against the purchaser, and it was refused, the facts withheld were within the exclusive knowledge of the vendor or his agent. Here, it was as a result of his own inquiries that the purchaser discovered that the land was subject to the Interim Development Order. The purchaser, therefore, could not rescind, but could the vendor, by failing to seek specific performance, deprive the court of its discretion under section 49 (2)?

In *Zsadony v. Pizer*[4] Dean J. favoured a general and unrestricted interpretation of the sub-section—rejecting counsel's submission that it did not apply where the vendor had validly rescinded the contract and forfeited the deposit. In *Mallett v. Jones*[5] Adam J. considered this point also. There the plaintiff sought the return of his deposit after confirming a contract entered into on the basis of a false representation, knowing it to be so. Adam J. stated that, although couched in the widest possible terms, the discretion was to be exercised on basic legal principles and it applied where at law the purchaser had no right to the deposit, but the vendors would not, in all the circumstances of the case, be entitled to succeed in a suit for specific performance.

However, Monahan J. continued, although the actions of the vendors in this instance would prompt refusal of a suit for specific performance, it did not follow that in every similar case, the plaintiff could rely on section 49 (2). He preferred to follow the line of reasoning in *Zsadony v Pizer*[6] and *Mallett v. Jones*[7] rejecting the narrower trend of thought suggested by *Re Hoobin.*[8] As this point was not fully argued in the latter decision, he quotes Dean J. as stating that he understood O'Bryan J. to hold a view similar to his own.

This decision crystallizes the position of Melbourne land under the purview of the Town and Country Planning Act. While the Interim Development Order is in force, at least, it will not cause any material defect in title of land subject to it, unless it results in a total failure of consideration on the part of the vendor, when the ordinary rules of contract law will apply.

MARY E. HISCOCK

STAR EXPRESS MERCHANDISING COMPANY PTY LTD v. V. G. McGRATH PTY LTD[1]

Hire purchase—Unascertained goods—Purpose known to owner—Nature of implied warranty as to fitness

The complainant, Star Express Merchandising Company Pty Ltd, brought a special complaint against the defendant in a court of petty sessions claiming damages arising out of the hiring of a trailer. The magistrate made an order in favour of the complainant for £126 with £92 14s. 0d. costs. The defendant obtained an order *nisi* to review this decision and this was made returnable before the Full Court.

[4] [1955] V.L.R. 496. [5] Unreported, but see, on appeal [1959] V.R. 122.
[6] [1955] V.L.R. 496. [7] *Supra* n. 5. [8] [1957] V.R. 341.
[1] [1959] Argus L.R. 976. Supreme Court of Victoria; O'Bryan, Dean and Smith JJ.

The complainant hired the trailer from the defendant in order to carry a load of steel from Melbourne to Adelaide. The front cross-member of the trailer 'collapsed' after it had proceeded only one hundred yards. The complainant had sent down their driver to pick up the trailer and he had made an 'on the spot' inspection of it. The crack in the cross-member which caused the collapse was not, however, visible to the naked eye.

The magistrate had found that the crack was an old one and that the defendant had not taken sufficient care to examine the trailer before delivery to the complainant. He considered that a better examination by the defendant would have disclosed the defect, particularly as it was known to the defendant that it had to carry a heavy load.

Before the Full Court the defendant company contended that its duty was discharged if it exercised reasonable care in examining the trailer and that on the evidence the magistrate should have held that reasonable care had been exercised. On the other hand, the complainant contended that if, in fact, the trailer was not reasonably fit for the purpose made known to the defendant, the warranty was broken whether due care was exercised or not. They claimed that the warranty was that 'the trailer was reasonably fit for the disclosed purpose'. Clearly, in fact, it was not. Alternatively, they claimed that even if the duty were to use reasonable care, the magistrate was justified by the evidence in holding that reasonable care had not been used.

Thus the main ground of the appeal centred around the nature of the warranty implied by law into a contract to hire a chattel.

The defendant had contended that no such warranty could be implied in this case because this was a hire of a specific chattel. The Court conceded that where a specific chattel is hired there is no warranty to the effect that it will be suitable for the hirer's purpose.[2] However, in this case Their Honours stated that the chattel hired was unascertained and not specific. The complainant wanted to hire 'a trailer'. In addition, the Court stated that the evidence was sufficient to show that the hirer had sufficiently made known to the owner the purpose for which he wanted the trailer. Dean J also stated[3] that it was a fair and proper assumption that McGrath was a 'dealer in trailers' and that the hirer relied on his skill and judgment. Smith J., however, thought that it was doubtful whether—in a contract of hire—the goods should be of a description which it is in the course of the supplier's business to supply—as is the case when implying the warranty as to fitness into a contract of sale.[4]

Having determined these preliminary points, the Court then went on to discuss the exact nature of the warranty to be implied into a contract of hire, where the hirer makes known to the supplier the purpose for which he requires the chattel, where the supplier is a dealer in such a chattel, and where reliance is placed on his skill and judgment. Dean J. pointed out[5] that in contracts of hire—just as in contracts of sale—there

[2] *Robertson v. Amazon Tug & Lighterage Co.* (1881) 7 Q.B.D. 598.
[3] [1959] Argus L.R. 976, 979.
[4] *Ibid.* 983. [5] *Ibid.* 979.

should be implied a warranty of some nature. Hitherto many had treated cases of sale and hiring as carrying the same warranties.[6]

Tracing the history of the matter, the Court said that the first observations on the nature of the warranty in contracts of hire were made by Lord Abinger C.B. when he said:

> If a carriage be let for hire and it breaks down on the journey the letter of it is liable and not the party who hires it. So, if a person hire anything else of the nature of goods and chattels, can it be said that he is not to be furnished with the proper goods—such as are fit to be used for the purpose intended? Undoubtedly the party furnishing the goods is bound to furnish that which is fit to be used.[7]

The next step in the development of the nature of the warranty came in *Randall v. Newson*.[8] This was a case concerning a contract of sale—the sale of a carriage pole which broke causing injury to the buyer. The Queen's Bench Division of the High Court decided that the buyer could not succeed unless he established negligence on the part of the seller. On appeal, this decision was reversed. Brett J.A.[9] stated that the warranty in a contract of sale is absolute. He said that if a chattel was to be used for a particular purpose it must be reasonably fit for that purpose. In deciding this, he enunciated what the Full Court believed to be the settled rule in English law—a rule which generally applied to contracts of sale, contracts of work and labour, hire purchase contracts and contracts of hire. In each case the supplier is bound to furnish an article reasonably fit for its intended and known purpose and is liable if he fails to do so without proof of negligence on his part. By supplying an article not reasonably fit for its purpose, he fails to perform what he has promised and is liable whether negligent or not.

This, then, was the view of the law adopted by all members of the Full Court. However, one obstacle which stood in their way was the case of *Hyman v. Nye*.[10] After much discussion Their Honours refused to follow this case. The case was one actually relating to the hire of chattels. It concerned the hire of a carriage, horse and driver. The carriage broke down and the hirer was injured. Lindley J., who gave the leading judgment, said:

> A person who lets out carriages is not . . . responsible for all . . . defects discoverable or not; he is not an insurer against all defects; nor is he bound to take more care than coach proprietors . . . but . . . he is bound to take as much care as they. . . . His . . . duty appears to me to be to supply a carriage as fit for the purpose for which it is hired as care and skill can render it; and if whilst then the carriage is being properly used for such purpose it breaks down (the owner must show) that the break down was in the proper sense of the word an accident not preventible by any care or skill.[11]

[6] *Criss v. Alexander* (1928) 28 S.R. (N.S.W.) 297; *Gemmel Power Farming Co. v. Nies* (1935) 35 S.R. (N.S.W.) 469.
[7] *Sutton v. Temple* (1843) 12 M. & W. 52, 60.
[8] (1877) 2 Q.B.D. 102. [9] *Ibid.* 105. [10] (1881) 6 Q.B.D. 685. [11] *Ibid.* 687-688.

This passage is attacked by Dean and Smith JJ. as being opposed to *Randall v. Newson*.[12] For Lindley J. had attempted to equate the position of a letter-out of carriages with a carrier for reward. This was in turn an attempt to equate a contractual and a tortious duty of care. Indeed, Lindley J. had placed the burden of negativing want of care on the owner. He had then gone on to indicate that in his opinion the earlier cases in which it had been said that the owner was bound to provide a thing 'reasonably fit and proper' means 'as fit and proper as care and skill can make it for use in a reasonable and proper manner'.[13] In doing this he obviously placed some duty of care on the owner, even to the extent—as Smith J. pointed out[14]—of being liable for defects due to the negligence of other people—for example, manufacturers and independent contractors. Such a duty would be akin to the duty owed by occupiers to those entering under contract.[15]

Lindley J., in likening the duty of a letter-out for hire to a carrier for reward, had based his analogy on *Readhead v. Midland Railway Co.*[16] But, in fact, as Smith J. noted,[17] he had misinterpreted the meaning of the judgment in that case. For in *Readhead's* case the Court had decided that 'there was no liability for defects which no human skill or care could have detected'. Lindley J. turned this into a much more stringent duty when he said that 'liability exists unless the accident was one not preventible by any care or skill'. For a carrier merely owes a duty to use reasonable care and skill in all the circumstances—his duty is a tortious one to take care and not a stricter contractual one—that is, Lindley J. was attempting to incorporate a test of negligence into a contract of hire where any such test is irrelevant.

This misinterpretation lessened the weight of Mr Justice Lindley's judgment and this was the reason Smith J. gave for not accepting it. Dean J. came to the same conclusion, saying that the contractual duty is a duty to supply an article and not simply a duty to use care, and for that reason the statements made by Lindley J. referring to care and skill are misleading.[18]

Having been able to dispose of *Hyman v. Nye*[19] in this way the Full Court concluded that the implied obligation to supply an article reasonably fit for the stated purpose was clearly established in the case of a contract of hire. The duty to be implied was a stringent contractual duty and not a tortious duty to use care in supplying a proper article. As Smith J. said:

> A less stringent rule making liability depend on the degree of care exercised by the owner . . . might seem adequate where what is in question is a claim for damages for physical injuries. But when one considers the question whether the hirer is to be held bound to accept the article and pay rent for it, such a view seems difficult to maintain. For where the hirer has made known to the owner the particular

[12] (1877) 2 Q.B.D. 102.
[13] (1881) 6 Q.B.D. 685, 688.
[14] [1959] Argus L.R. 976, 985.
[15] *Maclenan v. Segar* [1917] 2 K.B. 325.
[16] (1867) L.R. 2 Q.B. 412.
[17] [1959] Argus L.R. 976, 986.
[18] *Ibid.* 982, *per* Dean J.
[19] (1881) 6 Q.B.D. 685.

> purpose for which the article is required, so as to show that he relies on the owner's skill and judgment to provide a suitable article, it appears to me that it would not be consistent with justice that the hirer should be held bound to accept a useless article and to pay full hire for it for the whole of the agreed period of hire on the ground that the owner did his best to provide what was needed and that there was no lack of care in relation to the article.
>
> For these reasons . . . in a case such as the present, there is an implied condition that the article is *in fact* reasonably fit for the purpose for which it has been hired.[20]

It is submitted that this decision of the Full Court is of the utmost importance, for it settles the exact nature of the warranty as to fitness which had long been settled in regard to contracts of sale, work and labour and hire purchase. The warranty lays down a strict contractual duty and can be summed up from the passage in the short judgment of O'Bryan J.:

> Where . . . there is a letting for reward of unascertained goods, and the purpose for which the goods are to be used by the hirer is expressly made known by him to the owner there is an implied warranty that the goods supplied are reasonably fit and suitable for that purpose. Such a warranty goes beyond a mere promise by the owner that he will use reasonable care to supply goods reasonably fit and suitable for the disclosed purpose.[21]

In this case all the judges were of the opinion that the warranty had been broken, and the order *nisi* was discharged.

J. S. WINNEKE

[20] [1959] Argus L.R. 976, 983-984.
[21] *Ibid.* 976.