used. In asking this hypothetical question little distinction is drawn between past and future use and evidence of events during 30 years of actual registration may be disregarded. The questions that arise are substantially those appropriate to a new registration and no allowance appears to be made for the goodwill that may accrue to a long established mark.[72] The ultimate test is less one of evidence than of the court's impression of the mark. In the striking metaphor of Lord Upjohn 'the judicial ear has the final say'.

J. McL. Emmerson

WIGAN v. EDWARDS[1]

Contract – Consideration — Promise to perform existing duty — Compromise of 'right' bona fide claimed. Building contract — Obligation to repair — Builder's entitlement to notice — Notice not imputed.

Mr and Mrs Edwards inspected a house built by Wigan, and subsequently, on 15 April 1969, entered into a contract to purchase the house from Wigan. One week later, on 22 April, the Edwards presented Wigan with a list of minor defects requiring attention before they would consider 'going into the house and finalizing anything'. Wigan's response was a written warranty, stating: 'Minor defects set out hereunder[2] I will rectify one week after finance is approved. Any major faults in construction five years from purchase date I will repair.'

Settlement occurred on 2 June 1969, on the basis that the listed defects would be speedily attended to. However, Wigan did no further work after settlement, and subsequently additional defects came to light.

On 24 December 1969 the Edwards commenced an action against Wigan, claiming $1240.76 for (a) breach of an implied term that the house was constructed in a good and workmanlike manner and was free from structural defects (this claim was abandoned at the trial) and (b) breach of the written warranty.

The particulars of the claim were amended three times before the case came on for hearing. In the first, on 10 March 1971, the Edwards referred to damage caused by damp. The particulars were based on an architect's report, that no repair was possible without major demolition, because he believed the water was seeping through the concrete floor slab. The Edwards claimed compensation.

[72] It is true that the Acts give the courts some discretion. The House of Lords was unanimous that long registration does not in itself justify exercise of this discretion. ([1969] R.P.C. 472, 486 Lord Morris of Borth-y-Gest, 492 Lord Guest, 498 Lord Upjohn, 502 Lord Wilberforce.) In the High Court, Mason J. held that the present case was not one for exercise of discretion and seems to suggest that, *whenever* there is likelihood of deception or confusion, discretion should be exercised adversely to the defendant. (1973) 1 A.L.R. 443, 450.

[1] (1974) 1 A.L.R. 497. High Court; McTiernan A-C.J., Menzies, Walsh, Gibbs and Mason JJ.

[2] The Edwards' list of defects appeared below.

The amendment of 16 June 1971 related to defects in the concrete floor slab, a result of incorrect positioning. The final amendment occurred on 20 April 1972, when the case came before the District Court of Queensland. The Edwards claimed $6,000, the limit of the Court's jurisdiction, for depreciation of the value of the house, due to the faulty concrete slab. They claimed that the fault had existed ever since Wigan had built the house.

On these facts, the District Court of Queensland upheld the plaintiffs' claim and awarded the full amount of damages. An appeal to the Supreme Court of Queensland[3] was unsuccessful. On further appeal to the High Court[4], the decision was reversed by a majority of 3:2.[5]

The case raised two problems. Firstly, had Wigan received consideration, so that the agreement of 22 April became binding on him? If so, the court was required to interpret the agreement, to determine whether Wigan had become liable under it, either through a breach of one of the clauses or repudiation of the agreement altogether.[6]

The purchase contract of 15 April 1969 contained no warranties as to the good and workmanlike construction of the house, nor as to freedom from structural defects. If the Edwards had merely threatened not to proceed with the contract, then their renewed promise of performance once Wigan had made his additional promise could not have furnished sufficient consideration for that benefit.

However, the trial judge found as a matter of fact that the Edwards honestly believed that the defective condition of the house entitled them to refuse to complete the contract. He also found that Wigan had given his promise in order to induce the Edwards to complete the contract, and as a compromise of their claims to be excused.[7]

All the members of the High Court agreed that these facts showed consideration sufficient to support a binding agreement.[8] A promise to perform an existing duty, made by a party under a pre-existing contract to the promisee under that contract, is yet good consideration if given by way of a *bona fide* compromise of a disputed claim.[9]

Mason J. examined the meaning of *bona fide* in this context. Citing *Callisher* v. *Bischoffsheim*,[10] he stated that in the opinion of the court as to the probable outcome of the dispute, had it been litigated, would not affect the *bona fides* of an otherwise genuine compromise — it is sufficient that the promisee is willing to accept the fresh promise as good consideration.[11] He was of the opinion that a further requirement imposed by Bowen L.J. in *Miles* v. *New*

[3] Hanger C.J., Campbell and Williams JJ.
[4] (1974) 1 A.L.R. 497.
[5] Walsh, Gibbs and Mason JJ., McTiernan A-C.J. and Menzies J. dissenting.
[6] A problem arose concerning the time at which the cause of action, if any, had accrued. The discussion was centred on the question of whether Rule 104(b) of the District Courts Rules 1968 (Qld) would allow a cause of action accruing after proceedings had commenced, to be added to the original plaint. Though interpretation of the Rule was important in the actual outcome of the case, it is a local rule of procedure, and this note will be concerned rather with the question of whether a cause of action arose at any time.
[7] (1974) 1 A.L.R. 497, 500.
[8] *Ibid.* 500 (Menzies J.), 512 (Mason J.).
[9] *Callisher* v. *Bischoffsheim* (1870) L.R. 5 Q.B. 449; *Miles* v. *New Zealand Alford Estate Co.* (1886) 32 Ch.D. 266.
[10] (1870) L.R. 5 Q.B. 449.
[11] (1974) 1 A.L.R. 497, 512.

Zealand Alford Estate Co.,[12] that the claim be neither frivolous nor vexatious, was unlikely to exclude claims honestly made.[13] Finally, he held that the compromise here was nonetheless *bona fide,* though the Edwards had neither threatened an action nor claimed a defence to an action for specific performance. A genuine claim not to be bound by the contract is sufficient.

The principle that a compromise can constitute good consideration is well established. However, it seems that in most cases, the subject of the compromise, if not an established legal right, has at least some objective basis, as well as the subjective test of honesty.[14] In the present case, the court emphasized the subjective aspect: the Edwards succeeded on this point, though it is obvious that their claim was of negligible legal merit.

Carried to this extreme, the principle seems to favour the unintelligent and uninformed. The stupid (but honest) man who, on discovering some defect in his purchase, immediately claims to be freed from his contractual obligations, seems to be better off than the intelligent man aware of the law, or correctly advised by his solicitors, so that he knows whether the defect is sufficient to discharge the contract. He cannot honestly claim to be excused if the defect is only minor, wheareas the first man is not bound by the law and need not even threaten to bring an action.

It may be that a party's claims appear sufficiently weak to be rejected by the other contracting party as worthless, or as not being honestly held. On the other hand, the second party may realize the inadequacy of the claim and yet agree to compromise, reasoning that it cannot be enforced because there appears to be no consideration, and it keeps the other party happy. If the court considers there was a genuine compromise, the stupid man obtains a benefit, whilst the intelligent man does not. It would seem desirable that the courts be cautious about extending the principle beyond the *Wigan* v. *Edwards* situation, if the right to be compromised is to retain any objective existence.

Having established that the agreement of 22 April was enforceable, the Court next considered whether the Edwards had a cause of action against Wigan, for either a breach of one of the clauses, in particular the clause relating to the repair of major faults in construction, or for repudiation of the agreement altogether. The majority[15] interpreted the sentence, 'Any major faults in construction five years from purchase date I will repair', as meaning that any major faults appearing within five years of purchase date would be repaired. They held, this carried the implication that only those faults with which Wigan became acquainted were included in the promise, and that repair was to be undertaken within a reasonable time of his becoming so acquainted.[16]

All members of the majority agreed, that Wigan should not have knowledge of major defects attributed to him, merely because he had built the house.[17] Gibbs J. commented, 'It is true that he [Wigan] had built the house and built it badly, but men are not always aware of the nature of the blunders they have made.'[18]

[12] (1886) 32 Ch.D. 266.

[13] (1974) 1 A.L.R. 497, 513. However, he submitted that the Edwards' claim, in view of the fact that Wigan had not completed all his obligations under the contract *e.g.* connection of water, erection of a fence, was neither frivolous nor vexatious.

[14] Atiyah, *An Introduction to the Law of Contract* (2nd ed. 1971) 70.

[15] Walsh, Gibbs and Mason JJ.

[16] (1974) 1 A.L.R. 497, 501 (Walsh J.), 505 (Gibbs J.), 514 (Mason J.). Walsh J. considered and rejected an alternative construction, that Wigan could effect repairs at any time within five years of purchase.

[17] *Ibid.* 502, 505, 514.

[18] *Ibid.* 507.

Mason J., whose opinion was shared by Walsh J.[19] held *obiter dicta* that Wigan would have become liable, had he become aware of a major fault through some independent source.[20] As it was, he thought that delivery of the amended particulars to Wigan on 10 March and 16 June 1971 was sufficient notice of a major fault in construction, and gave the Edwards a cause of action when he failed to effect repairs within a reasonable time thereafter.[21]

Gibbs J. was of the opinion that before Wigan could become liable under the agreement, the Edwards should first have notified him of the fault, and expressly or by clear implication made known that they desired it to be repaired.[22] Whilst agreeing that the amendments to the particulars would constitute sufficient notice of the fault, he nevertheless found Wigan not liable. The Edwards had on each occasion demanded compensation, instead of requiring Wigan to repair the damage. As repair would entail major demolition, it would be unreasonable to expect Wigan to embark on this without the Edwards' express consent.[23]

In view of the trend in other areas of law, notably torts, to hold owner-builders liable for the defective state of the houses they build,[24] it seems strange that the High Court should here, in a contract case, show such leniency towards the builder. The requirements for notice set down by Gibbs J. seem unnecessarily formal, especially as the agreement of 22 April was a fairly informal one.

On the other hand, as the promise was to repair rather than to pay damages for faults, it does seem reasonable that some form of notice be given. The more practical views of Walsh and Mason JJ. are preferable to those of Gibbs J. on this point.

Though unable to prove a breach, the Edwards may yet have succeeded had the Court been satisfied that Wigan had repudiated the agreement. The judges forming the minority, McTiernan A-C.J. and Menzies J., were of opinion that he had, and thus found no cause to discuss the question of notice. By their interpretation of the agreement, Wigan's failure to remedy the minor defects noted in the initial list of 22 April 1969, before action was taken on December 24, was a sufficient act of repudiation.[25]

The majority opinion was that the greement should be read as if composed of two distinct parts, each capable of more than one breach.[26] The repudiation of the obligation to repair minor faults, or even of the obligation to repair *a* major defect,[27] (as distinct from the particular fault in the concrete slab) would not amount to repudiation of the whole agreement. They concluded that, though Wigan had acted in a 'dilatory and incompetent manner,'[28] this

[19] *Ibid.* 501.

[20] *Ibid.* 514. There was no proof of this having occurred before commencement of proceedings.

[21] Walsh and Mason JJ. held however that Rule 104(b) of the District Courts Rules 1968 (Qld) could not permit a new cause of action to be added to the plaint after proceedings had commenced. Therefore, the Edwards' claim failed.

[22] (1974) 1 A.L.R. 497, 505.

[23] A further point taken was that $1240.76, the amount claimed, was much less than the cost of demolition and reconstruction, and thus could not be construed as containing the necessary consent.

[24] *Dutton* v. *Bognor Regis U.D.C.* [1972] 1 Q.B. 373.

[25] (1974) 1 A.L.R. 497, 500.

[26] *Ibid.* 504 (Walsh J.), 514 (Mason J.).

[27] *Ibid.* 504.

[28] *Ibid.* 515 *per* Mason J.

did not amount to a repudiation of the entire agreement. Nor did his actions disclose an intention to waive the requirement of notice.[29]

In the end, the case was remitted to the District Court for determination of damages for failure to repair the minor defects listed on 22 April 1969. The most striking feature of the case is that it would seem litigation could have been avoided had the parties obtained proper legal advice in the first place. For instance, many difficulties could have been avoided had the parties adopted the wording of the repair clause normally found in standard form building contracts.[30] The net result of the litigation was, as Gibbs J. pointed out,[31] the Edwards still had the right to give the necessary notice, and to demand that repairs be carried out. He advised that the case could more easily be dealt with by settlement out of court, than by further expensive litigation. The writer fervently agrees.

JANET N. WALKER

COLEEN PROPERTIES LTD v. MINISTER OF HOUSING AND LOCAL GOVERNMENT[1]

Administrative Law — Compulsory Acquisition — Minister's Decision Ultra Vires.

The elimination of the many horrendous obstacles that have hampered judicial review of administrative action has been almost totally dependent upon the *ad hoc* development of case law. The Court of Appeal decision in *Coleen Properties Ltd* v. *Minister of Housing and Local Government*[2] represents a significant step forward in judicial attempts to gain effective supervision and control over arbitrary government. However, while it can be conceded that the difficulty and polycentricity of administrative decision-making alone requires its review,[3] the scope of such review as was purported to have been exercised in this case may give rise to controversy.

Described as 'an interesting case' by Lord Denning M.R.,[4] the Court of Appeal's decision concerned the problems inherent in the compulsory acquisition of private property. The local council concerned declared two rows of dilapidated houses to be clearance areas and proposed to acquire them under a

[29] *Ibid.* 515.

[30] A standard form of repair clause states, 'Any defects or faults in the works arising out of any omissions of the Builder or his use of defective or improper materials or faulty workmanship shall without delay be made good by the Builder at his own cost and if he shall fail to do so the Owner after seven days' notice of his intention so to do may cause those defects or faults to be remedied and charge the Builder with the cost thereof.'

[31] (1974) 1 A.L.R. 497, 509.

[1] [1971] 1 W.L.R. 433; [1971] 1 All E.R. 1049. Court of Appeal; Lord Denning M.R., Sachs and Buckley L.JJ.

[2] *Ibid.*

[3] Some argue that judicial review is not only necessary from this point of view, but is also a necessary premise of legal validity. See Jaffee, *Judicial Control of Administrative Action* (1965) 336 *et. seq.*; Jaffee and Henderson, 'Judicial Review and the Rule of Law: Historical Origins' (1956) 72 *Law Quarterly Review* 345.

[4] [1971] 1 W.L.R. 433, 435; [1971] 1 All E.R. 1049, 1051.