AGENTS AND CONSUMER GUARANTEES

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Introduction

The Consumer Guarantees Act 1993 introduced a number of minimum standards or obligations, called guarantees, which apply when goods and services are supplied to consumers. The guarantees as to goods cover matters such as title to goods, quality and fitness for purpose, correspondence with description and sample, price, spare parts and express guarantees; and guarantees as to reasonable care and skill, fitness for purpose, time of completion and price are imposed in relation to the supply of services. In some circumstances, manufacturers of goods may be liable under the Act. The right to contract out of the legislation is very limited, it being a consumer protection measure. The statute has a wide scope and very few consumer transactions are not covered by it. It does not derogate from other rights and remedies available to consumers except where other rules of law are expressly or impliedly repealed by it. The most significant of the express repeals in the Act relates to the Sale of Goods Act 1908; the provisions of that Act which imply conditions as to quality and fitness of goods as well as other matters covered by the new guarantees now apply only to sales to which the Consumer Guarantees Act does not apply. The Hire Purchase Act 1971 and the Motor Vehicle Dealers Act 1975 have been amended to enable the appropriate guarantees to apply to transactions covered by them; and the Contractual Remedies Act 1979 has been similarly limited in its scope where the supply of services to consumers is concerned. The new Act also has some application to matters within the Building Act 1991.

The guarantees may apply to agency agreements as they do to other transactions. An agent who agrees to act for a principal is performing a service, and provided the particular service is carried out pursuant to an agreement made with a consumer and is within the scope of the Act, the service performed by the agent will be covered by the guarantees. People who act wholly or partly as agents in the course of their professional work must therefore comply with the guarantees with respect to their consumer clients and will be liable under the Act if the guarantees are breached. However, the liability of agents under the Act is not confined to the obligations of agents to their clients. The Act introduces a provision which has the effect of making agents, in certain circumstances, liable for the failure of guarantees where the goods and services are in reality not supplied by agents themselves but by suppliers who have authorised agents to act for them. This represents a significant departure from the established common law position as to the liability of agents. Under the Act an agent may be personally liable where goods or services fail to comply with the guarantees even if the agent is not in fact a party to the transaction between the supplier and the consumer. Agents who would otherwise be merely intermediaries are brought within the Act by virtue of the definition of "supplier" in section 2(1). That provision states that a "supplier" is a person who supplies goods or services in trade to a consumer in certain stated circumstances, and includes:

> A person who, in trade, is acting as agent for another where that other is not supplying in trade.

Such a provision is novel in New Zealand. Under other legislation governing the supply of goods and services such as the Sale of Goods Act 1908 or the Contractual Remedies Act 1979 actions on contracts made are undertaken between the parties to the contracts themselves; an agent who has been instrumental in effecting a contract generally does not, as described below, bear any liability on it. There are of course circumstances in which agents themselves may be liable for their own conduct or statements relating to the formation of the contract. For example, an agent might, if in trade, breach the Fair Trading Act 1986, be liable in tort for negligent misstatements or breach an implied warranty of authority. But liability in these cases arises from the agent's own conduct, not from any breach of the contract which the agent has brought about between his or her principal and the third party. The unusual feature of the Consumer Guarantees Act is that it imposes on the agent responsibility for failures to comply with obligations for which the principal would have been solely liable had he or she been in trade.

The Act does not go so far as to deem the agent to be a party to the contract which has been made by him or her. It is only compliance with the consumer guarantees created by the Act for which the agent may be responsible and other law remains unaffected. The agent will continue to have no responsibility on the contract for breaches of other statutes or the general law which might have occurred. For example, if the contract made through the agent is not within the Act but instead is covered by the Sale of Goods Act, the agent will have no responsibility for the quality or fitness of the goods. A sale of commercial machinery for example would come within this category, for such machinery is not ordinarily acquired for personal, domestic or household use or consumption and the buyer will therefore not be a consumer.[1] In such a case, the agent will not incur liability if the machinery is not of merchantable quality, even if the seller of the goods, by virtue of not being a dealer or for some other reason, has no responsibility either. In other words, the imposition of liability on the agent is confined to the Consumer Guarantees Act and other areas of the law are unchanged.

The intention of the provision appears to be to protect the consumer by precluding the hardship which might result to the consumer where the supplier of goods or services is not in trade, and the consumer has received the goods or services from the agent in reliance on the agent's reputation. The Sale of Goods Act 1979 (UK), section 14(5) was enacted for this purpose,[2] although that provision deals with the problem differently, as discussed below. There is no equivalent provision in the Saskatchewan legislation from which the Consumer Guarantees Act is partly derived.[3]

The purpose of this article is to consider the responsibility of agents under the Act and the extent to which the established law of agency may have been altered by the new statutory regime. It is suggested that the legislation does not make clear whether the rules of the common law which

1 A "consumer" is a person who acquires from a supplier goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption and who does not acquire them to resupply in trade, consume in a process of production or manufacture or, in the case of goods, to repair or treat in trade other goods or fixtures on land: s 2(1).

2 See *Boyter v Thomson* [1995] 3 All ER 135, 137 (HL).

3 Consumer Products Warranties Act 1976-77 (Sask).

determine the liability of agents on contracts which they bring about have been completely, or only partly, superseded; that the imposition of liability on agents may be unduly onerous in some cases; and that the legislation could perhaps have better achieved its purpose by being differently drafted. How far the Act changes the law is determined, it is suggested, by considering whether the Act applies equally to agents who are disclosed as mere intermediaries and those who are not. Each situation will be examined in turn.

The disclosed agency

An agent is a person with the power or capacity to establish a contractual relationship between his or her principal and a third party. Provided it is clearly understood by the third party that the agent is no more then an agent and acting in a purely representative capacity, the position of the agent will be merely that of an intermediary. In such a case, the agent is not a party to the contract which he or she has brought about; the agent is a "mere scribe",[4] and is no more than an instrument or device to effect a contractual nexus between others. It is of course necessary that the terms of the arrangement or the surrounding circumstances indicate that the agent is occupying a position of a representative character such as to preclude any personal liability on the contract which is made. The use of qualifying words such as "on account of",[5] "as agent",[6] "on behalf of"[7] or "for"[8] have this effect and when added to an agent's name or signature on a contract make it clear that the agent acts only in an intermediary capacity. The agent then simply disappears from the scene as far as the particular contract is concerned; the contractual relation is solely between the principal and the third party and they must look to each other with respect to the benefits and burdens of the agreement. The agent may have other rights or liabilities resulting from the particular transaction; he or she may, for example, sue or be sued on the contract of agency made with the principal, or may be liable to the third party in tort or for breach of warranty of authority. The agent may also be in breach of statutory obligations, such as those imposed by the Fair Trading Act 1986 and so incur liability to either the principal or the third party. However, the contract which has been effected by the agent is purely a matter for the parties to it, and the agent acquires no rights or obligations under it. It is the essence of the agent's position that he or she is only an intermediary between two other parties.[9]

There are, however, occasions on which a disclosed agent may incur personal liability on the contract which he or she effects. It is not the fact that the third party is aware that the agent is in fact an agent which exonerates the agent from liability on the contract; it is the circumstance that it has been made clear that the agent is acting in a solely representative capacity and in no other which is important. An agent who contracts in his or her own name is, *prima facie*, bound on the contract, and does not cease to be bound because it is shown that the third party knew of the existence

4 *Leadbitter v Farrow* (1816) 5 M & S 345.
5 *Lester v Balfour* [1953] 2 QB 168.
6 *Oglesby v Yglesias* (1858) E B & E 930.
7 *Ariadne SS Co v James McKelvie & Co* [1922] 1 KB 518 (CA) affd sub nom *Universal Steam Navigation Co Ltd v James McKelvie & Co* [1923] AC 492 (HL).
8 *Kimber Coal Co v Stone and Rolfe Ltd* [1926] AC 414 (HL).
9 *L C Fowler & Sons Ltd v St Stephens College Board of Governors* [1991] 3 NZLR 304.

of the agency when the contract was made. In such a case, the agent is able to sue and be sued on the contract, as is the principal. Thus, in *Basma v Weekes*[10] it was held that an agent who signed an agreement to purchase two houses was contractually bound and had made a sufficient memorandum in writing to render the agreement enforceable, even though the sellers were aware that the agent was an agent for the principal. The contract made no reference to the principal. The agreement was held to contain the names of the contracting parties, and the evidence of agency simply indicated that someone else, the principal, was also bound.

The Consumer Guarantees Act makes no distinction between agents who are acting in a purely representative capacity and those who are themselves personally liable on the contracts which they bring about. It may be assumed that the Act applies to both classes for in any event it will be only be agents of the former class who will be affected by the imposition of a new legal liability. The position of an agent whose agency is disclosed but who is nevertheless personally liable will be unchanged by the legislation. Such an agent would have been liable anyway, on normal agency principles. It is the agent who, under the general law of agency, is a "mere scribe" and so not a party to the contract who is affected. Such an agent is, in effect, substituted for the principal where the principal is not in trade, and he or she assumes the obligations under the Act which would have attached to the principal had the principal been in trade.

The undisclosed agency

An undisclosed principal is one whose very existence is not revealed to the third party. Such a principal must be distinguished from an unnamed principal, who is a person whose existence is known to the third party, although his or her identity is not disclosed. Where an agent acts for a principal of whose existence the third party is aware, the agency is a disclosed agency of the kind described above, and it is generally immaterial that the third party does not know the name of the principal. In such a case, the third party is taken to have accepted that there is in existence a principal to whom the third party will be bound, and that he or she accepts that person as a principal no matter who the person may prove to be.

An undisclosed principal, however, is in a different category, for the third party is simply unaware that any principal exists at all. The third party contracts with the agent believing that the agent is the other party to the contract, and with no knowledge that the agent is representing anyone else. It is not only the identity of the principal which is not revealed to the third party; the fact that any agency exists at all is not disclosed. Where this occurs, the general rule is that the principal may, after the contract has been made by his or her agent, come forward and make his or her existence known and sue or be sued on the contract. This doctrine has been described as anomalous, for its effect is that the third party is contractually bound to someone of whose very existence he or she was unaware at the time of entering the contract. However, where there is an undisclosed principal, the liability of the agent does not disappear. The principal is not a substitute for the agent. The third party is still, as he or she had intended, bound to the agent; but there is an additional person to whom he or she is bound.

10 [1950] AC 441.

There are exceptions to this doctrine where the terms of the contract indicate that the agent is to be the only other party to the contract, so that the contract does not contemplate that any other person may be a party. However, the general rule is that the doctrine is applicable in ordinary commercial dealings and that any third party who does not want the possibility of discovering that an undisclosed principal exists must stipulate for this in the contract. Otherwise, the third party simply takes the risk that the agent is in fact acting for some other person, and that, if that should prove to be the case, the agent who was, in appearance, the only other party to the contract is in fact not the only other contracting party.[11]

There is nothing in the Consumer Guarantees Act to suggest that the agents of undisclosed principals are in a different position from other agents as far as their responsibility for the guarantees is concerned. It may be that in any event such a distinction would be unnecessary for it is likely, as suggested below, that an agent whose principal is undisclosed would be obliged to comply with the guarantees even in the absence of any express statutory provision imposing such an obligation.

The effect of the Act

Section 4(1) of the Consumer Guarantees Act provides that the Act is not a code; the rights and remedies provided in the Act are in addition to other rights or remedies existing under any other legislation or rule of law unless the Act expressly or impliedly repeals such other rights or remedies. It may therefore be assumed that the normal common law rules of agency continue to apply to transactions which are within the Act except to the extent that the Act changes those rules. It is, however, not entirely clear to what extent the provision which deems an agent to be a supplier where the real supplier is not in trade alters the common law rules as outlined above. There is, it is suggested, no doubt that the normal case where the agent is merely an intermediary will be subject to an alteration in the law, for such a person would not, at common law, ever be a party to the contract. However, in other cases, the result is less clear. The succinct wording of the Act in including as a supplier "a person who, in trade, is acting as agent for another where that other is not supplying in trade" does not address the question of whether the liability which, at common law, would normally attach to an agent who contracts in his or her own name remains unaltered; or whether such an agent's liability is ousted in cases where the principal is in trade.

If the common law rules remain unchanged, it is suggested that the provision in the Act which deems an agent to be a supplier where the principal is not in trade will effect a change in the law only in those cases where the agent has in fact contracted in such a way as to indicate that he or she is not a party to the contract which is formed. An agent who contracts in his or her own name is generally liable on the contract even where the fact of the agency has been disclosed in the manner described in *Basma v Weekes*.[12] In the case where the principal is undisclosed, the agent is in the eyes of the third party the other party to the contract and, *ex hypothesi*,

11 See *Murphy v Rae* [1967] NZLR 103 and *Siu v Eastern Insurance Co Ltd* [1994] 2 AC 199 (PC) for discussions of the principles of the doctrine and its exceptions.

12 [1950] AC 441.

necessarily makes the contract in his or her own name and is a party to it. In both these cases the agent, as a party to the contract, would be a supplier within the terms of the Act, not because he or she is an agent but because he or she is a party to the supply of goods or services. The agent would therefore, as a supplier within the Act, be required to comply with the guarantees provided he or she were in trade. However in such cases there is an additional person, the principal, who will also be responsible because the principal is an additional, and not a substituted, party; and provided the principal is in trade, he or she will also be liable under the Act. The third party, in seeking redress under the Act may therefore, if both principal and agent are in trade, elect which of them to pursue.

It may be, however, that the wording of the Act is intended to limit the obligations of the agent on the guarantees only to cases in which the principal is not in trade. This construction is possible, given that the word "agent" is unqualified; it is not expressed to apply only to certain classes of agent. If the intention of the Act were to impose liability on agents of whatever kind only where the principal is not in trade, the result would be that certain agents who would otherwise be suppliers within the terms of the Act would be relieved of their responsibilities for compliance with the guarantees provided it were shown that their principals were in fact in trade. An agent acting for an undisclosed principal would be of this kind; such a person would, as described above, be a party to the contract and so be a supplier within the terms of the Act, with the result that both agent and principal would be liable to the consumer. If, however, the object of the Act is to confine responsibility to agents only in cases where their principals are not in trade, the consumer will suffer a diminution, and not an increase, in the rights available to him in consequence of the provision which expressly brings agents within the ambit of the Act. It would appear unlikely that this is the intention of the provision, given that the Act is intended to increase the rights of consumers.

Asimilar issue arose for consideration by the House of Lords in the case of *Boyter v Thomson*.[13] In the United Kingdom, agents have in some circumstances liability for breach of the implied conditions as to merchantable quality and fitness for purpose set out in the Sale of Goods Act 1979 (UK). Section 14(5) of that Act provides that those provisions apply to:

> [A] sale by a person who in the course of a business is acting as agent for another as they apply to a sale by a principal in the course of a business, except where that other is not selling in the course of a business and either the buyer knows that fact or reasonable steps are taken to bring it to the notice of the buyer before the contract is made.

In *Boyter v Thompson* a boat had been sold to a buyer by an agent acting for an undisclosed principal. The boat was defective and the buyer wished to sue the principal in respect of the breaches of the implied statutory conditions as to fitness for purpose and merchantable quality. The seller argued that s 14(5) enabled action to be taken only against the agent and that he, the seller, could not be held liable. He contended that there would be an overlap in cases where the principal was selling in the course of a business through an agent because such a seller would already be within the ambit of the implied conditions, and that such an overlap could not be

13 [1995] 3 All ER 135.

intended. The House of Lords, however, found against the seller, holding that the subsection applied to any sale by an agent on behalf of a principal, whether disclosed or undisclosed; and that where the subsection applied the normal common law rules of principal and agent also applied. This construction was justified by a literal reading of the subsection. Further, the House of Lords observed that the seller's argument for a restrictive interpretation would, if adopted, result in the creation of statutory alterations to the normal common law rules which impose liability on the agents of undisclosed principals but not on those whose principals are disclosed. Such a result would mean that the legislation substantially failed to achieve its intended purpose of protecting consumers who bought goods from private sellers who sold through agents acting in the course of business. Such consumers would have no right of redress for breach of the statutory conditions against the private seller for such a person was not selling in the course of business; and it would cause hardship to the consumer in such a case who had bought the goods in reliance on the agent's reputation if no redress were available against the agent. The object of the statutory provision was to meet this situation.

The United Kingdom legislation is, of course, in very different terms from the New Zealand provision. Nevertheless, it is submitted that it is likely that the courts in New Zealand would, given that the object of the Consumer Guarantees Act is to protect consumers, construe the Act in such a manner as to maximise consumers' rights of redress. To treat the obligations of suppliers as ousted in cases where the supplier has chosen to supply by means of an agent would, it is suggested, not be in accordance with the purpose of the Act. Nor would the displacing of the normal common law rule that both agent and principal are liable where the agent contracts in his or her own name be justified by the terms of section 4 of the Act, for that section provides that other rules of law are in addition to those provided by the Act unless the Act expressly or implied repeals or modifies those other rules. It is doubtful whether the common law rules respecting agents who contract in their own names could be treated as impliedly repealed by the provision which confers liability on agents, for the provision is simply silent on the matter. It is suggested that a construction which regards the law as being altered only in respect of disclosed agents would be likely. This would result in the continuation of the common law principles respecting those agents who contract in their own names, so that the liability of principals in such cases would not be removed by the Act.

The New Zealand provision says nothing about the state of knowledge of the consumer as to the capacity in which the agent is acting. The United Kingdom provision, by contrast, provides an exception to the rule stated in it where the consumer knows, or is taken as knowing, that the principal is not acting in the course of business. This exception is consistent with the purpose of the United Kingdom provision, for in such a case the consumer is not deceived; the consumer knows that a principal exists and that the principal, not being in business, has no obligation to comply with the statutory conditions as to the quality of goods supplied. The New Zealand provision, however, makes no distinction between cases in which the consumer has knowledge of the existence of the principal and those where he or she has no such knowledge. Nor is any distinction made, in cases where the agent is aware of the existence of the principal, between cases where the consumer knows that the principal is in trade and those

where the consumer does not know of that fact. This may be viewed as a further indication that the Act is not to receive a restrictive interpretation. Even where the consumer knows in a particular case that the agent is acting only in a representative capacity and also that the principal is not in trade, the agent will nevertheless be responsible for any failure to comply with the consumer guarantees. This, as is suggested below, is a heavy burden on the agent; but it provides a stronger protection for the consumer than does the United Kingdom provision, which still contains an element of *caveat emptor* in its terms. The fact that the New Zealand provision contains no reference to the state of knowledge of the consumer perhaps gives further support to the view that any doubtful or ambiguous language should be interpreted in favour of the consumer. This is consistent with the intention that liability under the Act on the part of suppliers should be absolute, and that contracting out is not permitted.

If this interpretation is correct, the result would be that the only change to the law effected by the provision imposing liability on agents would be in the case where the agent in question would, at common law, have had no liability at all, having made it clear that he or she was acting only as an intermediary and not as a contracting party. This is, of course, the only situation in which there would be no possibility that the consumer would have been in any doubt as the identity of the other party to the contract, for the fact of the agency and the lack of liability on the agent's part would be clearly known to the consumer. In such a case, there is no possibility that the consumer would have been misled or deceived, or have entered the agreement in reliance on the agent's reputation.

In those cases in which the agent is not purely a representative, the agent would, at common law, have been liable anyway, having contracted in his or her own name. The agent's liability would result from the application of common law principles, rather than from the terms of the Act itself. In consequence it is likely that the Act, for the reasons described above, will make no difference to the law in this area.

Agents' liability in practice

The practical effect of the Act where contracts are made through agents will be that agents bear a heavy burden of responsibility. As no contracting out is possible, the burden is one which cannot be avoided. The agent who is acting purely as a go-between will be obliged to assume obligations relating to the goods or services which are supplied regardless of his or her state of knowledge of them and any clear statements he or she might make that he or she is not the true provider of the goods or services to be supplied to the consumer.

It is apparent that the agent who, under common law principles, would not be a party to the contract of supply of goods or services does not actually become a party to the contract even though he or she may be a supplier within the terms of the Consumer Guarantees Act. The general definition of "supplier" in the Act includes persons who are in fact parties to the contract of supply; and agents who are merely intermediaries are of course not within this category. Although an agent in trade is deemed to be a supplier when the principal is not in trade for the purposes of the Act, the Act does not go so far as to treat the agent as actually being a party to the contract. Rather, the agent takes on those obligations under the Act which would have attached to the principal had the principal been in trade.

It follows that the agent who is acting merely as an intermediary but who acquires responsibilities to comply with the guarantees will be in the position of having obligations on the contract but no corresponding rights. The Act does not deal with the rights of suppliers under the contract of supply for goods or services, but only with the guarantees themselves. Such remedies as are available to the sellers or suppliers of goods or services are to be found under the common law or in other statutes. In sales of goods, for example, the remedies given to sellers such as the right to stop goods in transit or to exercise an unpaid sellers' lien, or the right to sue for the price will continue to be available to the principal who sells through an agent, for such a principal is the real seller and so a party to the contract of sale. The agent, however, although responsible under the Consumer Guarantees Act for compliance with the guarantees, does not actually become a party to the contract and so does not acquire the rights which attach to the seller in a sale of goods. For example, section 30 of the Sale of Goods Act provides that payment and delivery are concurrent conditions. These obligations are mutual;[14] each party, to enforce the duty owed to him or her must be ready and willing to carry out his or her own obligation. The general rights and duties owed by buyer and seller to each other which arise from the Sale of Goods Act continue to apply to contracts to which the Consumer Guarantees Act applies except to the extent that the latter Act excludes them; and the express exclusions relate only to those matters such as quality and fitness which are replaced by the Consumer Guarantees Act. The remainder of the matters dealt with under the Sale of Goods Act remain in force, but they apply only to the parties to the contract of sale. As agents who act only as intermediaries are not parties to the contract, they will have no recourse to the Sale of Goods Act or, for that matter, to any other law affecting the contract of sale. Their only obligations on the contract will be those laid down in the Consumer Guarantees Act, but they will acquire no rights under the general law as against the consumer.

Nor is it clear whether the defences which would normally be available to principals who are suppliers of goods or services to will be available to their agents. If, as is suggested, agents may become suppliers under the Act but do not thereby become parties to the contract for other purposes, it is likely that the only defences available to them will be those recognised by the Act.

The practical requirements of the Act may also present difficulties for those who, while in reality acting as agents, are deemed to be suppliers. The requirements, for example, that they rectify defects in goods or services in appropriate cases, or complete the provision of services within a reasonable time, may prove unworkable. In such cases, the result in practice will doubtless be that the agent is liable for the cost in remedying defects or in compensating for losses due to delay in completion. The Act, however, does not provide for any right of indemnity against the principal on the part of the agent where the agent is found to be liable in this way. It may be that such a right would be implied.

A further difficulty which may arise is that, in cases where the agent acts only as an intermediary but is nevertheless liable for the consumer guar-

14 *Dunnachie v Urwin* [1951] NZLR 79.

antees because the principal is not in trade, there still continue to exist some rights and obligations on the part of the principal under other legal rules. This is because the principal, although not liable to comply with consumer guarantees because he or she is not in trade, will have all the rights and obligations of a contracting party. For example, if goods are sold by a seller who is not in trade by means of an agent who is a mere representative, the agent is solely responsible for the consumer guarantees. However, the principal and the consumer, who are in a contractual relationship will have to look to each other with respect to all the other incidents of the contract. The principal may, for example, have obligations with respect to the delivery of the goods; have a right to resell the goods in certain circumstances where payment has not been made; or be able to sue for the price of the goods where property has passed, which is a matter between the seller and the consumer. None of these obligations or rights will attach to the agent, as the agent is not a party to the contract and so has no rights under the Sale of Goods Act. This situation is unsatisfactory as it involves considerable duplication, and will doubtless be extremely confusing for the consumer if the sources of law which establish the parties' rights and remedies are divided in this way.

Further, it may be that the imposition of liability on the agent could result in a loss of rights for the consumer as against the principal in some cases. For example, section 56A of the Sale of Goods Act provides that sections 10, 13 to 17 and 38 of that Act do not apply to any supply of goods to which the Consumer Guarantees Act applies. As the Consumer Guarantees Act will apply where a seller who is not in trade sells through an agent who is in trade, the principal, although the real seller, will have no liability for matters covered by the excluded sections of the Sale of Goods Act. Not all of those provisions require that the seller be in trade. Sections 14, 15 and 17 of the Sale of Goods Act, which deal respectively with implied undertakings as to title, correspondence with description and sale by sample, make no mention of any requirement that the seller be in trade. In cases where those sections have been breached, the buyer would normally have redress against the seller, whether the seller is acting privately or in trade. However, if the Consumer Guarantees Act applies because a private seller has chosen to sell through an agent who is in trade, the language of section 56A would indicate that those excluded provisions in the Sale of Goods Act have no application to the sale. As a result, the seller will lose any rights under those sections of the Sale of Goods Act to take action against the real seller, and will be confined to seeking a remedy as against the agent pursuant to the Consumer Guarantees Act.

In addition to these objections, it is suggested that the imposition of responsibility on agents in cases where the agent is acting only as a representative and that fact is known to the consumer places an unduly heavy obligation on the agent. In cases whether the agent contracts in his or her own name, such as where the principal is undisclosed, there could be no objection to such liability, for the agent would in any event be a party to the contract of supply and so liable as a supplier under the Act for that reason. In such cases, the agent as a party to the contract also takes on the duties and obligations derived from other contractual rules. However, where the consumer deals with an agent knowing of the agency, of the fact that there exists another person who is in reality the true supplier and in circumstances where it has been made clear that the agent is no more than an instrument, there cannot be the same justification for making the agent

liable for complying with the consumer guarantees. In such cases, there is nothing in the appearance of the situation to cause the consumer to place any reliance on the agent; *ex hypothesi*, the consumer is aware that the goods or services are to be supplied by another, and that the agent is not personally the supplier.

The United Kingdom provision concerning agents' liabilities cited above is, it is submitted, preferable to that enacted in the Consumer Guarantees Act in New Zealand. The United Kingdom legislation makes an exception to the imposition of responsibility on agents in cases where the buyer knows or, in effect, ought to know that the principal is not selling in the course of a business. In such a case, the buyer is aware that there is in existence a principal who is the other party to the contract and that that person, not being in business, will have no liability for the statutory conditions as to quality and fitness. Such an exception allows the normal rules of agency to continue and permits a seller to sell freely through an agent, using the agent only as an instrument, provided it is drawn to the attention of the buyer that the agency exists and that the principal is not in business. This provision allows for the reality of commercial transactions and provides a more workable, simple and practical solution to the problems which might arise when agents are used to make contracts than does the New Zealand provision.

It is suggested that a more convenient way of providing consumer protection might have been to make the principal liable under the Consumer Guarantees Act where the principal is not in trade but chooses to use an agent who is in trade. This would mean that a supplier of goods or services who was not in trade but elected to use an agent in trade would, in effect, be bound as if he or she had dealt directly with the consumer; not only the acts of the agent, but the agent's status of being in trade would be imputed to the principal. The effect of this would be to place on the true supplier the obligation to ensure the quality and fitness of goods or services supplied, and to make that person responsible for dealing directly with the consumer in respect of remedying defects, giving refunds or paying compensation. The practical result would be more straightforward as far as the consumer is concerned, and more truly reflect the reality of the contractual dealings. It is difficult to see that a consumer would be prejudiced by having no recourse to a person when that person is known to the consumer to be dealing only as an agent for another, and that other is known to be the real supplier of the goods or services.

Had this approach been adopted in the Act, the difficulties of having the rights and remedies available to a consumer split as between the agent and the principal would also have been avoided. The duties to comply with the guarantees would have lain on the principal, the other contracting party, so that the general law of contract would also have been applicable. Other contractual incidents could have been taken into account in actions for breaches of the guarantees, and the confusion and possible duplication of actions suggested above would have been removed.