Open Terms Relating to Time in Contracts for the Sale of Goods

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The purpose of this article is to examine the various ways in which the courts, by the use of the standard of reasonableness, can assist parties who have shown an intention to contract but who have left open terms relating to time. As Corbin has stated:

> ... a contract is usually not too indefinite merely because it fixes no time for an agreed performance ... the court will infer that the parties have agreed upon performance within a reasonable time. Of course, this standard is itself indefinite; what is reasonable is a question of fact and a matter on which opinions differ. Nevertheless, it is a standard that is practically workable and one that results in satisfactory resolutions.[1]

The cases show that the courts have been concerned with several questions. In the first place, they must decide whether the parties have begun to perform their obligations under the contract within a reasonable time after the formation of their agreement where the contract fails to provide for the time for delivery of the goods or the time for payment. Secondly, a contract may not have provided for its duration, in which case the court may have to decide whether the contract can be terminated by either party giving reasonable notice or whether the agreement is of a perpetual character. Problems of this nature must be distinguished from two other quite separate matters. The first is where no time is fixed for the acceptance of an offer. In such a case, the courts will usually hold that it must be accepted within a reasonable time. The present problems are different because they are concerned with time in relation to obligations under an existing contract. The second is where the parties have used vague, ambiguous phrases relating to time, such as one requiring that delivery should be made 'as soon as possible', 'immediately' or 'forthwith'. The task of the court with this problem is to determine what these phrases mean in the context of the agreement and in the light of the circumstances surrounding the contract, but it can easily be seen that problems of this nature are totally different from those which face the court where the parties have left terms open. Here:

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[1] *Corbin on Contracts*, vol. I, (1963), 416.

> The question is not one of construction in the narrow sense of putting a meaning on the language which the parties have used, but in the wider sense of ascertaining, in the light of all the admissible evidence and in the light of what the parties have said or omitted to say in the agreement, what the common intention of the parties was in the relevant respect when they entered into the agreement.[2]

It is proposed to consider these problems under the following headings:

I Where No Time is Fixed for Payment.

II Where No Time is Fixed for Delivery.

III The Indefinite Duration of Obligations under the Contract.

I WHERE NO TIME IS FIXED FOR PAYMENT

The English *Sale of Goods Act* provides that, unless otherwise agreed, payment and delivery are deemed to be concurrent obligations.[3] Thus neither is a condition precedent to the other and the seller must be ready to give possession of the goods to the buyer in exchange for the price and, in turn, the buyer must be ready to exchange the price for possession of the goods. This implication will obviously be negatived where the parties have expressly or impliedly agreed that the time for payment shall be different from the time for delivery since the possibility of this contrary intention is expressly provided for in the *Sale of Goods Act*.[4] It will also be negatived where there is evidence of a trade usage [5] or a course of dealing between the parties which fixes the time for payment where the contract is silent on the matter.

It is with this latter situation that we are primarily concerned: where the contract is silent on the time for payment. However, there are one or two points worth noticing where the parties have expressly or impliedly negatived the implication that delivery and payment are concurrent conditions. The contract could provide that payment of the whole or part of the price should be made at an earlier date than delivery of the goods. This may easily be the case, for example, where the seller is to manufacture the goods and requires a down payment before he can purchase the materials. Similarly, any form

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[2] *Re Spenborough U.D.C.'s Agreement*, [1967] 1 All E.R. 959, 962 *per* Buckley, J. (Ch.D.).

[3] *The Sale of Goods Act*, 1893 (Eng.) 56 & 57 Vict. c.71, s.28.

[4] *Ibid.*

[5] Article 13(1) of the *Uniform Law on International Sales* defines 'usage' as "a practice or method of dealing which reasonable persons in the same situation as the parties usually consider to be applicable to the formation of their contract".

of agreement which requires the buyer to pay upon presentation of documents (which usually occurs before the delivery of the goods themselves) would negative the implication that payment and delivery were concurrent obligations. Thus the sale of goods on c.i.f. terms is a very common shipping contract and, under such an agreement, delivery is satisfied by delivery of the shipping documents to the buyer.[6] It may be noticed that the implication of law will also be impliedly negatived where delivery is to be 'as required' or 'as needed' by the purchaser. This particular problem will be considered later.[7]

However, goods will more usually be supplied on credit, where payment for the goods is to be made at some time after the date of delivery. A difficulty will occur where there is a transaction which one party maintains is a sale for cash and the other wishes to adduce extrinsic evidence showing that the transaction was a sale on credit. Again, difficulties will occur where the transaction is a credit sale but the parties have made no provisions for the period of credit. While extrinsic evidence of a trade usage or a previous course of dealing cannot be used to contradict any provisions which state, for example, that the sale is for ready cash, or if a credit sale, which fix the period of credit, it is submitted that such evidence ought to be admitted where the contract is silent upon both those matters unless, of course, the writing was intended by the parties to be the complete contract. The cases which illustrate this point also illustrate the principles applicable to the situation where the parties can be regarded as having 'otherwise agreed', *i.e.* where the contract was silent on the time for payment but where this is fixed by evidence of a course of dealing or trade usage. It is now proposed to consider the cases under that heading but it will be seen that they also illustrate the principles upon which evidence can be received to establish such things as the existence of a credit sale or a period of credit.

It is clear that the court will not admit evidence of a trade usage or a course of dealing which is relied upon to fix the time for payment where it is satisfied that the parties intended their written contract to be complete. Thus in *Okerby and Co. Ltd.* v. *Fabricus*[8] the court rejected evidence of a previous course of dealing between the parties, where the goods had been sold on credit, because other evidence showed that the present, written contract, which made no mention of a credit sale, was intended to be a complete one. The

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[6] See *e.g. E. Clemens, Horst Co.* v. *Biddel Bros.*, [1912] A.C. 18 (H.L.).

[7] *Infra*, at pp. 235-238.

[8] (1915), 17 W.A.L.R. 93 (S.C. W.A.).

court followed *Ford* v. *Yates*[9] where evidence of a course of dealing that goods so purchased were on a credit sale of six months was rejected. The memorandum of sale had stated that "of E.Y., 39 pockets of Sussex hops, Springett's, 5 pockets of Sussex hops, Kenward's 78s. Springetts to wait orders". The court held that extrinsic evidence was not admissible because "the legal construction of this contract is, that the hops were to be paid for on delivery" and "the writing does in terms, import a contract of sale for ready money".[10]

Where the conclusion is reached that the written contract was intended by the parties to be the complete agreement and if the time for delivery is stated, then this will fix the time for payment because the obligations will be held to be concurrent. However, if one party attempts to adduce evidence of a trade usage or a course of dealing in order to fix the time for payment the question then arises of whether the writing ought to be regarded as a complete contract. It is submitted that if the contract before the court is one of a type similar to others which the parties have entered into over a period of time, this course of dealing ought to fix the time for payment if the contract is silent; and the same principle ought to apply where the parties have negotiated against the background of a trade usage because this, like the previous course of dealing, is really part of their contract. In other words, payment and delivery are not concurrent obligations because the parties have, in effect, 'otherwise agreed' and this evidence should be admitted to fix the time for payment.

Lockett v. *Nicklin*,[11] though not concerned with evidence of a course of dealing or trade usage, is worth noting as an example of the willingness of the court to admit evidence fixing the time for payment where the written communications between the parties were silent on this matter. Although the writing was not sufficient to satisfy the *Statute of Frauds*,[12] a delivery and acceptance of the goods was held to be sufficient to take the case out of the provisions of the statute and it was further held that evidence was admissible to show the terms upon which the goods had been accepted. As Alderson, B. said:

> The question, then, is whether the defendant has not a right to adduce evidence, not to contradict the written instruments, but to show the real

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[9] (1841), 2 Man. & G. 549; 133 E.R. 866.

[10] (1841), 2 Man. & G. 549, 559; 133 E.R. 866, 870 *per* Tindal,C.J. and Bosanquet,J. It appears, however, that the memorandum of sale did not mention either the time for payment or the time for delivery.

[11] (1848), 2 Ex. 93; 154 E.R. 419.

[12] 29 Car. II (1677), c.3.

> contract, of which the paper contains only one of the terms. In order to do that, the defendant must resort to the previous conversation.[13]

This evidence showed that the goods were accepted upon the basis of six months' credit.

A type of case which would not present any of the above problems would be where the contract was entered into orally, there being acts of part performance, for example, to take it outside the sphere of the evidence requirements of the *Sale of Goods Act*.[14] Thus in *Reedman* v. *King*[15] there was an oral contract for the sale of a quantity of potatoes but there was no agreement on the time for the delivery of the goods. The defendant had made five deliveries under the contract but then refused to deliver the balance and argued that the plaintiff had refused to pay for the goods at the place of delivery. The plaintiff stated, however, that he was willing to pay for the goods but that the time for payment was after he had received and inspected the goods and he adduced evidence that payment for the first five deliveries had been made in this way. Evidence of this course of dealing under an existing contract was accepted as proof that payment and delivery were not concurrent obligations. The course of dealing relied upon would usually relate to previous transactions but this appears to be unnecessary and this case illustrates the point that the course of dealing can be relied on even under an existing contract.

It is clear that the implication that payment and delivery are concurrent obligations can be negatived either by agreement or, where the written contract was not intended by the parties to be complete, by evidence of a course of dealing or trade usage. However, where the time for payment and delivery are not fixed by the agreement and there is no evidence relating to the time for payment, then delivery and payment would be concurrent obligations and the time for payment would be the same as the time for delivery. It is now proposed to consider problems relating to the time for delivery.

II WHERE NO TIME IS FIXED FOR DELIVERY

Article 22 of the *Uniform Law on International Sales* provides that where the date for delivery has not been determined the seller is bound to deliver within a reasonable time after the conclusion of the contract having regard to the nature of the goods and the cir-

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[13] (1848), 2 Ex. 93, 100; 154 E.R. 419, 422.

[14] *Sale of Goods Act*, R.S.O. 1970, c.421, s.5.

[15] (1883), 49 L.T. 473 (Q.B.).

cumstances.[16] What would be a 'reasonable time' in any given case is a question of fact which depends upon all the circumstances of the particular case. It is suggested, therefore, that all that can usefully be done is to consider the various factors which may assist the courts in arriving at the standard of what is a reasonable time for delivery in the case before it. Where no time for delivery is fixed by the contract and the buyer complains that the seller has not delivered the goods within a reasonable time it is submitted that the factors which the court could properly take into account would include the circumstances surrounding the obligation of the seller to have the goods ready for delivery; events, outside the control of the seller, which occur after the formation of the contract; and the nature of the goods. These matters will now be considered.

1. The Circumstances Surrounding the Obligation of the Seller

If the goods are in a deliverable state at the date of the formation of the contract [17] then, unless subsequent events outside the control of the seller delay or prevent delivery, the 'reasonable time' for delivery would be quite a short period of time. However, the position might be quite different. The buyer may know or ought to have known, for example, that the goods have to be specially ordered by the seller from a manufacturer as in *Allen* v. *Danforth Motors* [18] where a car of a particular colour had to be ordered from the manufacturers. The car was delivered within ten days of the formation of the contract and this was held to be a reasonable time in the circumstances. Again, the goods may have to be manufactured by the seller himself as in *Foster* v. *Heintzman*,[19] where it was held that four months was a reasonable time for the delivery of a piano (being different from the usual orders) which the defendant had agreed to manufacture. In this latter situation, the capacity of the seller's

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[16] See also the similar provisions in *The Sale of Goods Act* and the American *Uniform Commercial Code* (U.L.A.), s.2-309. The seller, of course, may not be bound to deliver under the contract. Where the buyer is to get the goods from a third party or take possession from the seller, the seller is deemed to promise that the buyer shall receive the goods if he applies for them within a reasonable time.

[17] Where the contract is silent on the matter, extrinsic evidence is admissible to show that the goods were ready for delivery. This was held in *Ellis* v. *Thompson* (1838), 3 M. & W. 445; 150 E.R. 1219 (Ex.) where, however, delay in delivery was caused by events subsequent to the formation of the contract.

[18] (1958), 12 D.L.R. (2d) 572 (Ont. C.A.).

[19] [1923] 4 D.L.R. 166 (Ont. S.C.).

business and the availability of labour and materials are factors which the court ought to take into account.[20]

Again, where the buyer knows or ought to have known that the goods have to be acquired by the seller from another party, such matters as the distance which the goods have to travel before reaching the seller and any form of transportation problems which arise must, it is submitted, be taken into account. Conversely, where the goods are in a deliverable state, the seller may know or ought to have known of the special needs of the buyer. The seller may know, for example, that the buyer is under contract with a third party to complete the work within a certain time. The 'reasonable time' for delivery here would be that which would then enable the buyer, in the normal course of his business, to complete the work for the third party.

2. Events Outside the Seller's Control, Occurring After the Formation of the Contract

The circumstances so far considered are all ones which existed at the date of the conclusion of the contract. It is necessary, however, to consider the effect of events occurring after the agreement was concluded. In *Ford* v. *Cotesworth*[21] there is the *dictum* of Blackburn, J. that:

> Whenever a party to a contract undertakes to do some particular act, the performance of which depends entirely on himself, so that he may choose his own mode of fulfilling his undertaking, and the contract is silent as to time, the law implies a contract to do it within a reasonable time under the circumstances, and if some unforeseen cause, over which he has no control, prevents him from performing what he has undertaken within that time, he is responsible for the damage.[22]

However, it is submitted that in spite of this the court ought to be entitled to look at all the circumstances of the case as they existed at the date of the proceedings so that the occurrence of events, subsequent to the conclusion of the contract, which are outside one party's control must be taken into account in assessing what is a reasonable time for delivery.

Thus where goods are carried by sea, factors which would cause a delayed delivery outside the control of the seller would be the fact

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[20] See *Corbin on Contracts,* vol. I, (1963), 415 for a discussion of these matters.

[21] (1868), L.R. 4 Q.B. 127. This case, which involved concurrent acts in the unloading of a cargo, was applied in *Webber* v. *Copeman* (1912), 7 D.L.R. 58 (Sask. S.C.), where it was held that the plaintiff, through his own fault, did not have a quantity of hay ready for delivery within a reasonable time.

[22] *Ibid.,* 133.

of the ship running aground and having to be refloated,[23] the icing over of the water or the water level being too low (if the goods were being carried through canals as in *Ellis* v. *Thompson*[24]), and the existence of strikes at the ports of discharge which may result in a delayed discharge at that port or the need to go to another port for the discharge of the cargo.[25] These are merely examples dealing with the carriage of goods by sea. They could be multiplied and it is easy to imagine similar problems arising with other forms of transportation. Thus it is submitted that in spite of the *dictum* in *Ford* v. *Cotesworth*,[26] these are matters which the court can quite properly take into account.[27]

Another example falling within this category is the activities of third parties which hamper delivery of the goods, for example, by virtue of the economic pressure which they bring to bear upon the seller. In *Monkland* v. *Jack Barcley*[28] the contract for the sale of a new motor car provided that: "The sellers will use their best endeavours to secure delivery of the goods at the estimated time for delivery", but no delivery date was written in the space provided. The court agreed with the argument of the defendants that, since the space was left blank, what was required of them was that they should use their best endeavours to secure delivery within a reasonable time and that this is what they had done. The reason why the defendants had not been able to secure delivery was because the car manufacturers had refused after the conclusion of the agreement to make deliveries of cars to the defendants unless they had obtained from their customers a covenant against re-sale and in the present case the plaintiff-customer had refused to sign this covenant. The court held, however, that the defendants were not in breach because

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[23] See *Re Carver & Co. and Sassoon & Co.* (1911), 17 Com. Cas. 59.

[24] (1838), 3 M. & W. 445; 150 E.R. 1219 (Ex.).

[25] See, for example, *British and Beningtons Ltd.* v. *N.W. Cachar Tea Co. & Others*, [1923] A.C. 48 (H.L.).

[26] (1868), L.R. 4 Q.B. 127, 133.

[27] See, for example, *per* Lord Watson in *Pantland Hick* v. *Raymond & Reid*, [1893] A.C. 22, 32-33 (H.L.):

> ...the condition of reasonable time has been frequently interpreted; and has invariably been held to mean that the party upon whom it is incumbent duly fulfils his obligation, notwithstanding protracted delay, so long as such delay is attributable to causes beyond his control, and he has acted neither negligently or unreasonably.

See also *Piesse* v. *Tasmanian Orchardists & Producers Cooperative Association Ltd.* (1919), 15 Tas.L.R. 67, where an agent was held to have delivered goods within a reasonable time where delay in delivery was caused by circumstances outside his control.

[28] [1951] 2 K.B. 252.

they had attempted to secure delivery within a reasonable time and this period had not elapsed at the date of the issue of the writ.[29] This sort of pressure can be viewed in the same light as physical events which delay or hamper delivery of the goods and which, it is submitted, must be taken into account when assessing what is a reasonable time.

3. The Nature of the Goods

The nature of the goods may be a very important factor in determining what is reasonable. They may, for example, be goods of a highly perishable nature, such as fruit and vegetables, which deteriorate very quickly. Alternatively, the subject-matter of the sale may be a type of manufactured goods (the latest fashions in women's clothes, for example) where the effect of delay is to reduce their effectiveness for the purpose for which they were designed and purchased. These are all matters which would obviously affect the reasonableness of the time for delivery.

Implication of a Reasonable Time Excluded

It is submitted that the implication of a reasonable time will be excluded in the following circumstances:

1. *Where the delivery of the goods requires the co-operative acts of the buyer*

In the cases so far considered the obligation to deliver has been exclusively that of the seller and, in the absence of a stated time, his duty is to deliver within a reasonable time. The same principle would apply where the buyer is to take delivery from the seller or a third party where the seller is deemed to have promised that the buyer shall have the goods if he makes his demand within a reasonable time.[30] In both cases either party who has the duty to perform is allowed a reasonable time. But where delivery by the seller requires the co-operative acts of the buyer, it has been held that the implication of a reasonable time is excluded and the obligation imposed upon both parties is to use reasonable diligence in the performance of the

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[29] See also *Hartwells of Oxford, Ltd.* v. *British Motor Association,* [1951] Ch. 50, where delivery was to be 'on the date agreed' (and not on the date 'to be agreed') and the court held that this provision was inoperative because no date was agreed and therefore the obligation was to deliver within a reasonable time.

[30] *Buddle* v. *Green* (1857), 27 L.J. Ex. 33.

acts required of them. In *Ford* v. *Cotesworth*[31] Blackburn, J. said that: "what is implied by law in such a case is not that either party contracts that it shall be done within either a fixed or a reasonable time, but that each contracts that he shall use reasonable diligence in performing his part".[32] Thus where there is a delay by one party it would be inappropriate for the other party to argue that he has performed his obligations within a reasonable time where the act of delivery requires the co-operative acts of both parties. It would, however, be proper for him to say that he has performed the acts required of him with due care but that the buyer has not used reasonable care on his part.[33]

2. *Where the time for delivery is regulated by a trade usage or a course of dealing*

In *Spartali* v. *Benecke*[34] Wide, C.J. said that evidence of usage is admissible for the purpose of annexing incidents to the contract in matters upon which the contract is silent but that this "must not vary or contradict, either expressly or by implication, the terms of the written instrument".[35] It is submitted, however, that, if the contract is silent on the time for delivery, evidence of a trade usage or a course of dealing between the parties ought to be accepted by the court and that this would fix the time for delivery. In this sense, the time for delivery can be regarded as an 'agreed' time and thus falls outside the problems being considered, the trade usage or course of dealing being just as much a part of the contract as are the parties' written communications.

In *Spartali* v. *Benecke*,[36] the contract for the sale of goats' wool at a stated price contained the following clause: "Customary allowance for tare and draft, and to be paid for by cash in one month, less 5 per cent discount". The court held that this was a present contract with a deferred time for payment which entitled the buyer to call for delivery at any reasonable time within the month. It was also held that oral evidence of a usage in the trade showing that the

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[31] (1868), L.R. 4 Q.B. 127. See also *Electronic Industries Ltd.* v. *David Jones Ltd.* (1954), 91 C.L.R. 288 (H.C.). An agreement for the installation and use of equipment, requiring co-operative acts which negatived the implication of a reasonable time.

[32] (1968), L.R. 4 Q.B. 127, 134.

[33] This, of course, might negative the 'usual time' for delivery allowed by the custom of a particular port, where goods have been shipped and are to be unloaded and delivered to the buyer at that port.

[34] (1850), 10 C.B. 212; 138 E.R. 87.

[35] (1850), 10 C.B. 212, 223; 138 E.R. 87, 91.

[36] (1850), 10 C.B. 212; 138 E.R. 87.

seller was not bound to deliver without payment was not inadmissible because this would have had the effect of annexing to the contract an incident which was impliedly excluded by the agreement. In *Field* v. *Lelean*,[37] however, *Spartali* v. *Benecke*[38] was overruled on that point of evidence to the effect that the result of the introduction of a usage about delivery of the thing sold would be to alter or vary the time fixed for payment by the written contract. *Field* v. *Lelean*[39] took the view that "the time for payment would not be altered, and the custom would only affect the time for delivery, with respect to which the written contract was silent".[40]

It is of interest to notice at this point a tendency to imply terms, where no time for delivery is stated, and then to reject extrinsic evidence where it is inconsistent with the implied 'reasonable time'. Thus in *Allen* v. *Danforth Motors*,[41] where no time for delivery of a new car was stated in the written contract, the court, after implying a reasonable time for delivery (ten days), then rejected oral evidence adduced by the defendants that delivery was to be made within two or three days. The court applied *Greaves* v. *Ashlin*[42] where the contract did not provide for the time for delivery or the time for payment but where the court rejected oral evidence to the effect that the defendant's agent had verbally made it a condition of the sale that the oats should be carried away immediately because this "materially varied the contract, which had been reduced to writing".[43] However, it is submitted that, since the time for delivery did not appear on the face of the contract in *Greaves* v. *Ashlin*,[44] extrinsic evidence ought to have been admitted even though this would have 'materially varied the contract'. There appears to be nothing wrong with this because, as was pointed out by Wightman, J. in *Field* v. *Lelean*:

> It was observed by Lord Campbell, in the case of *Humfrey* v. *Dale* that in a certain sense every material incident which is added to a written contract varies it, and makes it different from what it appeared to be, and so far is inconsistent with it; and if such variance were a ground of objection, it

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[37] (1861), 6 H. & N. 617; 158 E.R. 255 (Ex).

[38] (1850), 10 C.B. 212; 138 E.R. 87.

[39] (1861), 6 H. & N. 617; 158 E.R. 255 (Ex.).

[40] (1861), 6 H. & N. 617, 626; 158 E.R. 255, 259 *per* Wightman,J. (Ex.).

[41] (1958), 12 D.L.R. (2d) 572 (Ont. C.A.).

[42] (1813), 3 Camp. 426; 170 E.R. 1433.

[43] *Ibid.*

[44] *Ibid.*

would be difficult in any case to introduce evidence of custom where there is a written contract.[45]

Returning to *Allen* v. *Danforth Motors*,[46] it is submitted that there is no need to imply a 'reasonable time' when there is extrinsic evidence which fixes the time for delivery. It would appear to be quite improper to imply a reasonable time, as was done in *Allen's case*, and then to reject extrinsic evidence which is inconsistent with the implied term. There is no need to imply the term in the first place.

3. *Where the parties have otherwise agreed*

The implication of a reasonable time will, of course, be negatived where the parties have provided for delivery. They may, for example, have fixed a definite time for delivery or have provided machinery for the fixing of that time which does not depend upon their own future agreement. Thus they might provide that a third party should fix the time for delivery. Alternatively, the contract may have provided that delivery is to be 'as required' or 'as needed' by the purchaser. This requires a consideration of what is a 'reasonable time' but, and this will become apparent directly, different considerations will apply in determining the standard of a reasonable time in cases of this nature. It will also be seen that the obligation of the seller is slightly more onerous in that he is bound to deliver after being required to do so by the purchaser.

Where the contract provides that delivery shall be 'as required' (or 'as needed') by the purchaser, the parties have not fixed a definite time for delivery but the courts are able to uphold such a provision by reference to the standard of reasonableness. An examination of the obligations of the parties will illustrate the various points at which the court will need to refer to the standard of a 'reasonable time'. In the first place, it is clear from *Jones* v. *Gibbons*,[47] where the goods were to be delivered 'as required' by the purchaser, that this stipulation must be made within a reasonable time after the conclusion of the contract; the parties are to be regarded as reasonable people and it will be implied that the buyer requires delivery within a reasonable time and not at any time during the lives of the

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[45] (1861), 6 H. & N. 617, 626-627; 158 E.R. 255, 259 (Ex.). In Canada, however, it may still be quite difficult to avoid the strict application of the Parole Evidence Rule: *Hawrish* v. *Bank of Montreal*, [1969] S.C.R. 515.

[46] (1958), 12 D.L.R. (2d) 572 (Ont. C.A.).

[47] (1853), 8 Ex. 920; 155 E.R. 1626. See also *Jackson* v. *Rotax Motor & Car Co.*, [1910] 2 K.B. 937 and *Ross Bros.* v. *Shaw & Co.*, [1917] 2 I.R. 367.

parties.[48] However, although the obligation of the seller under the usual contract is that he should deliver the goods within a reasonable time (where no time for delivery is stated), where delivery is 'as required' by the purchaser the seller must be ready to deliver when the buyer requires them and he cannot then delay delivery. It also seems clear that in this situation the seller cannot deliver prematurely but only when the buyer requires the goods unless, of course, the buyer waives this provision by accepting the goods.

A reference to the standard of a reasonable time is also necessary where the buyer has failed to require delivery. It is again clear from *Jones* v. *Gibbons*[49] that, although the seller cannot terminate the contract by doing nothing and pleading that a reasonable time has elapsed, he can, by notice after the lapse of a reasonable time, require the buyer to request the goods by a particular date and terminate the contract after the expiration of that date. It would appear that this final date for delivery must be a reasonable one. It can thus be seen that there are a number of circumstances in which it is necessary for the court to use the standard of a 'reasonable time' in determining the obligations of the parties.

It is now proposed to consider what sort of factors would assist the court in determining what was, in all the circumstances of the case, a reasonable time. A 'reasonable time' has been defined as "such time as is necessary conveniently to do what the contract requires to be done".[50] What is a reasonable time will, of course, depend upon all the circumstances of the particular case, but it is suggested that the following factors might be relevant considerations.

Taking first the obligation of the buyer that he should require delivery within a reasonable time after the contract is concluded, the seller may argue that either the buyer has not requested delivery within a reasonable time after the conclusion of the contract or that

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[48] See Chitty, *Contracts*, vol. II, 23d ed. (1968), 735, where it is stated that "the buyer must require delivery within a reasonable time". *Cf. Halsbury's Laws of England*, 3d ed. (1969), vol. 34, 95 f.n. *(s)*, where it is said that: "Prima facie, the buyer has the whole of his life to call for delivery... The rule as to reasonable time is excluded". *Llanelly's* case (1875), L.R. 7 H.L. 550 is relied upon but this decision, which was not a sale of goods case, was concerned with the duration of the continuing obligations of both parties under a contract which the court held to be perpetual. Therefore, it would appear that such a decision is not relevant to the present problem which is concerned with determining the time within which the single duty of the buyer (*i.e.* requiring delivery) must begin.

[49] (1853), 8 Ex. 920; 155 E.R. 1626.

[50] See the American *Corpus Juris Secundum*, Vol. 77, 873.

the buyer has requested delivery at too early a date after the agreement was concluded. In the first situation, where the seller argues that the buyer has not required delivery within a reasonable time, one of the factors upon which this argument might be based is that the seller, having the goods ready for delivery, would like to deliver them to the buyer because they are taking up valuable storage space at his place of business. Alternatively, the reason might be that the seller wants payment of the contract price. In this type of case payment and delivery are not concurrent obligations but if the contract so provided, the alleged failure of the buyer to require delivery within a reasonable time would be an argument that the seller would be likely to advance.

However, it is submitted that neither of these matters are circumstances of which the court ought to take any notice because they are not factors which are relevant in determining the reasonableness of the request of the buyer. Having regard to the nature of the agreement which the seller has entered into (he has agreed to have the goods ready when the buyer requires them), it is suggested that these are matters of which he cannot complain and which are not relevant in determining whether the buyer has required the goods within a reasonable time. It is submitted, however, that the subject-matter of the contract may be a very important consideration. Thus the subject-matter may be food which must be consumed within a fairly short period of time after being made or fresh fruit and vegetables which deteriorate very quickly. Similar considerations would apply to any form of manufactured goods where the effect of delay would be to reduce their effectiveness or suitability for the purpose for which they were made (the latest women's fashions, for example). It may be noticed, however, that if the parties had previously entered into agreements for the supply of similar goods in the past or there was evidence of a particular usage in the trade dealing with times for delivery, where none were specified, then this would also assist the court in deciding whether a reasonable time had elapsed.

In the second situation, where the seller complains that the buyer has required delivery within too short a time after the conclusion of the contract, there is a variety of reasons why the seller may not have the goods ready for delivery. It is clear, however, that the seller cannot normally argue that the request for delivery has been made before the lapse of a reasonable time because he has agreed to be ready to deliver when required to do so by the purchaser. It is suggested, therefore, that the only cases in which the seller could successfully argue that the buyer has not given him enough time would be where the buyer was aware, or ought to have been aware,

of special circumstances attending the obligations of the seller to have the goods ready for him. If the buyer knew, for example, that the goods had to be manufactured, then the court could quite properly take into account the length of time which it would take an efficiently operated business of the same type as the seller's to manufacture the goods. Alternatively, where the buyer knows that the seller has to get his supplies from a considerable distance, he ought to take this unavoidable delay into account. In the presence of such circumstances as these, it is submitted that the court would uphold the seller's argument that the buyer did not allow him a reasonable time in which to have the goods ready for delivery. The effect of the existence of these special circumstances is therefore that the 'reasonable time' would be a longer period than usual because the court ought to hold that the buyer had not allowed a reasonable time to elapse between the formation of the contract and the demand for delivery.

In addition to the special circumstances just noticed, it is submitted that the buyer ought not to be able to demand delivery immediately where the evidence suggests that expressions such as 'delivery as required' used in the contract mean 'as needed in the course of the buyer's business'. Evidence, for example, that the buyer would require delivery from time to time over a period of years might lead the court to hold that the buyer was not entitled to demand delivery of the whole quantity shortly after the contract was concluded.

It may be noticed, incidentally, that another unsatisfactory situation will occur where the contract provides that the price of each instalment, to be delivered as required by the buyer, is to vary with the market price at the date of delivery of the instalment. This would make it possible for the buyer to 'require' small quantities when the price is high and much larger quantities when the price is low. It is submitted, however, that a way out of this difficulty is to adopt the principle set out in s.1-203 of the American *Uniform Commercial Code* [51] which provides that: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement".[52]

Where the buyer has failed to require the goods within a reasonable time, then the seller can give notice requiring him to request delivery by a certain date and it is suggested that this final date for the request for delivery should, in turn, be reasonable. The seller may

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[51] *Uniform Commercial Code*, (U.L.A.).

[52] 'Good faith' is defined by s.1-201 of the *Uniform Commercial Code* (U.L.A.) as "honesty in fact in the conduct or transaction concerned".

be ready to deliver but the buyer may find that, contrary to his expectation when the contract was concluded, his need for the seller's products is delayed or no longer exists. A reasonable time ought to be allowed to the buyer to make alternative arrangements to deal with his difficulty: either using the goods in some other way or making arrangements to sell them. However, in view of the fact that a 'reasonable time' has already elapsed since the contract was concluded, it is suggested that this period ought to be a short one. If the buyer still fails to require delivery after that final date, then the seller would be justified in repudiating the contract if he so desired.[53]

It remains to consider the relevant circumstances in deciding whether the buyer has required delivery within a reasonable time. The seller might argue that he has the goods ready for delivery and the buyer could, as in *Jones* v. *Gibbons*,[54] counter this by arguing that he has not requested the goods because, as yet, he has no need for them. Assuming that the position taken by the purchaser is genuine, the only relevant consideration upon which the seller could rely would be either the nature of the goods or, alternatively, a trade usage or a course of dealing between the parties. Both of these matters have been considered already.[55]

III THE INDEFINITE DURATION OF OBLIGATIONS UNDER THE CONTRACT[56]

Parties may enter into a contract without providing for the duration of their agreement. The contract may provide, for example, for the delivery once a month of a specified quantity of goods at a stated price but may leave open the duration of the contract and, further, may not provide for any events or circumstances which would bring this agreement to an end. Faced with this problem, which is concerned with the duration of a continuing obligation, the court might interpret the promise as providing for perpetual performance. This is, as we shall see, a possibility, but it would be more usual for the court to interpret the promise as meaning that the performance is to continue for a reasonable time or that the contract could be ter-

[53] Unless the contract is divisible. The seller, of course, might not do anything and the court might take the view that this, together with the failure of the buyer to request delivery, amounts to an intention by the parties to abandon their contract as in *Pearl Mill Co. Ltd.* v. *Ivy Tannery Co. Ltd.*, [1919] 1 K.B. 78. See also *Fisher* v. *Eastwoods, Ltd.*, [1936] 1 All E.R. 421.

[54] (1853), 8 Ex. 920; 155 E.R. 1626.

[55] *Supra*, at p. 237.

[56] See Carnegie, *Terminability of Contracts of Unspecified Duration*, (1969) 85 L.Q.R. 392.

minated by reasonable notice.[57] In their efforts to uphold rather than destroy contracts, the courts would prefer this solution rather than hold that the parties can continue as long as they please or that the term is to be settled some time in the future with the result that the contract is of no effect.

It will be seen that problems of this nature are concerned with the duration of continuing obligations under the contract and not with the question of continuing offers. One party may argue that the nature of his promise is that of a continuing offer and that, although any acceptance of this offer forms a contract, it is separate and the offer can then be withdrawn, thus preventing any subsequent contracts being formed. On construing the contract, the courts may find, however, that a contract, indefinite about duration but involving continuing obligations, has been formed. It is with this problem of continuing obligations under a contract, and not continuing offers, that we are concerned. It will be seen that, depending upon such factors as the subject-matter of the agreement or the nature of the contract itself, such agreements may be terminated by reasonable notice. Thus in *Wright & Co. Ltd.* v. *Maunder*,[58] a contract for the return of cordial bottles, indefinite about duration, was held to be terminable on reasonable notice. These agreements may also be terminated without notice as in *Duff* v. *Kyle*,[59] where a contract for the supply of milk 'All the year round' was held to have been properly terminated without notice. Alternatively, on looking at the objects of the agreement, the court may come to the conclusion that perpetual performance had been agreed to as in *J. Kitchen & Sons Pty. Ltd.* v. *Stewart's Cash and Carry Stores*.[60] It may also be noticed that problems relating to the duration of obligations under the contract are separate from questions connected with the time within which performance of a duty is to begin after the contract has been con-

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[57] *Cf.* s.2-309(3) of the *American Uniform Commercial Code* (U.L.A.) which provides that "Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable".

[58] [1962] N.Z.L.R. 355. See also *W.K. Witt (W.A.) Pty. Ltd.* v. *Metters Ltd. and General Industries Ltd.*, [1967] W.A.R. 15, a re-seller agreement, indefinite concerning duration, terminable on reasonable notice.

[59] (1902), 20 N.Z.L.R. 706 (S.C.). See also *Australian Blue Metal Ltd.* v. *Hughes*, [1963] A.C. 74 (P.C.), where it was held that a right to mine was terminable at will.

[60] (1942), 66 C.L.R. 116 (H.C.). *Cf. Llanelly Ry. and Dock Co.* v. *London and North Western Ry. Co.* (1875), L.R. 7 H.L. 550, where it was held that the obligation was perpetual having regard to the character of the parties and the subject-matter of the contract.

cluded. Such matters as, for example, the time for payment or the time for delivery of the goods fall within this category and have already been considered.

Continuing Obligations Terminable by Reasonable Notice

In *Llanelly's* case,[61] Lord Selbourne stated that:

> ... an agreement *de futuro*, extending over a tract of time which, on the face of the agreement, is indefinite and unlimited, must (in general) throw upon any one alleging that it is not perpetual, the burden of proving that allegation, either from the nature of the subject, or from some rule of law applicable thereto.[62]

It is submitted, however, that the better approach to this problem, in the sphere of commercial contracts, is that of McNair, J. in *Martin-Baker Ltd.* v. *Canadian Flight Ltd.*,[63] where he preferred to approach a mercantile contract without any presumption in favour of permanence. Indeed if there was to be any presumption at all, it appeared to the learned judge to be a presumption the other way.

> For example, I have little doubt that the law merchant would regard a contract for the sale of a hundred tons of coal monthly at a fixed price, no period being fixed, as a contract determinable on reasonable notice... The common law, in applying the law merchant to commercial transactions, has always proceeded more on the basis of reasonableness in filling up the gaps in a contract which the parties have made on the basis of what is reasonable, so far as that does not conflict with the express terms of the contract, rather than on the basis of rigidity.[64]

Taking the example suggested by McNair, J. of the quantity of coal at a fixed price to be delivered at monthly intervals but with no period for the continuance of the obligation being agreed upon, either party could terminate such a contract by reasonable notice and what would be a reasonable notice would, as a question of fact, depend upon all the circumstances of the particular case. Assuming that it is the buyer who has given notice of his intention to terminate the contract, there are, however, a number of arguments which could be put forward by the seller, all of which would deny the right of the buyer to terminate the contract by reasonable notice. The seller may argue,[65] for example, that:

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61 (1875), L.R. 7 H.L. 550.

62 *Ibid.*, 567. See also (1873), 8 Ch. App. 942, 949 *per* James,L.J.

63 [1955] 2 Q.B. 556.

64 *Ibid.*, 577. Quite apart from this, there are many categories of contracts which, from their nature, are regarded as terminable. These include contracts involving a delegation of authority, contracts of partnership, principal and agent and employer and employee agreements. All of these involve an element of trust and confidence.

65 These arguments are, of course, equally open to the buyer where the seller proposes to terminate the contract by reasonable notice.

I. The contract provides for a perpetual duration and that the agreement can only be terminated by mutual consent or by a breach by one party which is accepted by the other.
II. The contract itself makes exclusive provision for the termination of the contract.
III. He has begun performance of his obligations under the contract.

I. *Perpetual Duration*

Williston has expressed the view that: "It is not often that a promise will properly be interpreted as calling for perpetual performance. Only in such negative promises as to forbear suit or not to carry on a business or occupation is so broad an interpretation likely to be permissible."[66] However, it is clear that the court may interpret the contract in this way having regard to the character of the parties, the subject-matter of the contract or its nature. *Llanelly's* case[67] illustrates this point although not concerned with sale of goods but with the use of railway lines by railway companies, both the subject-matter and the parties being of a permanent character.[68] Although such an approach would be most unusual with sale of goods' contracts, the basis of the agreement between the parties may be such that to interpret the contract in any other way would be to render it commercially useless. *J. Kitchen & Sons Pty. Ltd.* v. *Stewart's Cash and Carry Stores*[69] illustrates this point very well. In that case the High Court of Australia held that the price maintenance agreement between the parties, which fixed no time for the duration of the contract, was perpetual and that neither party had the right to terminate the contract apart from breach by the other party. The majority rejected the argument of the respondents that their right to take the goods of the appellant was a continuing offer which could be withdrawn. They took the view that such an approach would make the agreement commercially useless and that there were good practical reasons for not placing a limit upon the duration of the agreement and excluding the right of withdrawal by either party. The majority held further that although performance was perpetual, there was no restraint of trade. This was regarded as a common and well-recognized feature of price-maintenance agreements such as the one before the court.[70]

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[66] *Williston on Contracts,* vol. I, 3d ed. (1957), 113.

[67] (1875), L.R. 7 H.L. 550.

[68] The 'institutional character' of the parties is not necessarily decisive: see *Crediton Gas Co.* v. *Crediton Urban Council,* [1928] Ch. 174, where the contract provided for termination on reasonable notice.

[69] (1942), 66 C.L.R. 116 (H.C.).

[70] The majority took the view that the decision in *Palmolive Company (of*

II. *The Contract makes Exclusive Provision for its Termination*

The agreement may not fix the duration of the contract but may still provide for its termination upon the happening of certain events. In such a case, the parties make it clear that this is a matter which they have considered and state the circumstances in which the contract is to terminate. It is submitted that the effect of these express provisions is to prevent the implication that the contract can be terminated in some other way, such as by giving reasonable notice. The contract may provide, for example, that it is to continue for as long as the seller delivers a stated quantity each year. It is suggested that such an agreement cannot be terminated by a reasonable notice because the contract shows that the parties have directed their minds to the question and that, on this basis, the court should not allow either party to terminate by reasonable notice. An express provision would also exclude the interpretation that the contract is to continue for an indefinite period and can only be terminated by breach by the other party as in *J. Kitchen & Sons Pty. Ltd.* v. *Stewart's Cash and Carry Stores.*[71]

Prints for Pleasure v. *Oswald-Sealy (Overseas) Ltd.*[72] was not a case of sale of goods but was regarded by the court as being "concerned with conferring exclusive marketing rights on certain conditions".[73] However, the case shows very clearly the refusal of the court to imply a term for termination upon reasonable notice where the parties, although not making provision for the duration of their contract, expressly provide for the circumstances upon which it would terminate (a clause in the agreement that, "The agency agreement is to be a continuing one whilst Australian orders are not less than 10,000 prints per annum"). With an agreement such as this, the right to bring the contract to an end is conferred upon one party alone since a failure on his part to place the minimum of orders would terminate the contract. The court held that this contract could not be terminated by reasonable notice. It is submitted that the same principle will apply to contracts for the sale of goods so that the agreement cannot be terminated upon reasonable notice where the parties have made provision for its termination.

England) Ltd. v. *Freedman,* [1928] Ch. 264 was the answer to the defendant's argument.

[71] (1942), 66 C.L.R. 116 (H.C.). If, however, the contract provided that it could only be terminated by breach, this may be interpreted as another way of saying that the contract was to be of perpetual duration with no termination by reasonable notice.

[72] (1968), 88 W.N. (N.S.W.) 375.

[73] *Ibid.,* 381.

In *Prints for Pleasure* v. *Oswald-Sealy (Overseas) Ltd.*[74] the parties had made provision for the termination of their contract by the use of definite terms. Difficulties would arise, however, where the parties attempt to provide for the termination of their agreement, thus precluding the court from implying a 'reasonable time', but have used expressions of such a nature that a definite meaning cannot be attached to them. The agreement may provide, for example, that it is to terminate when the goods 'cease to be well-produced' or when deliveries are for less than 100 'attractive dresses'. In these circumstances, it is difficult to see how the court can help the parties in the absence of performance by one party of his obligations. If, for example, the seller had delivered a quantity of goods to the buyer he would be entitled to payment at the contract price for the goods so delivered.

III. *Performance of the Obligations under the Contract*

Where a continuing contract does not provide for its duration and neither party has begun performance of any of the obligations, then it would seem to be perfectly reasonable to allow either party to terminate the contract by reasonable notice. If, however, one party has begun performance of his obligations the position would be different. It is suggested that ideally such a contract ought only to be terminable by mutual consent. Termination by reasonable notice may be permitted but only where the length of notice given is such that the party who has begun performance is not prejudiced. In other words, it is submitted that the court, in determining what is 'reasonable', must take into account the fact and extent of performance. Suppose, for example, that A has agreed to manufacture and supply B with a yearly quantity of goods. It would, it is submitted, be unjust to allow B to give notice of termination which does not take into account the fact that A has manufactured a year's supply ready for delivery to B during the year. Although A would not be entitled to manufacture any more goods after B's notice, he should be entitled to deliver those goods which were in the course of manufacture and to be paid the contract price for them. In other words,

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[74] *Ibid. Cf. In re Berker Sportcraft Ltd.'s Agreement* (1947), 177 L.T. 420 (Ch.D.): an agency agreement which made express provision for termination on specified events. This case was distinguished in *Martin-Baker Ltd.* v. *Canadian Flight Ltd.*, [1955] 2 Q.B. 556 (another agency agreement which was terminable on reasonable notice). *Martin-Baker's* case was applied in *Re Spenborough U.D.C.'s Agreement*, [1967] 1 All E.R. 959. In both these cases the contract did not provide for the termination of the agreement.

the court must, it is submitted, allow a reasonable time in the performance of the seller's obligations.[75]

It is of interest to notice that in all the cases so far considered it was argued by one party either that the contract was terminable on reasonable notice or that it was of perpetual duration. Where X claims to be entitled to terminate by reasonable notice, in no case has it been argued by X that Y has not permitted the agreement to run for that length of time which would be regarded as reasonable having regard to the objects of the contract. The parties may have agreed for the supply of a very large quantity of goods and the terms of the contract, while not mentioning the duration of the agreement, may clearly indicate that the parties intended their relationship to continue for a long time. Would it be reasonable for the buyer, for example, to attempt to terminate the contract by notice a short while after the contract has been concluded? It is submitted that there would be much in favour of the argument of the seller that this contract ought to continue for a reasonable time and that any notice which the buyer might be entitled to give at this point of time should include a reasonable time for the running of the contract.[76] The argument of a 'reasonable duration' would be inapplicable, however, where the parties have agreed upon a total quantity of goods which are, for example, to be manufactured and delivered. Here, the contract will continue until that quantity has been manufactured and delivered, within a reasonable time, so that the interpretation of a 'reasonable duration' would be excluded.[77]

The various open term problems relating to time which have been considered illustrate the willingness of the courts to fill gaps, which the parties have either deliberately or inadvertently left in their contract, where they are satisfied of the parties' intention to contract. Apart from the provisions of the *Sale of Goods Act* relating to payment and delivery, the principal gap-filling device in this area is the use by the court of the standard of what is 'reasonable'. The courts can thus 'interpret' the contract in the sense of filling gaps by reference to this standard, whether the problem relates to the time for payment, the time for delivery or the indefinite duration of obligations under a contract for the sale of goods.

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[75] There appears to be no authority dealing with these matters and the submission is made on the basis of what appears to be reasonable.

[76] It is submitted that evidence of a trade usage or a course of dealing, fixing the duration of the contract, ought to be admissible and this may assist the seller.

[77] Again, there appears to be no authority on these matters and the submissions are made on the basis of what appears to be reasonable.