OPEN TERMS AS TO QUANTITY IN CONTRACTS FOR THE SALE OF GOODS

In this note it is proposed to consider open terms as to quantity in contracts for the sale of goods. Unlike other forms of open terms where the court may be able to preserve the contract by reference to the standard of 'reasonableness', in relation to quantity '... it is not usually possible to invoke the standard of reasonableness in order to give the promise sufficient definiteness to make it enforceable'.[1] However, it will be seen that, although the courts cannot usually[2] fill such a gap in the contract by reference to a 'reasonable quantity' in the same way in which other gaps can be filled, a contract, which fails to provide for the quantity of goods, can still be made sufficiently complete by methods other than a reference to 'reasonableness'.

Before considering these circumstances, it is proposed to note briefly two matters which raise associated, but distinct, problems. The first is where the contract refers to the subject matter in terms which are too vague and the second is where the parties use words of estimation or approximation in their contract.

VAGUE TERMS

Although it would be very unusual for the agreement to make no mention of the subject matter at all, it may easily happen that the contract refers to the subject matter but uses such terms that it cannot be identified with sufficient certainty. A promise to sell 'a first class car' or to buy all the suits 'which X may be able to purchase from Y' would be examples of cases falling within this category.[3] With cases relating to open terms as to quantity the problem is different because the goods are identified; it is merely that the parties have not fixed the quantity of the goods.

It may be noticed that the courts may still be able to assist the parties, by means of admissible extrinsic evidence, even where they have used vague phrases to describe the subject matter of their contract. *MacDonald and Another* v. *Longbottom*[4] illustrates this possibility. In that case the offer was 'for your wool 16s. per stone...' and evidence of a conversation, prior to the contract, was held to be admissible to identify what was meant by 'your wool'.

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1 *Williston on Contracts*, (3rd ed. 1959), Vol. 1, at p. 135.

2 See, however, *F. & G. Sykes (Wessex) Ltd.* v. *Fine Fare Ltd.* [1967] 1 Lloyd's Rep. 53, where the court upheld a contract, which provided for further agreement as to quantity, by the use of the standard of a 'reasonable quantity'.

3 See *Williston on Contracts* (3rd ed. 1959), Vol. 1, at pp. 135-138 for the many examples of this form of indefiniteness.

4 [1843-60] All E.R. Rep. 1050.

WORDS OF ESTIMATION/APPROXIMATION

MacDonald and Another v. *Longbottom*[5] also illustrates the principle that words of estimate will usually have no effect upon the obligations of the parties. The defendant had rejected a delivery of 2,505 stones as being a larger quantity than that which he alleged had been orally agreed upon. In rejecting the defendant's right to do this, the court took the view that statements made during the conversation prior to the written contract that the amount of wool would be '2,300 stones, 100 stones more or less . . .' were mere words of estimation and not contract. Other examples would include the following: 'say about 600 red pine spars',[7] 'say from 1,000 to 1,200 gallons per month',[8] 'about 150 tons',[9] 'The quantity will, we expect, be about . . .'[10] In all these cases it was held that these phrases were merely estimates, and not promises, as to quantity. It may be observed that the factor which helped the court to arrive as this conclusion was that in all the cases there was an objective standard, contained in the contract, by which the quantity could be measured. Thus in *McConnel* v. *Murphy*[11] ('say about 600 red pine spars') the agreement referred to the subject matter of the sale as 'All the spars manufactured by R.M.'; in *Stokes* v. *Hart*[12] ('The quantity will, we expect, be about . . .') the objective standard was the requirements of a third party; in *Gwillim* v. *Daniell*[13] ('say from 1,000 to 1,200 gallons a month') the quantity was the good faith output of the seller and in *McLay & Co.* v. *Perry & Co.*[14] ('about 150 tons') the sale was for a specific heap of scrap metal.[15]

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5 *Ibid.* See also *Hillas & Co.* v. *Arcos* [1932] All E.R. Rep. 494 ('softwood goods of fair specification') as an example of the problem of the identification of the subject matter where the parties had used vague phrases. See particularly the judgment of Lord W. Wright, *ibid.*, at 506.

6 Notice, however, that with either requirements or output contracts, estimates as to quantity do affect the obligations of the parties.

7 *McConnel* v. *Murphy* (1873) L.R. 5 P.C. 203.

8 *Gwillim* v. *Daniell* (1835) 2 C.M. & R. 61. *Cf. Leeming and Another* v. *Snaith* (1851) 20 L.J. (Q.B.) 164 ('say not less than 100 packs') where these words were held to be negative words of promise which defined the minimum quantity; see *McConnel* v. *Murphy* (1873) L.R. 5 P.C. 203, at pp. 217-218. Notice the intermediate position as illustrated by *Moray Park Fruit Company Limited* v. *Crowe and Newcombe* [1934] S.A.S.R. 149, (the sale of the output of a particular packing shed — 'Quantity: the full pack, between 90 and 100 tons, according to what is treated'). This was held (in the light of the seller's business and the nature of the goods) to be a 'qualified promise'. The buyer was bound to take the whole pack but the seller would not be liable for delivering a less amount than that stated provided that the deficiency was caused by circumstances (the weather, for example) outside the seller's control.

9 *McLay & Co.* v. *Perry & Co.* (1881) 44 L.T. 152.

10 *Stokes* v. *Hart* (1887) 8 L.R. (N.S.W.) 447, in particular at 456-457.

11 (1873) L.R. 5 P.C. 203.

12 (1887) 8 L.R. (N.S.W.) 447.

13 (1885) 2 C.M. & R. 61.

14 (1881) 44 L.T. 152.

15 See also *Reilly and Another* v. *Finlay* (1900) 21 N.S.W.R. 100 ('the whole of the wethers on Clyde station'). *Cf. Lowe and Another* v. *Josephson and Another* (1867) 6 S.C.R. (N.S.W.) 132 ('2,000 head of cattle, more or less, being a general herd bred by us on the Mole Station') where the court held that '2,000 head of cattle, more or less', were words of contract.

Mere words of estimate can be distinguished from words of approximation. The former will not usually have any effect upon the obligations of the parties at all. The latter provide a margin within which the obligation can be performed. If the seller's obligation is to deliver 100 tons 'or thereabouts' he would not be in breach if he were to deliver either 95 or 105 tons but the buyer could refuse delivery of 150 tons. In *Cross* v. *Elgin*,[16] for example, the buyer was held to be entitled to refuse to accept 350 quarters of rye where the contract provided for 'about 300 quarters, more or less'.[17] Thus, with words of approximation, the quantity is fixed and they provide an element of elasticity as to the particular obligation.

Methods of Preserving Open Term Contracts as to Quantity

Whilst it is reasonable to say that the court cannot usually[18] fill the gap in a contract by reference to a 'reasonable quantity', it is submitted that an agreement can still be made sufficiently complete in the following circumstances:

i) Where the contract provides an objective standard.
ii) Where the contract provides the necessary machinery.
iii) Where there is evidence of a previous course of dealing.

i) *The Contract Provides an Objective Standard.*[19]

Some cases dealing with estimates have already been noticed and it was seen that in each there was an objective standard, contained in the contract, which enabled the court to determine the quantity with sufficient certainty. It is proposed to examine some of those cases again to illustrate the way in which this can be done. The contract which does not specify the quantity may provide, for example, for the determination by other terms which are contained in the agreement. Similarly, the nature and purpose of the contract may help as in the case of either requirements or output contracts. In all these situations the quantity is not fixed at the date of entering into the contract but in all of them it will become certain in the course of performance.

In *McConnel* v. *Murphy*,[20] for example, there was a contract for the sale of 'all the spars manufactured in R.M., say about 600 red pine spars, . . .' and it was held that the respondents were bound to accept the 496 spars manufactured by R.M. and the expression 'say about 600 spars' was regarded as an estimate only. Thus the quantity, although

16 (1831) 2 B. & Ad. 106.

17 See also *Three Rivers Trading Co. Ltd.* v. *Gwinear & District Farmers Ltd.* (1967) 111 Sol. J. 831; (sale of '400 tons (Approx.)' of barley).

18 See, however, *F. & G. Sykes (Wessex) Ltd.* v. *Fine Fare Ltd.* [1967] 1 Lloyd's Rep. 53, where the court upheld a contract, which provided for further agreement as to quantity, by the use of the standard of a 'reasonable quantity'.

19 'Standards are objective if the criteria and the methods used to apply them are uninfluenced by the wishes and opinions of the parties.'; Schlesinger, *Formation of Contracts* (1968), Vol. 1, at p. 87, n. 8.

20 (1873) L.R. 5 P.C. 203.

not fixed at the date of the formation of the contract, became certain when there was delivery of the spars which had been manufactured by R.M. The result was the same in *Tancred, Arrol* v. *The Steel Coy. of Scotland*[21] where the respondents had agreed to supply the whole of the steel required for the Forth Bridge. The House of Lords regarded the provision describing the 'estimated quantity of steel we understand to be 30,000 tons, more or less' as words of estimate and held that the buyer was bound to take the whole of the steel required for the bridge from the respondents. The precise quantity of steel was unknown at the date of contracting but, as the contract itself described the purpose for which the steel was required, the quantity would be that amount which would be necessary for the Forth Bridge. It is submitted that the same approach can be applied to any case where the contract states the purpose for which the goods are purchased or the use to which they are going to be put so that the quantity can be measured in this way.

Again, with either the requirements, the 'total consumption' contract or the output, the 'total production', contract, the quantity is unknown at the date of contracting but there is again an objective standard in both cases. So far as the requirements contract is concerned, the quantity will be that which the buyer in good faith requires or needs.[22] With the output contract, the quantity will be the good faith output of the seller.[23] The special problems to which these contracts give rise have been considered elsewhere.[24] It is sufficient to notice here that in both cases the nature of the contract provides a sufficiently certain standard, in terms of the quantity of the goods, so that the gaps can be filled and the contracts enforced.

ii) *The Contract Providing the Necessary Machinery.*

It is well established that in relation to the price term the court will uphold a contract which provides the machinery necessary for the fixing of that term. It may be provided that a third party or one of the parties is to fix the price. In the latter case, this would be upheld provided that the court was satisfied that the price had been fixed in good faith. It is submitted that, as with the price term, the court would uphold an agreement which provided that the quantity was to be fixed by a third party or by one of the parties, subject to the requirements of good faith in the latter instance.

Alternatively the contract may contain an arbitration clause and this is a very useful piece of machinery for the purposes of filling the gap. *F. & G. Sykes (Wessex) Ltd.* v. *Fine Fare Ltd.*,[25] although not an 'open term' case because the parties had expressly provided for further agree-

21 (1890) 15 App. Cas. 125.

22 See *Kier & Co. Ltd.* v. *Whitehead Iron & Steel* [1938] 1 All E.R. 591.

23 See *Gwillim* v. *Daniell* (1835) 2 C.M. & R. 61.

24 See 'The Requirements and the Output Contracts', (1964-67) 2 *U.Tas.L.R.* at pp. 446-470.

25 [1967] 1 Lloyd's Rep. 53.

ment, illustrates the assistance provided by an arbitration clause and also emphasises the reluctance of the court to refuse to uphold an agreement where the parties have begun performance of their obligations. After providing for the quantity during the first year the contract stated that '... and thereafter such other figures as may be agreed between the parties hereto ...' The agreement, which was to last for five years, also included an arbitration clause. After performing the contract for eighteen months, the defendants attempted to repudiate the agreement and they argued that it was too indefinite to create legal relations. The court, in rejecting this argument, placed emphasis upon the presence of the arbitration clause. Lord Denning, with whom the other members of the court agreed, held that the provision that the figures were to 'be agreed' could be made certain by reasonable figures being ascertained by an arbitrator. It is submitted that the same solution could be adopted, even more easily, where the parties had left open the term as to quantity as there would be no difficulties associated with a reference to future agreement as was the position in *Sykes'* case.[26]

iii) *A Previous Course of Dealing.*

Taking the facts of the *Sykes'* case,[27] but without an arbitration clause, and assuming that the parties had left open the quantities after the first year, it is submitted that the court could determine for itself what would be a reasonable quantity by reference to the quantities which had previously been delivered after the first year. These amounts could at least form the basis for determining the seller's obligation in relation to future quantities. It may even be possible to use the same approach where there is evidence of a course of dealing between the parties in previous contracts. If, for example, the parties have entered into the same contracts over a period of time in respect of the same quantity their failure to provide for the quantity of goods in the present contract may be taken as indicating that the parties feel that it is no longer necessary, in view of their past dealing, to specify the quantity. In these circumstances, it is submitted that the court could properly accept evidence of this course of dealing in order to fix the quantity of goods in the present contract.

Conclusion

It is clear that a reference to the standard of what is 'reasonable' is inappropriate as a gap-filling device in relation to open terms as to quantity. In spite of this, it is evident that there is much that the courts can do, by the use of other objective criteria, to assist the parties to carry out their contractual intentions.

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26 *Ibid.*

27 *Ibid.*

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