 and known as such to the third party.[71]

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69 Ibid.

70 Ibid, at 878.

71 Ibid, at 879. Lord Wright in the earlier House of Lords' decision in *Cammell Laird & Co v The Manganese Bronze and Brass Co*, supra note 38, at 422 alluded to the prospect of a seller acquiring knowledge of the buyer's purpose from sources extraneous to the buyer when he commented as follows: "It is not necessary here to have recourse to writings or conversations between the parties outside the contract, or to other circumstances known to the parties involving the inference that at or before the date of the contract the particular purpose for which the buyers wanted the propeller was brought home to the minds of the respondents as contracting parties".

The views of at least three of the Law Lords in *Ashington*, as highlighted, have been consistent in articulating this quite expansive position of how the requirement for the buyer to "make known" its purpose can be met. This is to be contrasted with the narrowest construction that can be placed on this requirement that a buyer needs to fulfill. Such a restrictive construction on the need for a buyer to "make known" its purpose was articulated by Lord Diplock in his dissenting opinion in *Ashington*, in relation to the second appeal. In the second appeal, the respondents, Christopher Hill, who were compounders of the mink food in question, had argued that as buyers they had impliedly made their purpose known to the third party. It was clear in the second appeal that the respondents had only argued that, while they had not expressly made known their purpose,[72] they had made this known impliedly. Accordingly, they could claim the protection afforded under the equivalent to section 16(a). Lord Diplock rejected the argument that the purpose had been made known by implication:

> The range [of purposes] so made known included use as an ingredient in feeding stuffs for many kinds of domestic animals and poultry. What it did not include was use as an ingredient in feeding stuffs for mink. This seems to me to be conclusive that even if the third party knew that Norwegian herring meal was a commodity which might be used as an ingredient in the diet of mink, use for that purpose can neither be nor form any part of the particular purpose for which the goods were required which was *made known by the buyer to the seller*, so as to give rise to the implied condition under s 14(1)[equivalent to section 16(a) of SGA 1908]. ... Neither expressly nor by implication had the respondents ever made known to the third party that the range of purposes for which they required the herring meal included use as an ingredient in the diet of mink ....[73]

Of critical importance, in Lord Diplock's view, as to why the purpose had not been made known, albeit by implication, was that there was no knowledge that emanated from the buyer which informed the seller of the former's purpose. Unless the knowledge which the seller gained of the buyer's purpose was conveyed in some way by the buyer, the buyer could not have made known its purpose by implication. Any knowledge that the seller gained of the buyer's purpose had to have been gained through the buyer as the conduit for such information. There was no room in Lord Diplock's view for importing knowledge on the part of the seller of the buyer's purpose, as a consequence of independent third party information. Lord Diplock expressed his view as follows:

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72 Ibid, at 877.

73 Ibid, at 891.

> mere knowledge by the seller that the goods may be required for use for feeding to mink is not enough. Unless they know that the goods *are* required for that purpose and the source of their knowledge is the buyer himself, there is no ground for any reasonable inference that the buyer was relying on the skill or judgment of the seller to select herring meal which is fit for feeding to mink.[74]

If, as *Ashington* suggests thus far, there is a continuum of opinion represented on the one hand by an overwhelmingly strong view that making known by implication can be satisfied by independent third party information, and Lord Diplock's view on the other, the question arises as to whether there is an intervening position on the requirement to "make known" the buyer's purpose? It appears that there may be such a position, based on the law of agency and exemplified by the facts in *Ashington Piggeries*.

The issue of the respondent buyer making known its purpose to the seller's agent was assumed, and on occasion specifically alluded to, in the judgments in *Ashington.* However, the implications of the agency relationship were explicitly addressed in the opinion of Lord Wilberforce. The parties to the second appeal, having contracted with each other as buyer and seller, did not transact business directly with each other. The Norwegian seller/supplier of the herring meal had appointed a company called Bowrings to act as their agent in England.[75] It was the seller's agent that was responsible for and which in fact actively negotiated contracts of sale for the herring meal. Lord Hodson, whose opinion outlined the facts in *Ashington*'s case in some detail, encapsulated the agency position as follows. He said that Bowrings were "the exclusive selling agents of the third party in the United Kingdom".[76]

Lord Wilberforce in *Ashington* made reference to the sale which was the subject of the second appeal as one which was negotiated through an agent of the seller, such agent being based in England. However Lord Wilberforce considered it sufficiently significant to raise the issue of whether an agent of the seller was sufficiently informed of the buyer's purpose to the extent that the seller was. In other words, the comment by Lord Wilberforce raises the possibility, in an agency relationship, that an agent may have far less or even no knowledge of the buyer's purpose. If this difference in respective levels of knowledge between principal and agent as to the buyer's purpose existed, any lack of knowledge of the buyer's purpose by the seller's agent would be

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74 Ibid.

75 Ibid, at 877.

76 Ibid, at 855.

imputed to the seller as principal. It would appear to follow that, in an agency relationship involving sale of goods and where the principal had no knowledge of the buyer's purpose, the agent of the seller must have knowledge of the buyer's purpose in order that such knowledge may be imputed to the seller as principal. If the seller's agent lacks the necessary knowledge of the buyer's purpose, it would follow that the seller will be taken as not having the required knowledge of the buyer's purpose, unless it can be demonstrated that the seller, on its own account and quite independent of the agency relationship, had knowledge of the buyer's purpose. The comments in Lord Wilberforce's judgment which suggest this are as follows:

> The sale was negotiated through an agent in England, CT Bowring &Co Ltd on behalf of Sildmelutvalget, *but no point has been taken as to any limitation on their knowledge as compared with that of their principals* ... and here there is no doubt that the third party, through its selling agents, CT Bowring & Co Ltd, and also directly, knew what the herring meal was required for, ie for inclusion in animal feeding stuffs to be compounded by the appellants.[77]

The requirement that the seller's agent must have the required knowledge of the buyer's purpose, in order for it to be imputed to the seller, is well illustrated by *Mash & Murrell v Joseph I Emanuel.*[78] Here the plaintiffs, Mash and Murrell Ltd, were dealers in potatoes for human consumption. The plaintiffs were in the business of supplying potatoes to shipping companies for ships' stores and to a lesser extent to canteens. The defendant, Joseph I Emanuel Ltd, was also a dealer in and importer of potatoes. A contract was entered into between the plaintiffs and the defendant's agents, pursuant to which the defendant sold to the plaintiffs 2,000 half-bags of Cyprus spring crop potatoes. The evidence showed that the defendant's agents Messrs Constant Smith & Co knew the nature of the plaintiff's business, as a result of having had dealings with the plaintiffs for many years. It was also clear that Mr Mash of the plaintiffs had made it clear to Mr Smith, the defendant's agent, that he wanted the potatoes for use in his trade in England. It was this series of events which caused the defendant's agent to be fully informed of the buyer's purpose and which, under the law of agency, imputed such knowledge to the defendant seller. This enabled Diplock J to observe quite correctly as follows:

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77 Ibid, at 877 (my emphasis).

78 [1961] 1 All ER 485. For further comment on this decision see Hudson, "Time and terms As To Quality In Sale of Goods" (1978) 94 LQR 566, 568-569.

> It seems to me that in this case the knowledge of the defendants, through their agents; of the business carried on by the plaintiffs, coupled with the request by Mr Marsh for Cyprus potatoes to be made available for use in England, is sufficient to raise the inference, which I accept, that the plaintiffs did make known to the defendant the particular purpose for which the goods were required, namely for the purpose of use in this country for human consumption after arrival.[79]

It is worth noting that the effect of these judicial opinions, on the application of agency principles in the context of sale of goods, is that a seller's agent needs to be informed of the buyer's purpose. Only if this occurs will it follow that, by implication, the seller had made known to it the buyer's purpose as a consequence of the conduct of the seller's agent. Thus, on this aspect of impliedly making a buyer's purpose known, the law takes an expansive approach to the meaning of "making known". As highlighted by an examination of the authorities thus far, it appears that the seller can be informed of the buyer's purpose by actual knowledge or, where necessary, the law will hold the seller as having been informed of the buyer's purpose through constructive or imputed knowledge.

Pursuant to section 16(a), the buyer needs to make known its particular purpose for the goods. The question in law is how particular must the "particular purpose" be? In *Taylor v Combined Buyers Ltd*, Salmond J commented as follows:

> it is settled that the expression "particular purpose" used in this enactment is not limited to a special purpose communicated to the seller, as distinguished from the general purpose to which goods of that class are normally devoted, but includes such general purpose itself.[80]

If Salmond J has interpreted "particular" as including the general purpose, has this been a consistent position as a matter of law up until the decision in *Hamilton*? Lord Wright provided the leading judgment in the House of Lords' decision in *Cammell Laird & Co v The Manganese Bronze and Brass Co.*[81] This considered the application of section 14(1) of the SGA 1893. Lord Wright said that the tendency of court decisions in respect of section 14(1) had been to "give a liberal interpretation to these words". He also expressed the view that "[t]he definition of the particular purpose will vary according to the contract in question".[82]

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79 Ibid, at 490.

80 Supra note 54, at 629.

81 Supra note 38, at 422.

82 Ibid, at 424.

As the *Hamilton* decisions relied on the decisions in *Hardwick* and *Ashington* in order to apply the provisions of section 16(a), the latter decisions need to be examined to ascertain what they established as sufficient to meet the statutory test of "particular" in the phrase "particular purpose". In *Hardwick*, this issue was mainly addressed in respect of the purchases from the fourth party Kendall by Grimsdale as buyer. In Lord Reid's view, the fact that Kendall knew that Grimsdale were buying the goods in order to resell to compounders of animal feeding stuffs was a particular purpose. This was because there was no evidence to show that it was not sufficiently particular to enable Kendall to exercise skill and judgment. Lord Reid further observed that it would not have helped Kendall to be told that the goods were ultimately to be fed to any particular kind or age of animal because at the time nobody knew that what was suitable for one kind of animal may not have been suitable for another.[83]

Lord Morris of Borth-y-Gest in *Hardwick* most clearly articulated what meaning was to be ascribed to the phrase "particular purpose". In his view the degree of precision or definition required depended entirely on the facts and circumstances of a transaction for the sale of goods.[84] Lord Morris proceeded to make the following significant comments on the meaning of "particular purpose":

> No need arises to define or limit the word "particular". ... There is no magic in the word "particular". A communicated purpose if stated with reasonably sufficient precision, will be a particular purpose. It will be the given purpose. ... The law neither requires the use of any set formula nor the formal reiteration of that which has been made clear.[85]

Applying these principles to the sale of goods contracts between the third parties, namely Grimsdale and Lillico, and the fourth party, Kendall, Lord Morris noted as follows:

> If the Grimsdales and Lillico made it known (either expressly or impliedly) that they were buying the groundnuts in order to pass them on by way of re-sales to a number of people who would use the groundnuts in making compound foods for cattle and poultry that, in my view, was a particular purpose. No greater precision or elaboration of purpose was necessary.[86]

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83 Supra note 19, at 83.

84 Ibid, at 93.

85 Ibid, at 114.

86 Ibid.

Lord Pearce in *Hardwick* rejected the argument that a purpose would fail to be a "particular purpose" if it was expressed too widely and thereby lacked sufficient particularity. He said:

> Almost every purpose is capable of some sub-division, some further and better particulars. But a particular purpose means a given purpose, known or communicated. It is not necessarily a narrow or closely particularised purpose. ... A purpose may be put in wide terms or it may be circumscribed or narrowed.[87]

Lord Wilberforce in *Hardwick* noted that "particular" in section 14(1) was not used in contrast to "general" or "so as to require a quantum of particularity", but was more in the sense of "specified" or "stated".[88] Lord Wilberforce, who also delivered an opinion in *Ashington*, reiterated his view in *Hardwick* and arguably provided an even wider interpretation of particular purpose.[89] Lord Wilberforce stated that, on the facts of the second appeal in *Ashington*, the buyers' purpose of using the herring meal as an ingredient in their animal food qualified as a particular purpose. In saying that this was a particular purpose, Lord Wilberforce acknowledged that such a purpose was indeed wide, and "wider even than the purpose accepted as particular in *Kendall v Lillico*".[90]

The legal effect of holding that such a wide purpose was a "particular purpose" was that it covered a large part of the area which would normally have been considered to fall within the purview of s 16(b). However, this was a permissible interpretation of "particular purpose" for the reason provided by Lord Wilberforce in the following passage:

> But I do not think, as the law has developed, that this can be regarded as an objection or that in accepting a purpose so defined, as a 'particular purpose', the court is crossing any forbidden line. There remains a distinction between a statement (express or implied) of a particular purpose, though a wide one, with the implied condition (or warranty) which this attracts, and a purchase by description with no purpose stated and the different condition (or warranty) which that attracts. Moreover, width of the purpose is compensated, from the seller's point of view, by the dilution of his responsibility; and to hold him liable under an implied warranty of fitness for the purpose of which he has been made aware, wide enough though

87 Ibid.

88 Ibid, at 123.

89 Supra note 8, at 877.

90 Ibid, at 878.

> this may be, appears as fair as to leave him exposed to the vaguer and less defined standard of merchantability.[91]

Lord Wilberforce's views are consistent with Lord Reid's observation in *Hardwick*[92] that the tendency has been to construe section 16(b) too narrowly and to compensate for that by giving a wide construction to section 16(a). It is also consistent with the approach examined in respect of the requirement by the buyer impliedly to make known its purpose. It would be inconsistent to adopt the approach that section 16(a) is to be construed very widely but then take a very restrictive approach to interpreting the particular ingredients contained in its provisions.

2. Buyer's Reliance on Seller's Skill or Judgment

The statutory requirement is that the buyer's purpose needs to be made known so as to show reliance on the seller's skill or judgment. It is not unreasonable that a buyer should rely on the seller's "knowledge and trade wisdom", to use a phrase quoted in *Australian Knitting Mills Ltd v Grant*[93] by Evatt J from *Ward v Great Atlantic & Pacific Tea Co*.[94] In the earlier Privy Council decision in *Grant v Australian Knitting Mills Ltd* Lord Wright in respect of the material phrase, "so as to show that the buyer relies on the seller's skill and judgment", observed as follows:

> It is clear that the reliance must be brought home to the mind of the seller, expressly or by implication. The reliance will seldom be express: it will usually arise by implication from the circumstances.[95]

The House of Lords, prior to its decisions in *Hardwick* and *Ashington*, had examined this material phrase. In *Manchester Liners Ltd v Rea Ltd*,[96] Lord Sumner indicated that the words "so as to show" were satisfied if the reliance was a matter of reasonable inference to the seller and to the court. The matter was clearly expressed by Lord Wright in *Cammell Laird & Co v The Manganese Bronze and Brass Co* when he said:

> Such a reliance must be affirmatively shown; the buyer must bring home to the mind of the seller that he is relying on him in such a way that the seller can be taken to

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91 Ibid.

92 Supra note 19, at 79.

93 [1933] 50 CLR 387, 446.

94 (1918) 231 Mass 90, 93, 94.

95 [1936] AC 85, 99.

96 [1922] 2 AC 74, 90.

> have contracted on that footing. The reliance is to be the basis of a contractual obligation.[97]

The question of reliance was also the subject of comment in *Hardwick*, with Lord Reid saying that the test for reliance was an objective one. It seems that Lord Reid required for reliance that the seller knew of the reliance by the buyer and that a reasonable person in the shoes of the seller would have realised this. Lord Reid stated that:

> It is enough that a reasonable seller in the shoes of Kendall would have realised that he was inviting Grimsdale to rely on his skill and judgment and that is what I think that in fact Kendall were doing.[98]

This view appeared to have been reinforced by Lord Pearce's views in *Hardwick*,[99] that the whole trend of authority had inclined towards an assumption of reliance whenever the seller knew the particular purpose. It appears therefore that the key ingredient, in order to activate protection under section 16(a), is expressly or impliedly to make known, to the seller, the buyer's purpose. If this can be established by the buyer then there is almost a presumption that the seller, having known of the purpose, necessarily knew or ought to have known that it was being relied on by the buyer. The argument had been raised in *Hardwick*[100] that the width of the purpose should prevent any inference that there was reliance. Lord Pearce rejected the argument.

Ashington, which was heavily relied on in *Hamilton*[101] as articulating a correct statement of the law on section 16(a), confirmed the approach that reliance was a matter of reasonable inference in all the circumstances of a given case.[102] For the purposes of New Zealand law on the question of

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97 Supra note 38, at 423.

98 Supra note 19, at 84.

99 Ibid, at 115.

100 Ibid, at 116.

101 Supra note 3.

102 Supra note 8, at 862 where Lord Guest expressed the position as follows: "The question in the present case therefore resolves itself into this: whether in all the circumstances it is proper to draw the inference that there was reliance by the buyer on the seller's skill or judgment. ... If the proper inference from all the evidence is that the third party knew that herring meal was used as food for mink then, in my view, it is sufficient to show the reliance required by the section. If the particular purpose is shown , then it is an easy step to draw the inference of reliance".

reliance, the principles were clearly distilled by Moller J in *Milne Construction Ltd v Expandite Ltd*:

> My understanding of the law in this area is that it is not necessary for the purchaser to prove that he expressly made known to the seller that he was relying on the seller's skill or judgment. In some cases reliance of this kind can be established by the mere fact that the particular purpose has been made known to the seller. But this is by no means a general rule. The question is "whether in the whole circumstances the inference can properly be drawn that a reasonable man in the shoes of the seller would realise that he was being relied upon.[103]

Lord Wilberforce in *Ashington* also pointed out that reliance need not be total or exclusive. In a case where there is only partial reliance on the seller, it will be a question of fact to be determined by the evidence as to the extent to which a buyer partially relied on the skill or judgment of the seller and how far he relied on his own.[104]

Assuming that the buyer is able to establish that the ingredients of section 16(a) have been met, the seller's liability is quite onerous. Salmond J in *Taylor v Combined Buyers Ltd* observed:

> the liability of the seller is not limited to defects which might have been avoided by due use of his skill and judgment, but is an absolute liability for all defects which in fact make the goods unfit for the buyer's purpose, even though such defects were latent and undiscoverable.[105]

Lord Diplock in *Ashington* also appeared to indicate that the extent of the seller's liability included latent defects when he commented:

> It does not matter that the seller does not possess the necessary skill or judgment nor does it matter that in the then state of knowledge no one could by exercise of skill or judgment detect the particular characteristic of the goods which rendered them unfit for that purpose. This may seem harsh on the seller but its harshness is mitigated by

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103 [1984] 2 NZLR 163, 182. This test was adopted and applied by Gallen J in *Matthews v Bullock and Co Ltd*, supra note 39.

104 *Taylor v Combined Buyers Ltd*, supra note 54, at 632, per Salmond J.

105 Ibid, at 629. In *Hardwick Game Farm*, supra note 19, at 116, Lord Pearce agreed that the seller's liability extended to latent defects when he commented: "Goods are not fit if they have hidden limitations requiring special precautions unknown to the buyer or seller. The groundnut meal delivered was plainly not fit for the purpose of reselling in small lots to compounders of food for cattle and poultry. It was highly toxic".

the requirement that the goods must be of a description which it is in the course of the seller's business to supply.[106]

VI. Analysis of *Hamilton* Decision

It now becomes necessary to examine whether the law on fitness for purpose was correctly applied in *Hamilton*, as this decision has been described as being "New Zealand's leading decision on fitness for purpose".[107] The decision will be considered in relation to three ingredients in section 16(a), namely, the need for a buyer to make known its purpose, the meaning of particular purpose, and the question of reliance on the seller's skill and judgment. It was the failure of the buyer to meet this last requirement that led the Privy Council ultimately to find against the buyer.

1. Buyer's Requirement To "Make Known" Its Purpose

It is a central tenet of this analysis that the decisions in *Hamilton* fundamentally altered the law in New Zealand on what is required of a buyer to make known its purpose. Specifically, the question becomes whether, for the purposes of New Zealand law, a buyer can only make known its purpose expressly. A corollary to this is whether the statutory alternative enabling a buyer to make its purpose known explicitly is now redundant in New Zealand.

The Court of Appeal in *Hamilton* observed that Williams J in the High Court decision[108] decided against the Hamiltons on the ground that it had not been established on the evidence that they had either expressly or by implication made known their particular purpose to the Papakura District Council ("PDC"). Gault J, in delivering judgment for the Court of Appeal, commented on whether the requirement for a buyer to make known its purpose had been met. This was because PDC had knowledge that a number of customers that were drawing on the town water supply were involved with glasshouse horticultural activities, and that PDC knew that the presence of herbicides in the water could cause damage to crops. Gault J's response to this state of knowledge by PDC was that this was not sufficient in order to satisfy the statutory requirement for a buyer implicitly or expressly to make known its purpose. The Court of appeal expressed the view that "[p]lainly the words of the statute require more".[109]

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106 Supra note 8, at 885.

107 Lendrum, supra note 43, at 58.

108 Supra note 3 (HC).

109 Supra note 3 (CA).

It would appear from the Court of Appeal judgment,[110] and implicitly from the Privy Council's majority advice,[111] that mere knowledge of the buyer's purpose is not sufficient to amount to a communication of the buyer's purpose to the seller. This is despite the Court of Appeal's specific identification in *Hamilton* of the correct legal test that a buyer needs to meet, in order to convey its purpose to the seller. The Court noted "the importance of the statutory requirement that the particular purpose be made known by the buyer to the seller".[112]

The statutory requirement is to make the purpose known. The Court of Appeal, in responding to the plaintiff's argument, appeared to acknowledge that the buyer had argued that it had impliedly done this in that the seller had knowledge of it. The Court of Appeal rejected the argument that impliedly making known a buyer's purpose was sufficient to meet the statutory test. This was because there was still a requirement for the buyer to expressly or directly communicate its purpose to the seller.[113]

The discussion of the legal test for implicitly making known a buyer's purpose, as discussed above, makes it clear that the object of the requirement is to ensure that the seller is in some way informed of the buyer's purpose. Although the wording of the provision articulates the requirement as the buyer needing to make known its purpose impliedly, the decisions that have considered the requirement have given it a very wide meaning. The requirement is certainly not narrowly or literally interpreted so as to restrict its meaning only to those actions on the part of the buyer that make its purpose known to the seller. In other words, there is no requirement in law that, for the seller to be informed albeit impliedly of the buyer's purpose, any means employed by the seller to be so informed must ultimately be found to have, as their source, the buyer. The rationale for this narrow argument is that, even though the seller can be informed of the buyer's purpose implicitly by any means whatsoever, such means must ultimately have the buyer as their source. This is because, by statute, the buyer bears the onus of making its purpose known. This is not how restrictively the buyer's responsibility for impliedly making known its purpose has been interpreted. The requirement is not that the buyer implicitly communicate its purpose but that the buyer "impliedly make

110 Ibid, at 276.

111 Ibid, at 318, where the majority accepted the Court of Appeal finding that the seller had mere knowledge of the buyer's purpose.

112 Ibid, at 276.

113 Ibid.

known" its purpose. The law is clear that this covers any other means whatsoever by which the seller either knew or ought to have known of the buyer's purpose.

This legal requirement is also consistent with commercial reality, as was forcefully argued before the Privy Council but rejected by the majority. The buyers through their counsel argued that the threshold for meeting the legal test of "implicitly making known" a buyer's purpose cannot be raised so high as to be made unrealistic in the commercial marketplace. Specifically, it was argued that it could not be the case that, to avail themselves of the protection afforded by section 16(a), the Hamiltons were obliged individually and specifically to communicate their particular purpose of using water for glasshouse horticulture to the seller.[114] Counsel for the buyers in support of the argument provided the analogy of sales by means of vending machines which were to unknown buyers. Simply because such buyers were unknown did not relieve the seller of meeting its obligations under section 16(a) to supply products or goods that were fit for the buyer's purpose. The Privy Council merely acknowledged that "[t]here is considerable force in [such a] submission",[115] but rejected it for the same reasons as the Court of Appeal had in that all it alluded to was general knowledge on the part of the seller of the buyer's purpose. Mere knowledge was not sufficient and the buyer had to state specifically to the seller that it needed the water for glasshouse horticulture.

In adopting such an interpretation, a significant divergence in judicial opinion has emerged on the requirement for implicitly making known a buyer's purpose. The law as had been developed and applied until *Hamilton* drew a clear distinction between the requirements in section 16(a) for a buyer "impliedly to make known" its purpose and the requirement for a "particular purpose". There was no suggestion that, to meet the first requirement of "implicitly making known", there was also a requirement that it also had to be "particularly" made known. The requirement of "particularity" only related to "purpose" and not to the first ingredient of "implicitly making known". The issue of "implicitly making known" was taken to mean making known in a specific or general sense, and the law recognised that such could be made known by any person, not only the buyer. It was a logical interpretation based on the statutory wording requiring a buyer implicitly to make known its particular purpose, rather than a requirement prescribing a buyer implicitly yet particularly to make known its particular purpose.

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114 Ibid, at 318.

115 Ibid.

Even if the Privy Council was dismissive of any suggestion that "implicitly make known" included any actions of an unspecific nature by the buyers or anyone else, were there any such actions on the facts which nonetheless qualified as "implicitly making known"? It would appear that there were a number of such actions which would have so qualified and which would have placed the seller in a position of having knowledge of the buyer's purpose. First, there were other growers of horticultural crops such as Messrs Edgar, Haydon, McCarthy, Tod and one other grower neighbouring the buyers.[116] It was clear that Haydon's property also drew on the town water supply.[117] McCarthy had been a grower of standard tomatoes on the Bunnythorpe Road Property from 1978 until February 1995 when he leased the property to the buyers.[118] However, Edgar, Tod and McCarthy drew on the town water supply primarily for horticultural use. This in itself would have served to put the seller on notice that there were other horticultural users such as the Hamiltons who were drawing on the town water supply for the particular use of horticultural crop farming. This may have served as the basis for statements by Hamilton, and accepted in the High Court decision, that the seller was aware of the buyer's use of the water for horticultural purposes and that the seller "actively promoted horticultural development in the area".[119]

Of further interest of how well informed and knowledgeable the seller was of the buyer's purpose was the seller's knowledge of McCarthy's horticultural activities on the Bunnythorpe Road property for 18 years prior to it being leased to the buyers. McCarthy gave evidence that the PDC as seller was aware that his Bunnythorpe Road property had been used to grow tomatoes for at least 18 years when PDC required a prior owner to erect a new packing shed. Later in 1981, McCarthy applied to PDC for a permit to build a new glasshouse for tomato growing. McCarthy, in giving his evidence, expressed the view that the Council would have knowledge that his glasshouses were being employed for horticultural use because of water consumption that had occurred through a separate meter. McCarthy also asserted that PDC knew that his glasshouses were being used for commercial horticultural production. This was because of his need to have a dangerous goods licence for a large diesel tank used for heating the three glasshouses, and the fact that the tank was inspected every year by an officer

116 Supra note 3, at 19 (HC).

117 Ibid, at 41.

118 Ibid, at 30.

119 Ibid, at 11.

of the Council.[120] Although McCarthy admitted in cross-examination that he had personally never raised with the seller issues of water quality for the type of growing operation he conducted, the fact that such was the knowledge the Council had or was appraised of concerning his growing activities was an important aspect for the buyer's case of having met the terms of section 16(a). It meant that, in terms of the test for knowledge by the seller as propounded by *Ashington*, knowledge of such activities conducted by a third party would be imputed to the seller as knowledge of the buyer's purpose. Such imputation of knowledge on the seller's part would be even more compelling in a case such as the Hamiltons. In *Hamilton*, the buyers had engaged in horticultural activities identical to those of McCarthy's as third party, and the seller over many years had reason to have full knowledge of the third party's activities.

It could also have been argued that, if section 60(2) of the SGA 1908 preserved the rules of agency insofar as they had application in the context of sale of goods, the buyer's agent had indeed made known its purpose to the seller's agent. As the agents of the buyer and seller respectively had so acted, it could be said that, on the principles of agency law, each agent having acted under due authority from their respective principals, it followed that the buyer had indeed made known its purpose to the seller. The individual whose actions could arguably be construed as making known the buyer's purpose was a Mr van Essen whose role was referred to in the High Court judgment,[121] the Court of Appeal judgment,[122] and the minority opinion in the Privy Council.[123] The evidence accepted by the High Court was that, since 1991, van Essen, in his role as a greenhouse vegetable crop adviser, had advised the Hamiltons on tomato growing. Such advice also included matters involving nutritional management. In his capacity as advisor and in respect of the formulation of feed recipes for the plants, van Essen had "said that he had spoken to the Papakura District water engineer four or five times over a three-year period as to nutrient and element levels in the town water supply".[124] While the Court of Appeal and Privy Council minority judgments make reference to van Essen, this was only in the context of whether there was reliance by the buyer on the seller. The Court of Appeal went a step further by suggesting that such contact, although acknowledged as having occurred, did not result in the buyer's agent communicating any needs of the buyer. It is understandable for the Court of

120 Ibid, at 31.

121 Ibid, at 32.

122 Supra note 3, at 277.

123 Ibid, at 329.

124 Ibid, at 32.

Appeal to have taken the view that the role played by the agent did not amount to any communication of the buyer's needs. This is because the Court had consistently taken the view that any communication by the buyer had to be express in order to qualify under section 16(a).

Just as Lord Wilberforce in *Ashington*[125] had commented on the agency question in respect of the seller where no issue had been taken as to any limitation on the knowledge of the seller's agent who acted on the seller's behalf, so also no issue was raised in *Hamilton*. In fact the issue of the capacity of an agent to act on behalf of its principal went further in *Hamilton* than had been the case in *Ashington*. In *Ashington* the issue of agency, as described by Lord Hodson and as examined for its implications by Lord Wilberforce, only extended to one agency relationship, namely, that of the seller and its agent. In *Hamilton* the agency issue went further in that the communication was between the seller's agent, namely, the water engineer and the buyer's agent, van Essen. At no stage in the High Court, Court of Appeal and Privy Council judgments was the capacity of the respective agents questioned insofar as their ability to act on behalf of their principals was concerned. It must therefore be accepted that both agents had the necessary capacities to act on behalf of their principals respectively. It follows that the communication, being as it was about nutrient and element levels in the town water supply, must have made known to the seller the purpose for which the buyer required the goods. Even if, as the High Court found, the buyer's agent was never told that the water might be unsuitable for horticultural use, nor had the buyer's agent even asked the seller of the herbicide levels in the water, this would appear to be immaterial. If, as a result of the communications, the purpose was made known, namely, use of water for greenhouse vegetable crop growing, the legal test for "making known implicitly" would have been met.

In summary, then, the communications by the respective agents of the buyer and seller could well have been relied on by the buyer as evidence of having made known its purpose to the seller.

Thus far the discussion has emphasised the test of a buyer making known its purpose as a result of mainly third party actions as well as actions by the buyer indirectly through its duly authorised agent. However, there were also actions by the buyer itself that would have conveyed knowledge of its purpose to the seller. As Williams J noted in the High Court judgment,[126] in 1994 the Hamiltons received an award for excellence in food science at the

125 Supra note 8, at 877.

126 Supra note 3, at 13.

Printpak-UEB Food Awards for cherry tomatoes and were congratulated by the mayor of Papakura. Thus, the first citizen of the town that supplied water to the plaintiffs, and through the mayor the Council itself, knew in a general sense that the Hamiltons were numbered among the other horticulturalists, and also specifically knew of their horticultural activities and that these included the growing of cherry tomatoes. The Hamiltons were also directly responsible for bringing to the knowledge of the Council their purpose for the water, through the very large volume of water that they drew from the town water supply for their horticultural purposes. As the minority Privy Council opinion observed:

> [B]y asking for a large-scale supply of water for their horticultural business, the Hamiltons did impliedly make known to Papakura that they required the water for growing crops in the greenhouses. Indeed we find it hard to imagine that Papakura could have supposed that the volume of water in question was required for anything else.[127]

These means by which the seller obtained knowledge of the buyer's purpose were in addition to the matters referred to in the Court of Appeal judgment.[128] The common element in all these means was summarised by the Court of Appeal as follows:

> Together this material establishes that the Council knew at the relevant time that its town water supply was used for protected crop growing including the use of soil-less techniques, knew growers preferred that water to bore water because of its quality and knew that the catchment area was vulnerable to contamination from (inter alia) pesticides.[129]

The Court of Appeal's view that the buyer would not have made its purpose known implicitly if it did not expressly communicate its purpose to the seller is disturbing. This is contrary to established authority and increases the burden on the buyer quite considerably so as to render the protection afforded by section 16(a) utterly meaningless. This could not possibly have been the effect of *caveat venditor* as enshrined within the provisions of section 16(a)

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127 Ibid, at 326.

128 Ibid, at 277.

129 Ibid.

2. Buyer's Particular Purpose

Lord Morris of Borth-y-Gest in *Hardwick* observed that there is no magic in the word "particular".[130] If a buyer explains its purpose or impliedly makes it known, that will qualify as a "particular" purpose. Lord Wilberforce in *Ashington* was clear that broadly defining a "particular purpose" was an acceptable approach, and in fact applied such a broad approach to "particular" in his application of section 16(a) to the facts in the second appeal.[131]

A commentator[132] has suggested that the requirement of "particular purpose" would have been met on the facts in *Hamilton* if the Hamiltons had made known their particular purpose as growing "Evita" cherry tomatoes hydroponically. With respect, this has not been the degree of specificity of "particular purpose" required as a matter of law. In particular, the highly persuasive decisions that were considered in *Hamilton*, namely, *Ashington* and *Hardwick*, had accepted that a widely stated purpose would qualify as "particular". In respect of this requirement, the Court of Appeal appears to have considerably narrowed the requirement of "particular". The effect of this is that a very narrow or literal meaning is attributed to the phrase and in turn this makes it far more difficult for a buyer to come within its purview.

3. Buyer's Reliance on Seller's Skill or Judgment

The Privy Council majority judgment dismissed the appeal by the Hamiltons on the singular ground that their actions failed to demonstrate that they had shown reliance as required by section 16(a). This was despite the law in decisions such as *Hardwick* and *Ashington* which had held that, once the buyer had made known its particular purpose, there was a presumption or inference of reliance. The majority judgment in *Hamilton* raised the threshold of this requirement higher so that, on the facts, the buyer was found not to have met this requirement and so failed to obtain the protection of section 16(a). In the majority opinion, the buyer was required to make its purpose known "so as to show" reliance, and also had to show that the seller knew of its reliance. The effect of this additional requirement on the buyer is in effect to remove or negate any presumption or inference of reliance by the buyer. No longer can the buyer as a matter of law presume it has acted "so as to show" reliance merely by impliedly making known its particular

130 Supra note 19, at 93.

131 Supra note 8, at 877-878.

132 Lendrum, supra note 43, at 57.

purpose. It must go further and notify the seller expressly that it is in fact relying on the seller, before it can claim to have shown reliance.

The rationale given by the Privy Council majority for this significant new imposition on the buyer was because of the unique position of the seller. Its position was unique because of the particular good involved in that the seller was in the business of selling one and the same product, namely, water from one single source of supply to all its purchasers which numbered more that 38,000 people. Coupled with this was the fact that the only standard that the seller was required to meet in respect of the good was the drinking standard. These specific circumstances served as mitigating factors for the seller. It followed that, since the buyer had not specifically shown that the seller knew of its reliance, the buyer failed in its bid to claim the implied condition under section 16(a). The buyer failed even though it was clear on the facts that it had acted well beyond the legal requirement of making its purpose known "so as to show" reliance. This was because it had not merely made known its particular purpose to the seller. It had actually acted "so as to show" reliance on the seller by using the town water supply instead of bore water.

The second aspect which indicated that it had acted "so as to show" reliance on the seller was the large volume of water that it had drawn from the town water supply. The third aspect was that, unlike the New Zealand Milk Corporation, other large businesses such as pharmaceutical, photo-processing, hospital and brewery concerns, and specialist water users like the kidney dialysis patients, the buyer had not installed its own filtration plant to ensure that the water met its particular needs. These measures by the buyer were not considered by the majority as showing reliance, as there was no evidence that the sellers knew of the particular steps that had been taken by the buyer.

If the seller was in such a unique position as described by the majority, because of the type of product it was supplying and the statutory obligations it was under for that supply, the fact remains that the relationship with the buyer was contractual.[133] Since hydroponic tomato-growing, horticulture in general and the use of herbicide[134] were prevalent in the area, it would have been a prudent measure for the seller not to supply the product or

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133 Note that the statutory obligation was to supply to regular domestic consumers. The supply to the buyers was termed "extra-ordinary supply", and was not obligatory, hence the contractual nature of the relationship.

134 Williams J, supra note 3, at 148 spoke of "the prevalence of hydroponic tomato-growing and the use of herbicide".

alternatively, if it chose to supply, to disclaim responsibility for the suitability of the water. The seller in fact specifically disclaimed responsibility for the water quality to a rose grower in Drury in 1996. It followed that it could have done the same with respect to the buyers and others in their position. It appears that, because the seller did not so act, and gave no warning of the risk of pesticides of which it was aware, the buyer was saddled with the costly consequences of the seller's decision to supply the water.

VII. CONCLUSION

The overriding principle pervading the implied conditions in the SGA 1908, particularly section 16(a), is that of *caveat venditor* or seller beware. As stated by Thomas J in the Court of Appeal in *B Bullock and Co Ltd v Matthews*[135] and reaffirmed by the minority Privy Council opinion in *Hamilton*:

> The essential function of the implied term in the contract of sale between Papakura and the Hamiltons is to distribute or allocate loss between them. If the Hamiltons impliedly made known to Papakura that they needed the water for covered crop cultivation so as to show that they were relying on its expertise to supply water suitable for that purpose, then the law says that the parties contracted on the basis that the water supplied would indeed be reasonably fit for that purpose.[136]

However, the effect of the Privy Council decision in *Hamilton* is not to apply the law but to erode dramatically the effect of the protection afforded to a buyer by the implied provision in section 16(a). The decision will have a very significant impact on sale of goods law in New Zealand.

A prudent course for subsequent Courts would be to distinguish the decision on its facts. The very restrictive interpretation of section 16(a) in *Hamilton* may perhaps be explained by the special facts, namely, a local authority supplying water to a minimum health standard and subject to statutory obligations. Any wider application of the *Hamilton* decision to sale of goods law in regard to the application of section 16(a) generally would mean an unwarranted interpretation of section 16(a) which was designed to protect the buyer and hold the seller accountable.

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135 Supra note 38, at 12.

136 Supra note 3, at 331.