THE REQUIREMENTS AND THE OUTPUT CONTRACTS

by MICHAEL HOWARD*

From the point of view of both judicial decision and academic comment, the requirements and the output contract have received considerable attention in America.[1] By comparison the English authorities, taken together with the decisions of the other common law jurisdictions of Canada, Australia and New Zealand, are very few in number. This dearth of authority is surprising in so far as one would have expected these contracts to have been used frequently and, consequently, to have been the subject of litigation more often. It is perhaps because of this infrequency that the opportunity has not been taken of discussing the cases or the applicable principles.[2] This is to be regretted in that both contracts raise interesting problems.

With a view to determining the principles which emerge from the scattered English, Canadian, Australian and New Zealand case law, it is thought that it would be of value to use the provisions of the American *Uniform Commercial Code,* (set out at p. 448 and hereinafter referred to as 'The Code'), relevant to the requirements and output contracts,[3] as a framework within which to consider these cases. With this approach in view, it is proposed, in the first place, to consider the general nature of these contracts. The particular problems to which each gives rise will then be discussed and the relevant case law considered in conjunction with the provisions of The Code. The value of this would seem to be two-fold. In the first place, as a means of seeing how the decisions compare with what, it is submitted, ought to be the principles applicable to such contracts and, secondly, to provide a guide in relation to answers which The Code suggests to problems which have not arisen for decision in the case law of the jurisdictions under consideration.

The General Nature of the Requirements and the Output Contracts

The requirements contract, which has aptly been described as a 'total consumption contract,' is one in which the seller promises to

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1 E.g. *Corbin on Contracts,* Vol. 1A, at pp. 30-40 (and the many cases there cited) and *Williston on Contracts* (3rd. ed.) Vol. 1, at pp. 402-414.

2 The only academic comment appears to be a short consideration of the requirements contract in (1938) 16 *Can.B.Rev.*, at p. 302. This is a discussion based upon the then recently decided case of *Kier & Co. Ltd.* v. *Whitehead Iron & Steel* [1938] 1 All E.R. 591.

3 *Uniform Commercial Code* (U.L.A.) § 2-306 (1).

supply the buyer with all of his needs for a particular commodity during a stated period of time. The seller may agree, for example, to supply all the gas or oil that the buyer may need for the running of his business for a period of two years. With the output agreement, the 'total production' contract, the buyer has agreed to take from the seller his total output during a stated period. The buyer has undertaken, for example, to buy from the seller all the motor fuel or electricity which the seller may produce for the next five years.

A distinctive feature of the requirements and the output contracts is that they fall outside the rules of definiteness and certainty of terms which normally apply to other contracts. This is necessary by virtue of the nature and objects of these contracts. The requirements contract, for example, looks to the future needs of the buyer and at the time when the contract is entered into it cannot be stated with certainty what the buyer's needs will be. It will not be known, for example, how many gallons of oil will be needed for the running of the machinery in B's factory for a period of two years at the time when S agreed to supply all the oil which B may require for his factory for that period. It is the same with the output contract which is also an agreement which looks to the future. The buyer has agreed to take the seller's production for a period of time but it cannot be stated with complete certainty, at the time when the contract is entered into, what this production will be.

It seems clear that such contracts do not fail for uncertainty because (and this will become apparent when the particuluar problems arising under each type of contract are discussed) they both contain mutual obligations, with sufficiently definite standards, by which performance can be tested. With the requirements contract the seller has agreed to supply the buyer with his needs for a stated period. The buyer in turn has promised that, if he has a need for the goods, he will buy them from the seller. By implication the buyer will also have promised that, if he needs the goods, he will not buy them from another person. There is here a binding contract and the obligations of each party are clear even though the precise quantity of the subject-matter of the contract cannot be ascertained with certainty when the contract is entered into. As we shall see, the position is precisely the same with the output contract where the buyer has bound himself to take from the seller who in turn has promised to sell his output to the buyer and no one else.

Turning now to the cases, it is appropriate to remark that there are very few decisions and that in none of these, with the exception of *Kier's Case*,[4] is there any discussion of the principles underlying the requirements or output contract. In view of this, it seems necessary to use the provisions of The Code as a basis for a discussion of the

[4] [1938] 1 All E.R. 591.

problems. At the same time an attempt will be made to see what principles emerge from the decisions. §2 306(1) of the *Uniform Commercial code* provides:

> A term which measures the quantity by the output of the seller or requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

I The Requirements Contract

A. *Formation*

One of the main problems to which the requirements contract gives rise is the determination of the seller's obligations. It will be seen that these are fixed by reference to the contractual terms relating to the requirements or needs of the buyer. Before looking at this, it is important to notice two questions which may arise and which affect the formation of the requirements contract. In the first place, has the buyer bound himself to take the goods, which the seller has promised to supply, if he needs them? Secondly, what is the consideration which the buyer furnishes in return for the promise of the seller to supply the goods to him?

(i) *On construing the contract, the court must be satisfied that the buyer has bound himself, from the beginning, to take his needs from the seller.*

As far as the first question is concerned, it may become apparent, for example, that the buyer has not bound himself to take the goods from the seller but that the contract provides merely that the seller has promised to sell to the buyer that which the buyer may choose to take or demand. Thus in *Gilmour* v. *McLeod*,[5] where the defendants invited tenders for 'our requirements of timber during the year 1892' and the plaintiff seller replied that he would be pleased to supply them with the goods at the stated prices, the court held this to mean such timber as the defendants might think fit to order and that what they did order was the measure of what they required.[6] In such a case as this it is only the seller who has placed himself under an obligation and a contract only comes into existence when the buyer chooses to take the goods by performing the act which was specified in the seller's offer. This is clearly not a requirements contract the essence of which is an exchange of mutual promises the result of which is that the buyer is bound from the beginning to satisfy all his needs from the seller.[7] As we shall see later, it may be that the buyer has no 'needs' and

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[5] (1893) 12 N.Z.L.R.335.

[6] *Cf. Great Northern Railway Co.* v. *Witham* (1873) L.R.9 C.P.16. See a useful classification of these 'tender' cases in *Percival, Lim* v. *L.C.C.Asylums etc. Committee* (1918) 87 L.J. (K.B.) 677, at pp.678-679, per Atkin J. See also *Colonial Ammunition* v. *Reid* (1921) 21 N.S.W. S.R. 33 and *The Queen* v. *Maclean*, 8 Can. S.C.R.210. *Cf. Kenny* v. *The Queen*, 1 Can. Ex. R. 68; *Tairua Golden Hills* v. *McKane* (1912) 31 N.Z.L.R. 108.

[7] See, for example, *Wood* v. *The Governor & Company of Cooper Miners*, 137 E.R.359.

then the question may arise whether he is in breach of his obligations. But this is a separate issue and does not affect the existence of the contract.

In both *Att-Gen.* v. *Stewards & Co. (Limited)*[8] and *Cory Brothers & Company Ltd.* v. *Universe Petroleum Company Ltd.*,[9] the court held that the seller was the only party under an obligation and that his duty was to provide the goods which the buyer might choose to ask for. In the *Cory Brothers' Case*[10] the court was faced with the difficult task of interpreting a written agreement for the sale of motor spirit which, after providing for the subject-matter of the sale stipulated, in terms of the quantity, in the following way: 'Requirements up to but not exceeding 45,000 Imperial Gallons per week.' The principal issue before the court was whether the defendants, who were distributors of motor spirit, were by virtue of this clause bound to take what they needed during the period of the agreement or whether the contract should be interpreted to mean that the buyers were under no obligation to take any motor spirit unless they chose to ask for it. The court pointed out that the language was obscure. It did not say 'all our requirements' or 'all the requirements of the buyers' nor, on the other hand, did it say 'such quantities as we may require' or 'such quantities as are agreed upon, if we require them.' Taking into account the special condition 10 of the agreement (which provided that 'Clause 2 entitling the buyers to draw up to 45,000 gallons per week shall mean that each week's delivery shall constitute a separate contract and any balance not taken up under that week's contract shall be automatically cancelled') the court took the view that, although the phrase entitling the buyers to take up to a certain quantity was apt to describe an option to take a certain amount, the clause on the whole was more consistent with the interpretation of the buyer asking for the goods during the period and therefore the defendants were held not bound to take them.

It is surprising that, in view of the difficulties encountered with the contractual terms, no reference was made to the fact that the buyers had entered into a contract with a third party for the supply of motor spirit which entitled the third party to draw up to the exact amount of the quantity specified in the agreement before the court and that the buyers had informed the sellers of this contract before their agreement was entered into. Thus, although the terms were obscure, the surrounding circumstances appear to indicate that the defendants, by virtue of their contract with a third party, had an actual need for the motor spirit. In the light of this, it is submitted that it would not have been unreasonable to say that the defendants had intended to bind themselves to buy their needs from the plaintiffs. There was no discussion of principle in the *Cory Brothers' Case*[11] and only

8 (1901) 18 T.L.R. 131.
9 (1933) 46 Ll.L.Rep.309.
10 *Ibid.*
11 *Ibid.*

two cases *(Att-Gen.* v. *Stewards & Company (Limited)*[12] and *Tancred, Arrol* v. *The Steel Coy. of Scotland)*[13] were mentioned. These the court regarded as falling on different sides of a very fine line and came to the conclusion that the result should be the same as in *Stewards' Case.*[14] *Tancred's Case*[15] will be mentioned later but it will be convenient to look at *Stewards' Case*[16] in this context.

In this case the suppliants (the present respondents) were stone merchants who had sent in a tender to the Admiralty stating that they agreed to deliver stone amounting to approximately 2,000,000 tons. This was accepted by the Admiralty in the following terms: '. . . your tender dated 7th September, 1895, is accepted for the supply for the new breakwater at Portland of about 2,000,000 tons, or such quantity as may be required, of cap and roach stone. . . .' After a small amount had been delivered, the Admiralty gave notice that they had entered into an agreement with a contractor for the completion of the breakwater and that no more stone would be required from the suppliants. The Court of Appeal, affirming the decision of the court at first instance, held that the contract meant that the Admiralty would accept approximately 2,000,000 tons or such quantity (a little more or a little less) as might be required for the construction of the breakwater and that the suppliants were entitled to damages for breach of this contract. This decision was reversed by the House of Lords. The Lord Chancellor (with whom Lord Shand agreed) interpreted the clause as meaning that the respondents were ready to supply the stone from time to time as the Admiralty demanded it. It is clear on this interpretation that there was no contract until the stone was ordered. On the other hand, Lord Davey (with whom Lord Brampton agreed) interpreted the clause as meaning 'or such less quantity as may be required by the Admiralty from time to time.' With this approach there would be a contract formed with an upper limit of the quantity stated. What would have happened had the Admiralty wanted more than 2,000,000 tons was not considered. This is a question which will be discussed later. It would seem that, regarding the figure of 2,000,000 as an upper limit, the suppliants could not have been compelled to deliver an amount in excess of this figure. Perhaps a more satisfactory approach would have been to find that a requirements contract had been entered into and then to ask whether the Admiralty had in good faith ceased to have any need for the stone by virtue of their handing over the work to contractors. It will be seen later that the court does not imply a promise that the buyer will continue to have any 'needs' and it seems clear that the Admiralty would not have been held liable as they had ceased in good faith to require further stone.

12 (1901) 18 T.L.R. 131.
13 (1890) 15 App. Cas. 125
14 (1901) 18 T.L.R. 131.
15 (1890) 15 App. Cas. 125.
16 (1901) 18 T.L.R. 131.

(ii) *The consideration which the buyer furnishes is the expressed or implied promise that, if he needs the goods, he will buy from the seller and no one else.*

The second question, which also goes to the formation of the contract, is that of consideration. If, on construing the contract, the court concludes that the buyer has bound himself to take the goods if he needs them, the further question arises as to what is the consideration which the buyer furnishes in return for the promise of the seller to supply the goods to him. It is clear that such consideration is to be found in the promise of the buyer that, if he needs the goods, he will not deal with anyone else except the seller. This promise may be an express one as in *Pitcaithly & Co.* v. *John McLean & Son*[17] or an implied one as in *In re Gloucester Municipal Election Petition*[18] and *Brandon Gas & Power Co.* v. *Brandon Cremery Co.*[19] In the absence of such a promise, of course, the court would be compelled to hold that no contract had been formed. Thus in *Gilmour* v. *McLeod*[20] ('our requirements of timber') the court, after pointing out that the defendants had not expressly stated that they would buy from the plaintiffs and no one else, held that such a promise was not a necessary inference here and could not be implied, and therefore there was no contract between the parties. In *Pitcaithly's Case*[21] the appellants had agreed to supply the respondent contractors with 'all the assorted gravel and sand required by and in accordance with the specification . . . which shall from time to time be ordered or required by the employer.' The contract also contained a provision which imposed an obligation upon the respondents to order all the gravel and sand required by them from the appellants. The court held that the effect of this clause was to entitle the appellants to require that all sand and gravel actually used in the work should be ordered from them by the respondents. This case will be mentioned again when considering the circumstances under which the buyer will be in breach of the contract where he ceases to have any needs.

In the absence of an express promise of the buyer not to purchase from anyone other than the seller, it would seem that the court can very easily imply such a promise once they have come to the conclusion, on construing the contract, that the buyer has placed himself under an obligation to take from the seller. It would appear to be a natural corollary of the express promise that he will not buy from another. Thus in *Brandon Gas & Power Co.* v. *Brandon Cremery Co.*[22] the court held that, where the appellants had agreed to supply the respondents for a stated period with 'all artificial gas for power purposes,' the respondents were in breach when they set up their

17 (1912) 31 N.Z.L.R. 648.
18 [1901] 1 Q.B. 683.
19 [1912] 8 D.L.R. 191.
20 (1893) 12 N.Z.L.R. 335.
21 (1912) 31 N.Z.L.R. 648.
22 [1912] 8 D.L.R. 191.

own machinery for making artificial gas for power purposes, there being an implied obligation upon the respondents to take from the appellants if they needed the gas. Similarly in *In re Gloucester Municipal Election Petition*[23] where Darling J., after construing an agreement between a council and the respondent whereby the council accepted the respondent's tender for the articles that they may want during a stated period, held that there was an obligation on both sides and therefore a contract. Darling J.[24] came to this conclusion by holding that the council had bound themselves to take the goods and, following on from this, they were not justified in ordering them from any other source.

Kier's Case[25] is mainly relevant to the problem of determining the obligation of the seller in relation to the good faith needs of the buyer, but it can be used here to show that where the buyer expressly promises to take his requirements from the seller he impliedly promises not to take them from another and thus furnishes consideration for the seller's promise to supply him. In this case the quantity in a contract for the sale of steel was expressed in the following way: 'Buyer's total requirements up to 8,000 tons.' Branson J. had this to say:[26]

> . . . if the true interpretation is that 'requirements' equals 'needs' then the quantity is ascertained by taking the total needs of the buyers up to 8,000 tons and that prevents the buyers from filling those needs up to 8,000 tons from any other source other than the sellers. There one has a contract which has some mutuality in it.

It is submitted that the use of the word 'mutuality' in this context, although common, is unfortunate and best avoided and that it is better merely to say that we have here an enforceable contract from the beginning because the buyer, by expressly promising to take his requirements from the seller if he has any, has impliedly promised not to take them from another and has thus furnished consideration.

B. *The Obligations of the Seller*

It has already been pointed out that one of the main problems of the requirements contract is the determination of the seller's obligations and it has been noticed that these are fixed by reference to the contractual terms relating to the requirements of the buyer. It has been argued,[27] for example, that the principal question with the requirements contract is not the problem of whether consideration is present but concerns the difficulties which may arise because of the reluctance which a court may have in compelling the seller to perform his obligations where the terms of the contract do not place any limit upon the buyer's requirements. In such a situation as this

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23 [1901] 1 Q.B. 683.
24 Channel J. did not consider this point.
25 [1938] 1 All E.R. 591.
26 *Ibid.*, p.594.
27 See 'The Construction of Requirement Contracts and The Effect of Estimate Provisions Therein', (1928) 28 *Col. L. Rev.* 223, at pp. 223-4.

it is said that the buyer could in theory demand an excessive amount, which might be quite disproportionate to the buyer's past needs or to anything contemplated by the parties, and the seller would be bound to supply it.

It is common to find, however, that the parties have agreed to an upper limit as far as the buyer's requirements are concerned. The effect of this is to limit, in ways we shall see, the obligation of the seller. Even where no limit forms part of the contract, it is submitted that, if the court is prepared to read into a requirements contract the demands of good faith in the performance of that contract by adopting the approach of The Code (which provides that a term which measures quantity by the requirements of the buyer shall mean his actual requirements which occur in good faith and, further, that no amount unreasonably disproportionate to a stated estimate can be demanded) the seller's obligation ceases to be a potentially unlimited one and there is no reason on this ground for a court refusing to recognise the existence of the contract. It is now proposed to see how the cases compare with the provisions of the Code which place emphasis upon good faith performance but also envisage a reasonable elasticity in terms of good faith variations from previous requirements or amounts stated in the contract.

(i) *The obligations of the seller are regulated by the bona fide needs of the buyer.*

It seems clear that, once the court has arrived at the conclusion that the buyer has bound himself to take all that he requires from the seller (and not merely what he chooses to take) then it should construe the word 'require' ('requirements') as meaning 'need' or 'use' (and not request or demand or order). Before looking at *Kier's Case*[28] which adopted, it is submitted, a very sound approach to the requirements contract, we may notice as a matter of interest two old Scots cases. *Tancred's Case*[29] may also be usefully mentioned at this point. In *North British Oil & Cannelle Co.* v. *Swann*,[30] where a coalmaster agreed to supply the company with as much coal as they should 'require,' the court held that this did not mean as much as they should demand but as much as they should require for the purposes of their manufacture. Similarly in *Pillans* v. *Reid & Co.*,[31] where a steelmaker contracted to supply a ship-builder with his 'requirements of rivets during 1888,' the court held that he was only bound to supply rivets actually used during that year. It would perhaps be more appropriate to discuss *Tancred's Case*[32] in the context of the circumstances under which the buyer is in breach of his promise, but the case indirectly illustrates the nature of the seller's obligation. In this case the respondents had agreed to supply the whole of the steel

28 [1938] 1 All E.R. 591.
29 (1890) 15 App. Cas. 125.
30 (1868) 6 M.835; 40 J.444.
31 (1889) 17 R. 259; S.L.R. 211.
32 (1890) 15 App. Cas. 125.

required for the Forth Bridge and they argued that the appellants were in breach where they had bought some steel from a source other than the respondents. The House of Lords, regarding a clause in the contract describing 'the estimated quantity of steel we understand to be 30,000 tons, more or less' as mere words of estimate, held that the buyer was bound to buy the whole of the steel required for the bridge from the respondents. Looked at from the point of view of the obligations of the sellers, it is clear that they were governed by the actual needs of the buyer in relation to the particular purpose of building the Forth Bridge.

Kier & Co. Ltd. v. *Whitehead Iron & Steel*[33] is an important case. In the first place because it is the only case in the jurisdictions under consideration in which any attempt has been made to look at the principles underlying the requirements contract. Secondly, it is important because of the way in which the court approached the problem before it. This approach was entirely consistent with the ideas of good faith performance underlying the provisions of The Code and is, it is submitted, the correct one. As we shall see directly, the court, on an interpretation of the provisions of the contract in the light of the surrounding circumstances and holding that 'requirements' meant 'needs,' determined the seller's obligations by reference to the actual, *bona fide* needs of the buyer.

The plaintiffs were a firm whose business was to contract for the execution of concrete work and who were continuously in need of mild steel reinforcing bars. The defendants were a firm of manufacturers who produced these bars. They had agreed to sell steel to the plaintiffs and the quantity was expressed in the following way: 'Buyer's total requirements up to 8,000 tons.' In this action, the plaintiffs claimed that the defendants were in breach of the contract when they refused to fulfil their requisition for 4,000 tons. The plaintiffs argued that the effect of the provision was that, whilst they were not liable to ask for any quantity at all, they may at any time they liked, and for any purpose which suited them, ask for any amount they like up to 8,000 tons. Branson J. rejected this argument and held that the word 'requirements' meant 'needs' and that, unless it could be established that the plaintiffs needed the 4,000 tons which they had requisitioned, the defendants were under no obligation to supply that amount. There were two principal factors which led the court to this conclusion. The first was the use of the word 'total'. If the construction which the plaintiffs contended for was placed upon the word 'requirements' (as meaning 'demands') then the word 'total' would have no meaning. With the defendants' argument (with which the court agreed) the use of the word 'total' was important and meant that if the plaintiffs needed the steel then they must buy it from the defendants. Secondly, in addition to this, the court found that there was no evidence that the plaintiffs had any need for the 4,000 tons

[33] [1938] 1 All E.R. 591.

which they had ordered for any contract which they had obtained or were operating. Thus the plaintiffs had no actual need for the steel and, in the absence of this need, the defendants were not in breach.

It is of interest to notice that in *Kier's Case*[34] there had been a rise in the price of steel since the contract was entered into. In view of the fact that the plaintiff's business merely involved the use of steel and they were not dealers in steel, it would have been quite improper for them to have bought from the defendants with the object of re-selling at a profit on a rising market. This was expressly disclaimed by the plaintiffs but, clearly, it would not have been a good faith performance of the contract. The position would have been different if the plaintiffs had been dealers in steel because this would be regarded as an accepted method of making a profit. Where the buyer is not a dealer then a rise in the market price of the goods is obviously an important factor to be taken into account in the requirements contract, where the contract price of the goods is usually fixed.

This is a suitable place to consider *Chipman* v. *Bennett*[35] where the defendants had entered into a contract with the plaintiff for the purchase of 'all the printing paper which they shall require for the printing of two newspapers . . . for the whole term of five years . . .' Differences had arisen between the parties and two of the questions which were submitted to the court by an umpire were whether the defendants must buy all the paper actually used from the plaintiff and, secondly, whether they could deduct, from the quantity used, paper which they already had in stock. The court held that the defendants were bound to buy from the plaintiff all the paper which they used for the newspapers and the fact that they already had a supply of paper for this purpose did not affect their obligation to buy from the plaintiff the whole of what they used. Stephen A. C. J. (who delivered the leading judgment) said:[36]

> I was also impressed by the *Attorney-General's* argument that the plaintiff, if for some reason such as the increase in the price of paper, found it more convenient not to supply the defendants with paper in accordance with the terms of the agreement, could not say: 'You have a large surplus stock in your store, therefore you cannot require this paper from me, and I won't supply you.' It is clear that he could not. The contract was on the one hand to buy, and on the other to sell all that was required for the actual printing of the newspapers, and not what the defendants might require under circumstances best known to themselves.

Two comments may be made. The first is that it is arguable that the contract was not for the supply of paper that was required for the actual printing of the papers nor was it to satisfy the requirements of the defendants 'under circumstances best known to themselves.' What the defendants appear to have promised is that if they needed

34 *Ibid.*
35 (1903) 3 N.S.W. S.R. 653.
36 *Ibid.*, pp. 658-659.

the paper for this particular purpose (and not for 'circumstances best known to themselves') they would buy it from the plaintiff. As we shall see later, there is no implied promise that the buyer shall have any 'needs' and in this case the answer to the questions asked by the umpire would seem to be that the defendants need not have bought any paper from the plaintiff at all. If their own supplies ran out (which, incidentally, had been purchased from the plaintiff in the first place) then they would have had to buy the paper from the plaintiff. Secondly, the argument of the Attorney-General is not as impressive as the court appears to have found it. If the price of paper had risen as suggested, then the plaintiff could not have refused to supply the defendants with paper for this reason (which is one of the risks the seller must be prepared to take) if they had a *bona fide* need for it in the production of their paper; but, if the defendants were amply supplied with paper, then the plaintiff could have argued that, by demanding paper, when they had no need for it, they would not have been performing their contract in good faith. This approach to the hypothetical problem appears to be consistent with that of Branson J. in *Kier's Case*[37] and, it is submitted, is the correct one.

Whitehouse v. *The Liverpool New Gas-Light Coke Coy.*[38] may also be considered in this context. Here the defendants were a company incorporated by Act of Parliament for the supply of gas to Liverpool and its neighbourhood. The plaintiff was an iron manufacturer who agreed to supply the defendants with such quantities of iron pipes, at given prices, as they should require during a period of three years and for the following eighteen months the plaintiff supplied the defendants with all the pipes they required. The price of iron then increased and so did the 'requirements' of the defendants and by the end of two years they were asking for three times the amount of pipes they had required during the two years when the market was low. It appeared that at this stage the defendants had on hand about four thousand pipes which they intended to use for projected works or to lay up in stock and it was estimated that it would have taken them another eighteen months to use up the quantity. However, they were still asking for more pipes and the plaintiff found that he could not keep pace with the orders. The court held that the plaintiff was bound to supply the company with all the pipes they might require during the three years for all authorised works whether ordinary or extended. Wilde C. J. said:[39] 'I think the word "required" meant, not all such pipes as the company might think fit to order, but only such as were requisite to supply the reasonable wants of the company in the course of the execution of works authorised by their Act of Parliament.' Wilde C. J. correctly described this as 'a very unfortunate case for the plaintiff,'[40] but it

37 [1938] 1 All E.R. 591.
38 136 E.R. 1093.
39 *Ibid.*, p. 1096.
40 *Ibid.*

is difficult to see how the quantities ordered could be regarded as the company's 'reasonable wants.' Bearing in mind that there was a rise in the cost of iron and that the quantity asked for during the third year was both quite disproportionate to the quantities ordered during the first two years, and not needed for immediate use, it is difficult to regard this as a good faith performance.

Although the provisions of The Code make it clear that no amount unreasonably disproportionate to an estimate or to a prior requirement may be demanded, the *Uniform Code Comment* states[41] that a normal expansion undertaken in good faith would be within the scope of the section. A Scots case illustrates this well and is worth noting. In *Blacklock & Macarthur* v. *Kirk*[42] manufacturers had supplied a glazier with putty for a period of five years, varying in quantity between 88 and 134 tons a year. For the following year they had agreed to supply his 'usual requirements.' In that year the glazier ordered 189 tons but the manufacturers refused to deliver more than 81 tons. Apparently, the glazier's business had not changed in character or locality but part of the increase was due to the glazing of roofs of munition factories. The court held that the manufacturers were liable to the glazier where he had purchased the balance at an enhanced price. The court pointed out that 'usual requirements' had no reference to quantity but meant requirements of the glazier's *bona fide* business. This decision seems correct in so far as the amount asked for was not unreasonably disproportionate to the glazier's past needs and was the result of a *bona fide* expansion. It is submitted that the courts of the jurisdictions under consideration should follow this decision.

(ii) *Estimated requirements and upper limits will affect the obligations of the seller.*

It remains to consider the effect on the seller's obligations of a statement which is an estimate of what the buyer's requirements will be. The contract may state that the seller will supply all the buyer's requirements for a stated period and then go on to say that it is estimated that these will be 600 tons per month. Alternatively, the contract might set a lower or an upper limit upon these requirements. It may be agreed that S shall supply B with all his requirements of petrol and that the amount shall not be less than 50 gallons a week, or it may provide that not more than 100 gallons per month shall be supplied. As far as the setting of a lower limit is concerned, this does not affect the obligation of the seller at all because he is still bound to supply the buyer's needs, but it does affect the buyer's promise in so far as he has bound himself to take up to that amount and he has no option in this direction at all. It is only above that

41 *Uniform Commercial Code* (U.L.A.), p.109.

42 [1919] S.C.57. *Von Merehen & Co.* v. *Edinburgh Roperies & Sailcloth Co.* (1901) 4 F. 232 was distinguished.

amount that he has the choice of either buying from the seller if he needs the goods or not buying at all.

With regard to upper limit provisions it is submitted that the principles of The Code, applicable here, can only affect the seller's obligations when the buyer is asking for amounts in excess of the upper limits. The position is the same with the stated estimate. The *Uniform Code Comment* states[43] that, where an estimate of requirements is included in the agreement, no quantity unreasonably disproportionate may be demanded and that any minimum or maximum set by the contract shows a clear limit on the intended elasticity. It would seem that this can apply only where the buyer is demanding quantities in excess of, and not less than, these estimates or upper limits. Looking at *Kier's Case*[44] again ('Buyer's total requirements up to 8,000 tons'), it will be remembered that the plaintiffs had argued that they had the right to take any amount up to 8,000 tons that they might choose to take. The court rejected this argument and held that their rights were measured by their good faith needs. They could only ask to be supplied with the goods if they actually needed them. It would appear then that it is only where what is asked for (that being the buyer's actual needs) exceeds the upper limit that you need to look at that figure. Similarly with the estimated amount; the court needs only to look at this figure when the quantity demanded (again being the actual needs of the buyer) is unreasonably in excess of that amount. Conversely, although the seller can complain if the requirements of the buyer fall short of a stated minimum (because here the buyer has bound himself to take up to this amount) he could not complain if the requirements of the buyer fall short of an estimated quantity (or an upper limit) because the seller's position is regulated by the good faith needs of the buyer. Thus in *Hume* v. *Martin & Another,*[45] the court rejected the argument of the plaintiff that there was a contract for the supply by him of three tons of chaff per week where, by virtue of a written contract, the defendants had agreed to take from him 'all the chaff we require for our use at mill, Westerway, about three tons per week . . . at £9 per ton . . . chaff to be delivered as required by us, about a truck a fortnight.' The court took the view that the governing words were 'all the chaff we require for use at mill' and, speaking of the plaintiff, said:[46] 'What he *has* obtained is, I think, a contract to supply defendants' reasonable requirements for that mill, and an estimate, or expression of expectation as to what those requirements will approach.' In fact, the defendants' actual requirements were below three tons per week; they only ordered and took delivery of one truck of between 5 and 6 tons. They were however held not liable for refusing to accept delivery of 30 tons.

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43 *Uniform Commercial Code* (U.L.A.), p.110.
44 [1938] 1 All E.R. 591.
45 [1921] Tas. S.R.8. (*Cf. Stokes* v. *Hart* (1887) 8 N.S.W.R. 447)
46 *Ibid.*, p.11.

C. *When is the Buyer in Breach?*

(i) *If the buyer needs the goods he must buy them from the seller and is in breach if he buys them from a third party.*

> There is also an intermediate contract that can be made in which, although the parties are not bound to any specified quantity, yet they bind themselves to buy and to pay for all the goods that are in fact needed by them. Of course if there is a contract such as that, then there is a binding contract which will be broken if the purchasing body in fact do need some of the articles the subject matter of the tender, and do not take them from the tenderer.

Although this statement was made in the context of tenders,[47] it is submitted that it expresses a general principle applicable to all types of requirements contracts. The buyer would thus be in breach if he had an actual need for the goods, which the seller was able to supply, and he bought them from a third party. *Tancred's Case*[48] has already been mentioned and it is a clear authority on this point. It will be remembered that the respondents had agreed to supply the whole of the steel required for the Forth Bridge and the House of Lords held that the appellants were in breach when they bought steel, which was needed for the bridge, from a third party.

(ii) *The buyer is not in breach if he ceases in good faith to need the goods*

The promise not to buy of another, which results in the agreement being enforceable, must be distinguished from a promise, which the seller might well argue ought to be implied into the contract, that the buyer shall have 'needs' or 'requirements.' Both Corbin and Williston (relying upon the weight of American authority) express the view that no such promise can be implied.[49] It is also envisaged by the *Uniform Code Comment* that the buyer can properly have reduced requirements or no needs at all and still not be in breach. Thus it is stated that:

> . . . good faith variations from prior requirements are permitted even when the variation may be such as to result in discontinuance. A shut-down by a requirements buyer for lack of orders might be permissible when such a shut-down merely to curtail losses would not. The essential test is whether the party is acting in good faith.[50]

Quite consistent with this approach is the one adopted in *Berk* v. *International Explosives Co.*[51] where the court held that the defendant company, who had agreed to buy from the plaintiffs all their requirements of acid (estimated at 500 to 750 tons) for a period of twelve months, were not in breach where they did not commence business, on the ground that the defendants, by virtue of this abandonment, had ceased in good faith to have any requirements.

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47 Per Atkin J. in *Percival, Lim.* v. *L.C.C. Asylums etc. Committee* (1918) 87 L.J. (K.B.) 677, 678.

48 (1890) 15 App. Cas. 125.

49 See *Corbin on Contracts,* Vol.III, pp.338-341, and *Williston on Contracts* (3rd. ed.), p. 406.

50 *Uniform Commercial Code* (U.L.A.), p.109.

51 (1901) 7 Com. Cas. 20.

Berk's Case[52] can be compared with *Pitcaithly & Co.* v. *John McLean & Son,*[53] another example of a buyer being held not liable where he ceased in good faith to have any requirements. The court held that the defendants were only bound to take such quantity as they actually required where the contract provided that the plaintiffs would supply them with 'all the assorted gravel and sand required by and in accordance with specifications for the Wellington Graving-Dock attached to the contract entered into by the employers (John McLean & Son) with the Wellington Harbour Board which shall from time to time be ordered or required by the employer . . .' Thus, when the defendants were released from their contract by the board shortly after commencing work because they found it impossible to complete the work according to the plans, it was held that they were not bound to take all the gravel and sand which would have been necessary to complete the work. This appears to be a clear case of the buyer *bona fide* ceasing to have any needs and therefore not being in breach. *Stewards' Case*[54] has already been discussed in another context. It was suggested that a more attractive approach to the problem before the court (where the Admiralty replied to the respondents in the following terms:'. . . your tender . . . is accepted for the supply for the new breakwater at Portland of about 2,000,000 tons, or such quantity as may be required, of cap and roach stone' and subsequently entered into another contract with a third party for the completion of the breakwater) would have been to say that there was a valid requirements contract but that the Admiralty were not in breach because they had, in good faith, ceased to have any need for the stone.

It may be noticed that any descriptive or parenthetical reference to the buyer's requirements cannot affect his obligation where he has bound himself to do a specific job of work or to take a particular quantity of goods. Thus in *Montefiore* v. *Parkin and Others*[55] the court held that, where the defendant had bound himself to order from the plaintiff the amount of stone contemplated by the parties to carry out works with a third party the defendant was in breach when he failed to order any stone from the plaintiff. The use of the words 'as much bolder stone as the [defendants] will require to carry out and complete their existing contract . . .' were held not to affect the buyer's obligations. Again, in *British Whig Publishing* v. *Eddy*[56] the sellers had agreed to supply the buyers with approximately 150 tons of paper for three years '(being the whole of the buyer's requirements).' The majority held that 150 tons of paper was what the parties were contracting for and that the buyers could not ask for more than that amount. The parenthetical '(being the whole of the buyer's re-

52 *Ibid.*
53 (1912) 31 N.Z.L.R. 648.
54 (1901) 18 T.L.R. 131.
55 (1907) 26 N.Z.L.R. 1317. See also *Tancred's Case* (1890) 15 App. Cas. 125.
56 (1921) 59 D.L.R. 77.

quirements)' was construed merely as a statement by the appellant buyer that the whole of the requirements would be approximately 150 tons. During the first two years the sellers supplied the buyer with more than 150 tons a year and then, in the third year of the contract, there was a rise in the price of paper; the sellers refused to deliver the buyer's actual needs (above 150 tons) and were held not to be in breach. The position would, it is submitted, have been different if the contract had read 'X's requirements (150 tons approx.).' In such a case the seller would have to supply the buyer with his good faith requirements although, applying the principles of The Code, nothing unreasonably in excess of the stated amount could have been demanded. The rise in the price of paper, a matter which has already been mentioned in the context of the buyer's good faith needs, would again obviously be an important factor here.

D. *The sale of the Buyer's Business*

The final point which may be made here concerns the situation which arises where the requirements contract is of a kind that will survive the transfer of the purchaser's business to a third party. In such a case the obligations of the supplier continue to be determined by the good faith requirements of the *enterprise itself*. Hence the restrictions associated with reasonable proportion and good faith will continue to limit the demands of a successor to the purchaser. The same principle will apply where the vendor in an output contract disposes of his business. The *Uniform Code Comment* makes this point and suggests[57] that 'Assuming that the contract continues, the output or requirements in the hands of the new owner continue to be measured by the actual good faith output or requirements under the normal operation of the enterprise prior to the sale.' Whether the contract continues depends upon the nature of the agreement. In this context *Kemp & Others* v. *Baerselman*[58] can usefully be compared with *Tolhurst* v. *Associated Portland Cement Manufacturers (1900), Limited and The Imperial Portland Cement Company, Limited.*[59]

In *Tolhurst's Case*[60] the plaintiff had entered into a contract with the Imperial Portland Cement Company under which he had agreed to supply them, for a period of fifty years, with at least 750 tons of chalk a week and so much more as the company should require for the whole of their manufacture of Portland cement upon their land. The company afterwards sold its business and assigned this contract to Associated Portland Cement Manufacturers. The House of Lords, by a majority, held that the contract must be read as if it had been expressed to be made with the Imperial Company or with its successors or assigns and that the Associated Portland Cement Company were entitled to the benefit of the contract. The basis of

57 *Uniform Commercial Code* (U.L.A.), p.110.
58 [1906] 2 K.B. 604.
59 [1903] A.C. 414.
60 *Ibid.*

the majority decision appears to be that this was a contract which could be performed 'vicariously'. As Lord Macnaughten said:

> There may be an element of personal skill or an element of personal confidence to which, for the purposes of the contract, a stranger cannot make any pretensions. But no one, I suppose, would seriously argue that a contract for delivery of chalk from particular quarries for the use of particular cement works cannot be performed by any person for the time being possessed of the quarries, or that it can make the slightest difference to anybody who the proprietors of the cement works or the actual manufacturers may be, provided that they are in a position to carry out the terms of the original contract.[61]

In *Kemp's Case*[62] the Court of Appeal distinguished *Tolhurst's Case*[63] and held that the seller was discharged from his contract when the buyer sold his business. In *Kemp's Case*[64] the seller had entered into a contract to supply Kemp, a cake manufacturer, with all the eggs 'that he shall require for manufacturing purposes for one year.' It was held that the defendant seller was discharged from the contract when the plaintiff buyer sold his business to a company and that he was entitled to refuse to supply either the plaintiff or the company with eggs. This contract the court regarded as being personal to the parties. The object here was to supply a person and not merely, as in *Tolhurst's Case*,[65] to provide a place, such as a factory, with cement. As Farwell L. J. said:

> . . . the contract contains a personal element in that the quantity to be supplied is measured by the requirements of Kemp himself. When he assigns his three businesses to the new company one of them was given up and a much larger business taken in its place. That fact brings into prominence the importance of the provision in clause 1 that the defendant shall supply to Kemp as many fresh eggs as 'he shall require for manufacturing purposes.' The requirements of Kemp for manufacturing purposes are one thing, and the requirements of anyone to whom Kemp may assign his business are another.[66]

II. The Output Contract

It is now proposed to see what principles emerge from the cases dealing with the output, or total production, contract. It will be recalled that this type of contract, like the requirements contract, falls outside the normal rules of definiteness. This is a contract which looks to the future production of the seller and, because of this, it cannot be said at the time when the contract is entered into precisely what this production will be. Nevertheless, like the requirements contract, the output agreement contains promises of a sufficiently definite nature to provide standards of performance against which the obligations of both parties can be measured.

Thus if A has agreed to take all the gas produced by the local gas company for a period of two years, there is a contract which imposes

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61 *Ibid.*, p.416. See also the observations of Lord Lindley, at p.424, to the same effect.
62 [1906] 2 K.B. 604.
63 [1903] A.C. 414.
64 [1906] 2 K.B. 604.
65 [1903] A.C. 414.
66 [1906] 2 K.B. 604, pp.610-611.

sufficiently definite obligations upon both parties although the actual quantity of gas which will be produced during the period of the contract is unknown. The obligation of the buyer would be to take the actual good faith output of the seller. The seller in turn has bound himself to deliver all the gas he produces to the buyer and has, impliedly, also bound himself not to supply any other person with his gas production. There is a binding contract and the obligations of both parties are clear even though the quantity of gas cannot be ascertained with certainty when the contract is entered into.

One of the principal problems with the output contract is the determination of the obligations of the buyer by reference to the terms of the contract relating to the seller's output. The Code provides that a term which measures quantity by the output of the seller is to mean such actual output as occurs in good faith and it is submitted that this is the test which ought to be applied to the obligations of the buyer. The circumstances under which the seller will be in breach of his obligations will then be considered. It seems clear that he will be in breach where he sells to a person other than the buyer. Such a promise to sell to the buyer and no one else may be expressed in the contract or, in the absence of express promise, is one which the court will be very willing to imply because in its absence the seller would not have furnished sufficient consideration for the buyer's promise. However, it seems equally clear that no promise will be implied that the seller will continue to have an output and when he ceases to have one this is something of which the buyer cannot complain.

A. *The Obligations of the Buyer.*

(i) *The buyer must take the good faith output of the seller.*

According to the provisions of The Code, the obligation of the buyer is to take the actual good faith output of the seller. This requirement of 'good faith performance' on the part of the seller is not necessary for the validity of the contract in terms of the consideration which he furnishes for the buyer's promise that he will take the seller's total output. It is sufficient that the seller has either expressly promised, or that the court will imply such a promise that, if he has an output, he will sell to the buyer and none other. Any requirement of 'good faith performance' therefore merely places an extra burden upon the seller.

Bealey v. *Stuart*[67] and *Gwillim* v. *Daniell*[68] illustrate the principle that the buyer is bound to take the actual, good faith output of the seller. In *Bealey's Case*[69] the defendants had agreed to take a lease of the plaintiff's premises for a year, with an option for renewal, and had also agreed to take the whole of his chlorine still-waste so long

[67] 158 E.R. 672.
[68] 150 E.R. 26.
[69] 158 E.R. 672.

as they held the premises. The plaintiff had undertaken that he would not use or part with any still-waste except to the defendants, thus expressly furnishing consideration for the defendant's promise. The court held that the defendants were bound to take the still-waste so long as they should hold the premises, that they were in breach in refusing to take it and that it was no answer that they no longer had any use for the still-waste. As Pollock C. B. said:

> It seems to me clear that it was intended that the plaintiff should supply and the defendants should take the whole of the plaintiff's chlorine still-waste during the year. If the defendants had intended to take so much only as they required, they would have inserted in the agreement the words 'or so much as we may require.'[70]

If this had been the case, it would seem that the addition of a phrase such as this would have turned the agreement into a 'requirements' contract and that the buyers would not have been held liable where they had in good faith ceased to have any actual need for the still-waste.

Gwillim v. *Daniell*[71] also illustrates this principle indirectly. In this case the plaintiff had agreed to buy all the naptha which the defendant might make for a period of two years from a fixed date, the expression 'say from 1,000 to 1,200 gallons per month' being used in the contract. The court held that the defendant was not in breach when he only delivered a total amount of 3,300 gallons. The court took the view that the phrase 'say from 1,000 to 1,200 gallons per month' was merely a non-contractual statement to the effect that, in all probability, the quantity produced would amount to that but that the defendant did not undertake that the output should be that amount. The court regarded the performance by the defendant as a *bona fide* one. As Lord Abinger C. B. said:

> If by fraud the defendant manufactured less than he ought to have done, the breach should have been shaped accordingly. Here it does not appear that in the ordinary course of his manufacture the defendant ought to have produced a larger quantity than he has done; and we cannot, therefore, say that he has broken his contract.[72]

What was said here is completely consistent with the principles of good faith performance underlying the provisions of The Code. Although *Gwillim* v. *Daniell*[73] is directly concerned with an alleged breach by the seller it also illustrates the principle that the buyer's position is regulated by the *bona fide* performance of the seller. It is clear from this case that the only quantity which the buyer is entitled or bound to take is the actual, good faith output of the seller.

(ii) *The buyer's obligations are affected by an estimate or an upper limit.*

Two factors which will limit the obligations of the buyer, other than that the seller's output shall be his actual, good faith production

70 *Ibid.*, p.675.
71 150 E.R. 26.
72 *Ibid.*, p.30.
73 150 E.R. 26.

are, in the first place, the statement of an estimated amount and, secondly, the presence of a term which places an upper limit upon the seller's output. The contract may provide, for example, that the seller's total production shall not exceed 100 tons per month or, alternatively, the agreement may state that it is estimated that the seller's output will be in the region of 50 gallons per week. The Code provides, in circumstances such as these, that no quantity unreasonably disproportionate to the stated amount may be tendered. Thus it regards an estimate as the centre around which any reasonable variations may occur and would regard the statement that 'the total production shall not exceed 100 tons per month' as a clear upper limit upon such variations and that nothing in excess of this amount could be tendered by the seller. [A provision which places a lower limit upon the seller's output will be considered in the context of the obligations of the seller].

The result of these limitations is that the buyer is protected. Thus the effect is that the seller ought not to be able to tender to the buyer anything unreasonably in excess of an estimate or upper limit. However, it is suggested that this is its only purpose and, as seems clear from *Gwillim* v. *Daniell,*[74] the buyer cannot use an estimate or an upper limit for his own benefit and argue that, whatever the actual output may be, the seller is bound to deliver the amount stated in the contract. This should not be permitted and, as has already been pointed out, the only quantity which the buyer is entitled or bound to take is the actual, good faith output of the seller.

It is submitted that in the light of The Code's approach, which appears to be a very attractive one, there is little to be said in favour of the decision in *Hammond* v. *Daykin.*[75] In this case the defendants had agreed to act as commission agents for the sale of the plaintiff's crop of potatoes and agreed to handle 'the entire crop,' which the plaintiff expressly estimated in the contract as '600 tons more or less.' In fact the entire crop exceeded 1,200 tons and the defendants disposed of 1,140 tons. It was in respect of this balance, left on the plaintiff's hands at the end of the season, that the present action was brought. The majority took the view that the words 'the entire crop' were the governing ones and regarded the '600 tons more or less' as merely an 'estimate' and held that the defendants were in breach. In view of the fact that the information which would go towards such an estimate as this would be exclusively within the knowledge of the plaintiff it is suggested that these words should have been regarded as providing a guide for the defendants and indicating to them that they were bound to dispose of a quantity of potatoes within a reasonable margin of 600 tons. If the provisions of The Code are applied, then the actual output was 'unreasonably disproportionate' to the stated estimate and

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[74] *Ibid.*
[75] (1914) 18 D.L.R. 525.

the court should have held that the defendants were not in breach because, as it was, they had more than reasonably fulfilled their obligations.

There appear to be no cases, in the jurisdictions under consideration, where there has been an upper limit placed upon the seller's output which he has exceeded and then claimed that it should be ignored and that the buyer is bound to take his actual, total output. Applying the approach of The Code again, it is clear that the buyer would not be bound to take anything which was in excess of the stated upper limit.

B. *The Obligations of the Seller*

It has already been said that to give validity to the output contract a promise must be found that the seller will sell to the buyer and none other. If the seller does sell to a person other than the buyer then clearly he is in breach. This is a matter which does not appear to have arisen for decision in the jurisdictions under consideration nor is it a question which is discussed in the cases. It has also been noticed that no promise will be implied that the seller will continue to have an output; hence he will not be in breach if he ceases to produce. Before turning to the cases illustrating this rule, it is proposed to look at the effect upon the obligations of the seller of any contractual terms which place a lower or an upper limit upon the seller's production. (We have already noticed that, in spite of what was held in *Hammond* v. *Daykin*,[76] where there is a stated estimate this must be regarded as the centre around which the parties intended the variation to occur.)

(i) *The obligations of the seller are affected by a lower or upper limit*

To consider first the contract which places a lower limit upon the output of the seller: it may provide, for example, that the buyer shall purchase all the oil produced by the seller where it is agreed that such amount shall be not less than 6,000 gallons per month. Here the seller is under an obligation to deliver the 6,000 gallons and, in respect of this amount, he has no choice. In respect of anything in excess of this quantity he must sell to the buyer or not sell at all and the only limitation which is placed upon him, in the absence of an estimate or an upper limit, is that his output should be a *bona fide* one and not unreasonably disproportionate to any previous production. *Leeming and Another* v. *Snaith*[77] illustrates the principle that, where the contract speaks of a lower limit, then the seller has no option below that amount. In this case the defendant, who was a puller of wool, sold to the plaintiff 'what he may pull up to 6th January, say not less than 100 packs of combing skin, at 7½ per pound. . . .' The plaintiff was held

[76] *Ibid.*
[77] (1851) 20 L.J.(Q.B) 164.

to be in breach of this contract where he pulled and delivered only 80 packs of combing skin, the court taking the view that the plaintiff was to have all the wool pulled and that the phrase 'say not less than 100 packs' were words of contract and fixed the minimum which should be delivered to him.

We have already noticed the effect of an upper limit (that, for example, the total production shall not exceed 100 tons per month) when looking at the obligations of the buyer. It was seen that the buyer cannot complain if the seller's actual, good faith output falls short of this amount, nor, as was held in *Gwillim* v. *Daniell*,[78] if it fall short of an estimated quantity. It is the seller's *bona fide* output that the buyer is bound by and it is this alone which he is entitled to demand from the seller. The buyer's only ground for complaint would arise where the amount tendered was in excess of an upper limit (or unreasonably disproportionate to an estimate) and these are the factors which control the amount that the seller can tender to the buyer. There is another aspect of an upper limit upon the seller's output which, although not affecting the seller's obligations in relation to the performance of the contract, is worth noting. This is that such a stipulation would tend to have the effect of weakening the bargaining value of the seller's promise in the sense that, if he does produce anything in excess of this amount, he will be entitled to sell to whom he pleases. The value of such a promise to a person who is intent upon securing to himself all that the seller may produce is less than it would be if the seller had agreed to sell to that person his total production whatever the quantity might be.

(ii) *A term will not be implied that the seller will have an output*

Where the contract provides for a lower limit to the seller's output we have seen that the seller will be in breach where he does not supply goods to that amount. It would appear however that, in the absence of a lower limit, the seller will not be in breach when he ceases, in the course of the contract, to have an output. It is clear from *Hamlyn* v. *Wood*[79] (and *Re Arawa Dairy Coy.*[80] which followed *Hamlyn* v. *Wood*[81]) that no promise can be implied in this direction. In this case the Court of Appeal held that the defendants, who carried on a business as brewers, were not in breach of a contract which they had entered into with the plaintiffs for the supply, for a period of ten years, of all the grains made by them, where the defendants sold their business and thereby ceased to have any output. This is a clear case of the court recognising that the seller does not promise by implication that he will have an output. The court refused to imply a term that both parties contemplated an undertaking by the defendants that they

78 150 E.R. 26.
79 [1891] 2 Q.B. 488.
80 [1938] N.Z.L.R. 411. See also *Re Premier Products Limited (In Liq.)* [1965] N.Z.L.R. 50.
81 [1891] 2 Q.B. 488.

would not voluntarily discontinue the business for ten years. They were merely selling a by-product of their business and to imply such a term would have forced them to continue the main business for ten years at perhaps a loss, finally finding that they could not sell it at a profit. The court took the view that the implication of such a term as this would certainly not give business efficacy to the contract and could not therefore have been intended by them. *Hamlyn* v. *Wood*[82] was applied in the New Zealand case of *Re Arawa Dairy Coy.*[83] which was similarly concerned with the supply of a by-product. In this case a contract was entered into between C and the Dairy Company whereby it was agreed that the company should supply C with 'all buttermilk produced from the making of butter at the company's factory' for a specified time. The company then sold the business, went into voluntary liquidation, and ceased to be able to supply. C lodged a proof of debt claiming damages for breach of this contract. The liquidator rejected this proof and the court refused to reverse this rejection. The court said[84] that: 'no doubt problems of this kind ought to be decided by considering what is the authoritative principle, rather than by seeking to discover what has been done in other similar cases.' The court regarded *Hamlyn* v. *Wood*[85] as such a case and applied it, holding that there could not be implied into the contract a term that the company would continue in business. The 'authoritative principle' appears to be that, where there is no express statement by the seller that he will continue to have an output for the period of the agreement, there will be a gap in the contract because the court will not imply it. There is no reason to fill a gap merely because one exists, and the present contract, without such an implication, was still enforceable and neither unreasonable nor unfair. As Corbin states in the context of the implied term in the requirements and output contracts,

> A promise that is not there in language, or an unexpressed condition of an express promise, should be put in by process of implication only when the conduct of the parties reasonably interpreted already has expressed it. It should be put in by construction of law, in the absence of justified implication only when justice imperiously demands it under the circumstances that have arisen.[86]

The buyer may not be entirely happy with this view but it is submitted that it is a risk he must be prepared to take. There are, of course, obvious compensatory advantages accruing to the buyer. If everything goes according to expectation, he has cornered a particular market and secured to himself a supply of goods and also excluded others, perhaps his business rivals, from buying the particular goods produced by the seller. In addition to this the goods, which are to be bought over a period of time, have a fixed price so that the buyer, although adversely affected by a drop in price, is not affected by any rise in the market

82 *Ibid.*
83 [1938] N.Z.L.R. 411.
84 *Ibid.*, p. 420.
85 [1891] 2 Q.B. 488.
86 *Corbin on Contracts*, Vol. III, p.341.

price. In view of these considerations, the risk of the seller ceasing to have an output (and this is, after all, a slight risk if the seller is properly selected) is one which the buyer ought to be willing to carry. That such contracts are entered into suggests that this is in fact the case.

III. A Summary

So far as the general characteristics of the requirements and the output contracts are concerned, one would have thought that, by virtue of their rather special nature (as we have seen, the normal rules relating to certainty of terms do not apply here), the distinctive features of these contracts would have been discussed, in some detail, in the cases. In fact, there is a complete absence apart from a limited discussion, in relation to the requirements contract, in *Kier's Case*.[87] It is submitted, however, that the following principles can be deduced from the cases which have been discussed.

A. *Requirements Contracts*

I. *Formation*

(i) The court must be satisfied, on construing the contract, that the buyer had bound himself from the beginning to take his needs from the seller. If it is found that the seller has merely promised to take what he chooses to ask for then there is no contract at all but merely a revocable standing offer by the seller.[88]

(ii) The consideration which the buyer furnishes is the expressed or implied promise that, if he needs the goods, he will buy from the seller and no one else.[89]

II. *The position of the Seller*

(i) Once the court has concluded that the buyer has bound himself to take (and not merely to take what he chooses), it will then interpret 'requirements' as meaning actual 'needs' and hold that the seller is bound to supply the buyer with his good faith needs.[90]

(ii) *Estimates—Upper and Lower Limits*

a. Where there is an estimate of the requirements, the buyer cannot demand anything unreasonably disproportionate to that figure.

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87 [1938] 1 All E.R. 591.

88 This is made clear by such cases as *Gilmour* v. *McLeod* (1893) 12 N.Z.L.R. 335, *Steward's Case* (1901) 18 T.L.R. 131 and *Cory Brothers' Case* (1933) 46 Ll.L.Rep. 309.

89 See *Pitcaithly & Co.* v. *John McLean & Son* (1912) 31 N.Z.L.R. 648 (an express promise) and *Brandon Gas & Power Co.* v. *Brandon Cremery Co.* (1912) 8 D.L.R. 191; *In re Gloucester Municipal Election Petition* [1901] 1 Q.B. 683 (an implied promise).

90 See *Kier & Co. Ltd.* v. *Whitehead Iron & Steel* [1938] 1 All E.R. 591. Such cases as *Chipman* v. *Bennett* (1903) 3 N.S.W.R. 653 and *Whitehouse's Case* 136 E.R. 1093 ought not to be followed.

b. Where there is an upper limit, the buyer cannot demand anything in excess of this.

c. Conversely, although the seller can compel the buyer to take a quantity up to a lower limit (because the buyer has bound himself to take at least that amount), the buyer cannot be compelled to take anything in excess of an upper limit or unreasonably disproportionate to an estimate, because the position of the seller, in relation to what he can compel the buyer to take, ought to be regulated by the good faith needs of the buyer.[91]

III. *When is the Buyer in Breach?*

(i) The buyer will be in breach when, needing the goods, he buys of a third party.[92]

(ii) The buyer will not be in breach when he ceases, in good faith, to have any need for the goods.[93]

B. *Output Contracts*

I. *The Obligations of the Buyer*

(i) The buyer must take the good faith output of the seller.[94]

(ii) With estimates and upper limits the case law is unsatisfactory[95] and the provisions of The Code ought to be adopted. Thus, no quantity unreasonably disproportionate to a stated amount may be tendered by the seller. Where there is an upper limit, no quantity in excess of this may be tendered.

II. *The Obligations of the Seller*

(i) The obligations of the seller are affected by a lower limit. Here, the seller has bound himself to produce at least that quantity.[96]

(ii) With regard to estimates and upper limits, this has already been considered in dealing with the obligations of the buyer.

(iii) A term will not be implied that the seller will have an output.[97]

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91 This is illustrated by *Hume* v. *Martin* [1921] Tas. S.R.8. There are no other cases dealing with estimates or upper and lower limits. The submissions which have been made are therefore based upon the provisions of The Code and the principles which underlie those provisions.

92 *Tancred's Case* (1890) 15 App. Cas. 125.

93 See *Berk's Case* (1901) 7 Com. Cas. 20; *Pitcaithly's Case* (1912) 31 N.Z.L.R. 648.

94 *Bealey* v. *Stuart* 158 E.R. 672 and *Gwillim* v. *Daniell* 150 E.R. 26.

95 *Hammond* v. *Daykin* (1914) 18 D.L.R. 525 ought not to be followed.

96 *Leeming & Another* v. *Snaith* (1851) 20 L.J.(Q.B.) 164.

97 *Hamlyn* v. *Wood* [1891] 2 Q.B. 488 and *Re Arawa Dairy Coy.* [1938] N.Z.L.R. 411.