

ON APPEAL  
FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN :

UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED LEGAL STUDIES  
- 7 APR 1972  
25 RUSSELL SQUARE  
LONDON, W.C.1.

BATEMAN TELEVISION LIMITED (in liquidation)  
and BATEMAN T.V. HIRE LIMITED (in liquidation)

Appellants

- and -

COLERIDGE FINANCE COMPANY LIMITED

Respondent

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CASE FOR THE APPELLANTS

Record

A. The Circumstances out of which the Appeal arises

- 1. This is an appeal from a judgment of the Court of Appeal of New Zealand delivered on the 8th day of May 1969 dismissing an appeal by the Appellants from a judgment of the Supreme Court of New Zealand delivered on the 12th day of December 1968 which ordered the winding up of the Appellant companies by the Court under the provisions of the New Zealand Companies Act 1955. 175  
126, 128
- 2. The Appellant Bateman Television Limited was incorporated under the provisions of the Companies Act 1955 in November 1963 with an authorised capital of \$2,000. The Appellant Bateman T.V. Hire Limited was incorporated under the provisions of the Companies Act 1955 in November 1963 with an authorised capital of \$200. The same persons, namely Noel Desmond Bateman and Graham Irving Thomas, 3  
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Record	both of Christchurch in New Zealand, are and were at all material times the directors and shareholders of both companies.	
North P. 133 line 1	3. The Appellant companies are members of a group of companies which carry on business in Christchurch, New Zealand connected with television.	
North P. 113 line 7.	Bateman Television Limited at all relevant times was engaged in selling television sets for cash or on hire purchase to members of the public.	10
North P. 133 line 8. Macarthur J. 122 line 4.	Bateman T.V. Hire Limited was engaged in the hiring of television sets to members of the public for long or short periods.	
	4. The operations of both Appellants were substantially financed by the Respondent. Those transactions fell into two main classes:-	
	(a) The Respondent made a number of loans to Bateman Television Limited upon the security of assignments by way of mortgage of hire purchase agreements entered into between Bateman Television Limited and members of the public as hire purchasers. The Appellants have throughout the proceedings admitted that such loans are lawful.	20
	(b) The Respondent made a number of loans either to Bateman Television Limited or to Bateman T.V. Hire Limited purporting to have been made upon the security of assignments by way of mortgage of conditional purchase agreements in the same printed forms as those in group (a) executed by or on behalf of Bateman Television Limited therein described as "the Owner" with Bateman T.V. Hire Limited therein described as "the Conditional Purchaser". The Appellants contend that such loans, or most of them, are unlawful.	30  40
	5. The Respondent produced in evidence in the Supreme Court of New Zealand 156 conditional purchase agreements of the kind referred to in paragraph 4(b) hereof. An example of these agreements is reproduced as Exhibit "A" in the Record.	

	The Agreements provided for the insertion therein of a "Schedule of Chattels ... ". Examples of the Schedules of Chattels in the various agreements have been reproduced in the Record.	Record 181, 183 184, 185
	The printed form of agreement has been re-typed for ease of reference and that is included in the Record.	186 to 197
10	An analysis of the financial details of the 156 conditional purchase agreements mentioned has been reproduced in the Record.	198 to 203
	For convenience, the Appellants will refer to the said 156 agreements as "the Bateman Inter-Company Agreements".	
20	6. The Respondent has at all material times admitted that if and to the extent that the Bateman Inter-Company Agreements are not customary hire purchase agreements within the meaning of the Chattels Transfer Act 1924 and its amendments then the alleged debts said to arise from the loans which purport to be secured by assignments by way of mortgage of the Bateman Inter-Company Agreements are illegal and void for contravention of the provisions of the Moneylenders Act 1908 and its amendments	North P. 141 line 44 to 142 line 1. Turner J. 155 line 23 to line 35. McCarthy J. 173 line 25 to line 38.
30	7. (a) Section 57 of the Chattels Transfer Act 1924 as amended by Section 2(7) of the Chattels Transfer Amendment Act 1931 and as further amended by Section 3 of the Chattels Transfer Amendment Act 1953 provides as follows: -	
	"(1) A customary hire purchase agreement is a deed or agreement in writing made between the owner of or a dealer in certain chattels and a conditional purchaser of those chattels where -	
40	(a) The owner of or dealer in the chattels is either the manufacturer thereof or a person who is engaged in the trade or business of selling or disposing of chattels of such nature or description.	

- (b) The deed or agreement provides expressly or impliedly for delivery of possession to the conditional purchaser, but that the property in the chattels shall not pass to the conditional purchaser, or shall only conditionally so pass, until the completion of the payments to be made by him: 10
- (c) The chattels the subject of such deed or agreement are such as are described in the Seventh Schedule hereto, or of a description hereafter added to that Schedule by Order in Council as hereinafter provided.
- (2) A customary hire purchase agreement may be either an actual contract for sale and purchase or a contract of bailment under which the purchaser has an option of purchase of the chattels defined in the agreement. 20
- (3) A customary hire purchase agreement and any assignment of a customary hire purchase agreement and of the chattels the subject of the agreement, whether absolute or by way of mortgage is valid and effectual for all purposes without registration thereof.
- (4) Chattels the subject of a customary hire purchase agreement shall not be deemed to be in the order and disposition of the purchaser or bailee thereof within the meaning of any law relating to bankruptcy or insolvency. 30
- (5) The purchaser or bailee of chattels the subject of a customary hire purchase agreement shall not have any right to sell, deal with, or dispose of such chattels otherwise than as may be specially provided in the agreement; and no sale, dealing, or other disposition purported to be made by such purchaser or bailee shall be effectual to confer title upon any person as against the vendor or bailor named in the customary hire purchase agreement, or against the assigns of such vendor or bailor. 40

(6) The Governor-General, if satisfied that a practice has been established of dealing with any specific chattels, or class of chattels by the method of hire purchase or that it is desirable in the public interest that such practice should become established in respect of any specific chattels or class of chattels, may from time to time, by Order in Council, add to the class of chattels defined in the Seventh Schedule hereto any other chattels or class of chattels, and thereafter such chattels or class of chattels may be the subject of customary hire purchase agreements.

(7) Any chattels which now or hereafter are the subject of a customary hire purchase agreement shall, notwithstanding any rule of the law to the contrary, remain and be deemed to have remained in all respects chattels although the same may have been fixed or attached to any land or building, and shall be removable by the vendor or bailor if and when he shall become entitled to possession of the same under the provisions of such customary hire purchase agreement:

Provided that such vendor or bailor shall not be entitled to remove any such chattels fixed to such land or building without first giving to the owner or other person for the time being in possession of the said land one month's previous notice in writing of his intention to so remove them.

(8) This section shall not apply to any chattel which is at the time of the commencement of this Act the subject of any action or proceeding in any Court of law. "

(b) Section 16 of the Statutes Amendment Act 1936 provides as follows:-

"16. The provisions of section twenty-three of the Chattels Transfer Act 1924 shall apply to customary hire purchase agreements as defined in section fifty-seven of that Act to the same extent as if such agreements were instruments within the meaning of that Act. "

(c) Section 23 of the Chattels Transfer Act 1924 provides as follows: - 10

"23. Every instrument shall contain, or shall have endorsed thereon or annexed thereto, a schedule of the chattels comprised therein, and, save as is otherwise expressly provided by this Act, shall give a good title only to the chattels described in the said schedule, and shall be void to the extent and as against the persons mentioned in sections eighteen and nineteen hereof in respect of any chattels not so described." 20

(d) The persons mentioned in the said sections 18 and 19 are:-

(i) The Assignee in Bankruptcy of the estate of the person whose chattels or any of them are comprised in the instrument:

(ii) The assignee or trustee acting under any assignment for the benefit of the creditors of such person: 30

(iii) Any sheriff, bailiff, and other person seizing the chattels or any part thereof comprised in the instrument, in execution of the process of any Court authorising the seizure of the chattels of the person by whom or concerning whose chattels such instrument was made, and against every person on whose behalf such process was issued: 40

(iv) A bona fide purchaser or mortgagee for valuable consideration

(v) Any person bona fide selling or dealing with the chattels as auctioneer or dealer or agent in the ordinary course of his business.

10 (e) Subsections (1) to (6) of Section 2 of the Chattels Transfer Amendment Act 1931 as amended by Section 2 of the Chattels Transfer Amendment Act 1950 provide as follows:-

"2.(1) In this section, unless the context otherwise requires:-

20 "Customary chattels" means chattels described in the Seventh Schedule to the principal Act or of a description added to that Schedule by Order in Council as provided by the principal act:

"Finance corporation" means a corporate body engaged in financing transactions in relation to purchases of customary chattels on hire purchase terms or conditional sale.

30 (2) A finance corporation shall be deemed for all the purposes of section fifty-seven of the principal Act to be a dealer engaged in the trade or business of selling or disposing of customary chattels, and a deed or agreement of hire purchase between a finance corporation and a conditional purchaser of a customary chattel in relation to such customary chattel shall for those purposes be deemed to be  
40 a customary hire purchase agreement.

(3) The Moneylenders Act 1908, except section three thereof, shall have no application in respect of any of the provisions of -

(a) Any customary hire purchase agreement; or

- (b) Any instrument by way of security given over any customary chattels to secure the cost of repairs, additions, alterations, or improvements to those chattels; or
- (c) Any assignment to a finance corporation of any such agreement or instrument, whether absolute or by way of mortgage, - 10

and except for the purposes of the said section three, a finance corporation shall not, in respect of any such agreement, instrument, or assignment, be deemed to be a moneylender within the meaning of the Moneylenders Act 1908.

(4) Customary chattels the property of a wholesale dealer in the possession of a retail dealer for the purposes of sale, hire, or demonstration shall not be deemed to be in the order and disposition of the retail dealer with the consent of the true owner thereof within the meaning of any law relating to bankruptcy or insolvency. 20

(5) An agreement in relation to customary chattels, made between the manufacturer of or a wholesale dealer in such chattels or a finance corporation and a retail dealer in such chattels, by which possession of the chattels is given to such dealer, shall not be deemed to be a customary hire purchase agreement. 30

(6) Subsection five of section fifty-seven of the principal Act shall be read subject to the provisions of section three of the Mercantile Law Act 1908. For the purposes of the last-mentioned section, a person entitled to the benefit of a customary hire purchase agreement as assignee or mortgagee shall be deemed to be the true owner of any customary chattels the subject of such hire purchase agreement. " 40

(f) The Moneylenders Act 1908 and its amendments are not reproduced, in view of the Respondent's admission mentioned in paragraph 6 hereof. Section 3 of the Moneylenders Act 1908 refers to the re-opening of moneylenders transactions.



- (g) "Television sets and equipment" were added to the said Seventh Schedule by the Chattels Transfer (Customary Hire Purchase) Order 1962 (S. R. 1962/7) which came into force on 9th February 1962. Record
8. On 26th March 1968 the Respondent served on Bateman Television Limited a demand calling upon it to pay forthwith the sum of \$8,704.46c. A copy of the demand is contained in the Record. 10 North P. 133 line 38. 16.
- At the same time the Respondent served on Bateman T. V. Hire Limited a demand calling on it to pay forthwith the sum of \$166,354.54c. A copy of the demand is contained in the Record. North P. 133 line 50. 15.
9. The Appellants did not pay the sums demanded. Through their solicitor Mr. J. R. B. Menzies they made proposals for settlement of the amounts between the parties and they stated that the Respondent's claims were disputed. 20 218.
10. Thereafter there were negotiations between the parties which are described in the reasons for judgment of Macarthur J. in the Supreme Court. The Appellants do not examine these negotiations in detail as they have accepted the judgment of the Supreme Court that the negotiations did not lead to a binding and concluded agreement. Macarthur J. 118 to 121. North P. 134 line 35 to 42.
- 30 11. On 27th September 1968 the Respondent presented to the Supreme Court of New Zealand a petition for the winding up of Bateman T. V. Hire Limited alleging: - 1.
- (i) That the Appellant is unable to pay its debts; and
- (ii) That it is just and equitable that that Appellant should be wound up.
- 40 12. On 30th September 1968 the Respondent presented to the Supreme Court of New Zealand a petition for the winding up of Bateman Television Limited, alleging: - 3.
- (i) That the Appellant is unable to pay its debts; and
- (ii) That it is just and equitable that that Appellant be wound up.

Record  
Order  
Omitted.

13. On the 10th day of October 1968 on the application of the Respondent, the Supreme Court of New Zealand made an order appointing Walter Arnold Hadlee of Christchurch, Public Accountant, as Provisional Liquidator of the Appellant companies and pursuant to the said order the said Walter Arnold Hadlee took control of the assets and affairs of the Appellant companies accordingly.

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14. The Respondent's petitions referred to in paragraphs 11 and 12 hereof, together with a similar petition against Star T.V. Limited another Company of the Bateman group of companies, were heard by the Supreme Court of New Zealand before Macarthur J. at Christchurch on 27th 28th and 29th November and 8th and 9th December 1968. The petition against Star T.V. Limited was adjourned. The Appellants and the Respondent appeared by counsel and both sides adduced evidence. There were no other appearances on the petitions. On 12th December 1968 the Court pronounced orders for the winding up of the Appellant companies by the Court under the provisions of the Companies Act 1955.

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113 to 129

15. Neither in the Supreme Court nor in the Court of Appeal did the Respondent pursue the allegations in the winding up petitions that it was just and equitable that the Appellants should be wound up, and the Appellants contend that for the reasons stated by Turner J. in the Court of Appeal the Respondent is precluded from relying on those allegations.

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151 line 28.

16. The Respondent relied upon paragraphs (e) of Section 217 and Section 218 of the Companies Act 1955. Those Sections are as follows:-

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"217: A company may be wound up by the Court if -

- (a) The company has by special resolution resolved that the company be wound up by the court;
- (b) Default is made in delivering the statutory report to the Registrar or in holding the statutory meeting;

- (c) The company does not commence its business within a year from its incorporation, or suspends its business for a whole year:
- (d) The number of members is reduced below seven:
- (e) The company is unable to pay its debts:
- 10 (f) The Court is of opinion that it is just and equitable that the company should be wound up. "

"218: A company shall be deemed to be unable to pay its debts -

- 20 (a) If a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding fifty pounds then due, has served on the company, by leaving it at the registered office of the company, a demand under his hand requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or
- 30 (b) If execution or other process issued on a judgment, decree, or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
- (c) If it is proved to the satisfaction of the court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company. "

- 17. In the Supreme Court, Macarthur J. held:-
- 40 (a) That the demands mentioned in paragraph 8 hereof did not comply with the provisions of paragraph (a) of the said Section 218 for the reason that in his opinion the demands were not signed in the manner required by that Section. 115 line 15 to 116 line 24.
- (b) That his conclusion (a), as he said counsel for the Appellants freely conceded, did not affect the position of the petition in relation to the 116 line 25.

Record

Appellants because, the learned judge said, there was ample evidence that the Appellants were unable to pay their debts and, subject to certain defences which had been raised, must clearly be held to be insolvent.

116 line 34.

(c) That he was not prepared to uphold a submission by counsel for Bateman Television Limited, that as the alleged debt of \$8,704.46 was disputed the Court should stay its hand, and the learned judge referred to Re Tweeds Garages Limited [1962] Ch.406. The learned judge said

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117 line 26.

"In my view, upon this aspect of the matter, the evidence is ample to show a prima facie case that the whole of the debt as claimed is owing. It could be, of course, that some part of the debt will ultimately be shown as not owing, but if there were any real point involving a substantial part of the debt then I have no doubt that facilities were available to the debtor companies to enable them to bring the point to the notice of the Court, and that has not been done..."

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118 line 10.

(d) That there was no binding agreement for composition.

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123 line 39.

(e) That speaking generally the Bateman Inter-Company Agreements on which the Respondent relied were valid customary hire purchase agreements and assignments thereof.

124 line 7  
to 41.

(f) That there was some evidence that there were some agreements amongst the many Bateman Inter-Company Agreements produced that did not in their schedules have serial numbers of the television sets, and that there was some evidence that in some cases there were fictitious numbers inserted in the schedules. The learned judge said that having regard to the total amount of the advances under consideration the total amount covered by those particular types of agreement was not a very large proportion of the grand total. He did not think that the defects could affect the rights of the petitioning creditor and the debtor companies inter se, or mean that the documents were not customary hire purchase agreements.

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	(g) That orders for winding up must be made against both Appellants	Record 124 line 42
	18. Both Appellants appealed to the Court of Appeal of New Zealand contending that the judgment of the Supreme Court of New Zealand was erroneous in fact and in law. Their appeals were heard by North P., Turner J. and McCarthy J. on 18th, 19th, 20th and 21st March 1969 and were unanimously dismissed on 8th May 1969.	130 and 131.  175 to 176.
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	19. North P., having narrated the circumstances giving rise to the appeals expressed his opinions:-	132.
	(a) That the demands mentioned in paragraph 8 hereof did conform with the requirements of Section 218 (a) of the Companies Act 1955 as to signature.	135 line 18 to 137 line 48.
20	(b) That His Honour was prepared to accept Macarthur J.'s conclusion that the evidence was ample to show a prima facie case that the whole of the debt of \$8,704.46 claimed by the Respondent from Bateman Television Limited was owing.	137 line 49 to 138 line 32
	(c) That His Honour was not satisfied that the Bateman Inter-Company Agreements under consideration were shams got up by the three parties in an attempt to disguise ordinary moneylending transactions as dealings in customary chattels.	138 line 33 to 141 line 36
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	(d) That the Bateman Inter-Company Agreements were not agreements to which the provisions of Section 2(5) of the Chattels Transfer Amendment Act 1931 apply.	141 line 37 to 145 line 22.
40	(e) That although the Bateman Inter-Company Agreements did not contain a statement of the cash price of the goods, the agreements were not void for breach of the Hire Purchase and Credit Sales Stabilisation Regulations 1957 because, so he held, those Regulations did not apply.	145 line 23 to 146 line 24.

Record 146 lines 25 to 40.	(f) That it was unnecessary to deal with the submission of counsel for the Appellants that if any of his earlier submissions had been accepted neither Appellant could be held to be insolvent. His Honour added that "If his earlier submissions had prevailed then I think there is no doubt that both the T.V. Company and the Hire Company would not have been shown to be insolvent. The T.V. Company would remain the owner of the television sets sold to it on terms to the Hire Company and would be under no obligation to the Finance Company under the terms of the various assignments by way of mortgage in favour of the Finance Company. Likewise the alleged debts due to the Finance Company by the Hire Company would be irrecoverable."	10
146 line 41 to 150 line 26	(g) That he would be doing the greatest possible injustice if he allowed further litigation by accepting a submission by counsel for the Appellants that the winding up petitions should be dismissed or stayed because they were founded upon disputed claims.	20
150 line 35	20. <u>Turner J.</u> having narrated the circumstances giving rise to the appeal:-	
152 line 27 to 33.	(a) noted that no judgment had been obtained by the Respondent against either Appellant and that it was submitted that the tests provided by paragraphs (a) and (c) of Section 218 of the Companies Act 1955 were satisfied on the facts;	30
152 line 34 to 155 line 10.	(b) expressed his opinion that the demands mentioned in paragraph 8 hereof complied with the provisions of the said Section 218 as to signature;	40
155 line 10.	(c) said that it followed that if the liability of the Appellant companies to the Respondent and its quantum were sufficiently established then the two	

Appellant companies were both to be deemed to be unable to pay their debts;

Record

- 10 (d) rejected the submission on behalf of the Appellants that the Bateman Inter-Company Agreements were "shams" got up by the parties including the Respondent as a disguise for moneylending transactions because, His Honour thought, the submission involved a misconception of the meaning of the word "sham". The learned judge accepted the form of the Bateman Inter-Company Agreements and the assignments by way of mortgage as indicating the true nature of the transaction;
- 20 (e) held that the lack of a sufficient schedule of chattels did not dis-qualify an agreement from being regarded as a customary hire purchase agreement but merely deprived it of an immaterial part of its effect as such;
- 30 (f) held that subsection (5) of Section 2 of the Chattels Transfer Amendment Act 1931 did not apply to the Bateman Inter-Company Agreements because he was confident that Bateman T.V. Hire Limited was not a "retail dealer" in television sets. His Honour said
- 40 "Its business is conceded to have been exclusively the hire of sets, and this business did not include even the conditional sale of sets, or their disposal by way of hire-purchase under hire-purchase agreements. It did nothing more than hire out sets, the property in which it never relinquished or agreed to relinquish. I cannot accept the submission that such a business is the business of a "retail dealer". This term to my mind necessarily involves the idea of sale to members of the public, and I think that the context of the words in the subsection 5 of section 2 thoroughly supports this view. I am prepared therefore to hold that the subsection is not applicable to the
- 50 agreements before us, and does not avail to deprive the agreements of their status as customary hire-purchase agreements.";
- 156 line 22.
- 157 line 20 to 158 line 21
- 158 line 22 to 159 line 43
- 159 line 25.

Record 159 line 44 to 161 line 5.	(g) held that the Hire Purchase and Credit Sales Stabilisation Regulations 1957 do not apply to the Bateman Inter-Company Agreements because the transactions were not, so he held, transactions "at retail";	
161 line 6 to line 29.	(h) held that the rule in <u>Re Tweeds Garage Limited</u> /1962/ 1 All E.R.121 must apply to cure the objections as to the quantum of the debts, and that the provisions of section 218(a) of the Companies Act 1955 disposed of the appeal as against Bateman T.V. Hire Limited;	10
161 line 30 to 163 line 11.	(i) rejected the submission of counsel that because of sundry payments and cross payments it was impossible to say that the amount demanded from Bateman Television Limited or any of it was then owing, for two reasons:-	20
162 line 7.	(i) That counsel's applications for adjournment of the petition was too late and, so His Honour said, had not been made to the Supreme Court.	
162 line 38.	(ii) That once a debt is prima facie proved, as (he said) it had been proved here, it must fall upon the debtor to show that any payments made between the parties since the relevant date have been properly appropriated towards the debt by either creditor or debtor.	30
163 line 26.	21. <u>McCarthy J.</u> referred to the course of proceedings in the Supreme Court, and continued his judgment as follows:-	
165 line 45 to 166 line 14.	(a) His Honour concurred with North P. and Turner, J. upon the efficacy of an agent's signature of a demand under paragraph (a) of the said section 218.	40
166 line 15 to 168 line 35.	(b) Regarding the appeal of Bateman Television Limited, His Honour said he was satisfied that the course taken by Macarthur J. in the Supreme Court could not be said to be wrong, and concluded this phase of his judgment by observing that Macarthur J.	



had been satisfied that there was sufficient proof of a debt large enough to found a petition, and that he would not disagree with that.

- (c) Regarding the appeal of Bateman T.V. Hire Limited, His Honour rejected the Appellants' submissions that the Bateman Inter-Company Agreements were not customary hire purchase agreements, and found it unnecessary to consider certain dependant submissions. 168 line 36 to 173 line 24
- 10 (d) Having rejected all the submissions on behalf of the Appellants he favoured the dismissal of the Appeals. 173 line 25 to line 44.
- (d) Having rejected all the submissions on behalf of the Appellants he favoured the dismissal of the Appeals. 173 line 4.

B. The Appellants' Contentions

22. The Appellants contend that the judgments of the Supreme Court and the Court of Appeal are erroneous in fact and in law in holding that each Appellant is unable to pay its debts. 20

23. The Appellants contend that the case does not raise a presumption under s.218(a) of the Companies Act 1955 that either Appellant is deemed to be unable to pay its debts. (Paragraphs 25 to 40 hereof). In particular the Appellants contend that:-

- (a) Neither the Supreme Court of New Zealand nor the Court of Appeal has held that such a presumption is raised in the case of either Appellant. (Paragraphs 25 to 31 hereof). 30
- (b) Alternatively, if it should be held that either Court has found such a presumption to arise, the finding is erroneous in fact and in law for the following reasons:-
- (i) That the demands made upon the Appellants were not given "under the hand" of the Respondent as required by the said s.218(a). (Paragraph 32 hereof). 40
- (ii) Alternatively, the Respondent was not at the date of demand a creditor of Bateman Television Limited or of Bateman T.V. Hire Limited in the very sums

demanded on behalf of the Respondent. (Paragraphs 33 to 38 hereof in the case of Bateman Television Limited, and paragraph 39 in the case of Bateman T.V. Hire Limited).

- (iii) That neither Appellant has "neglected" to pay the sum demanded within the meaning of the said s.218(a). (Paragraph 40 hereof). 10

24. The Appellants further contend that the judgments of the Supreme Court of New Zealand and the Court of Appeal of New Zealand wherein it is held that each Appellant is unable to pay its debts are in each case erroneous in fact and in law. (Paragraphs 41 to 82 hereof). In particular the Appellants:-

- (a) Repeat the contentions mentioned in paragraphs 33 to 39 hereof: 20
- (b) Contend that the Supreme Court and the Court of Appeal erroneously rejected their contention that certain loans made by the Respondent to the Appellants or either of them, or such a substantial number of the said loans as precluded the drawing of an inference that the appellants or either of them are unable to pay their debts, are illegal and void. (Paragraphs 43 to 70 hereof). 30
- (c) Contend that the Supreme Court and the Court of Appeal erroneously rejected their contention that the Appellants disputed the Respondent's claims on substantial grounds which require further investigation before it can be determined whether or not either appellant is indebted to the Respondent in such a sum as that Appellant is unable to pay. (Paragraphs 71 to 82 hereof). 40

25. In elaboration of the contention that the case does not raise a presumption under paragraph (a) of s.218 of the Companies Act 1955 that either Appellant is unable to pay its debts, the Appellants first refer to the reason for judgment in the Supreme Court and the Court of Appeal and contend that neither Court has held that such a presumption is raised in the case of either Appellant.

26. In the Supreme Court, Macarthur J. held that the demands relied on by the Respondent were not executed in the manner he held requisite to satisfy the provisions of paragraph (a) of s. 218. It is clear that His Honour did not treat the case as one raising the presumption of insolvency under that paragraph, and he did not consider the other requirements of the paragraph.

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Record  
Macarthur J.  
116 line 6.

27. In the Court of Appeal Their Honours unanimously reversed the decision of Macarthur J. as to the sufficiency of the signature of the demands, holding them to have been sufficiently signed, but they adopt different approaches to the remaining criteria under paragraph (a) of s. 218. North P. does not explicitly refer to s. 218 in his reasons for judgment except on the question of the sufficiency of the signature. It is submitted that, read as a whole, His Honour's judgment does not rely on any presumption under paragraph (a) of s. 218 and that His Honour founded his judgment upon paragraph (c) of s. 218.

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North P.  
135 line 18  
to 137 line  
48.

28. Turner J., having stated his opinion that the demands were sufficiently signed in each case, treated the cases of Bateman T.V. Hire Limited and Bateman Television Limited separately. In relation to Bateman T.V. Hire Limited His Honour said:-

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Turner J  
152 line 34.

"I have already held that the notice requiring it to pay the sum set up in these proceedings as due was a good notice; and nothing turns on the point that the amount set forth in the notice may not be the precise amount owing, for it was not contested that the rule in Re Tweeds Garages Limited /1962/Ch.406 must apply to cure this objection. I am therefore of opinion, for the reasons which I have given that the provisions of s. 218(a) dispose of this appeal as against Bateman T.V. Hire Limited; and that its appeal should be dismissed accordingly."

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161 line 17  
to line 29.

Later in his judgment, His Honour said about Bateman Television Limited that:-

Record  
163 line 8  
to line 18.

"...failing proof to the contrary, the debts prima facie proved by the finance company to have been due must be deemed still owing at the date of the proceedings. Once this conclusion is reached, the rest of [Counsel for the Appellants] argument as to the validity of the notice given and the presumption that the company is unable to pay its debts goes against [Bateman Television Limited] almost by default, by the same process as has availed against [Bateman T.V. Hire Limited]."

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165 line 45  
to 166 line  
14.

29. McCarthy J., having stated his opinion that the demands were sufficiently signed, does not distinguish between the criteria under paragraph (a) of s.218 and paragraph (c) of that section. It is submitted that, like North P., he founded his judgment upon paragraph (c) of s. 218 .

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30. The Appellants contend that in Re Tweeds Garages Limited [1962] Ch.406 cannot be applied in the manner suggested by Turner J. to raise a presumption of insolvency under paragraph (a) of s.218. That case, as Plowman J. pointed out at p.412, was not concerned with a statutory demand.

31. Accordingly the Appellants contend that neither the Supreme Court nor the Court of Appeal has found a presumption of insolvency under s.218(a) of the Companies Act 1955 in the case of either Appellant, and that Turner J. was in error in holding that the provisions of s.218(a) dispose of the appeal.

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32. The Appellants contend that the demands made upon the Appellants were not given under the hand of the Respondent as required by s.218(a) of the Companies Act 1955. The demands in each case are signed by a solicitor, Mr. A. D. Holland. It is admitted that Mr. Holland was authorised to sign the demands on behalf of the Respondent. Nevertheless the Appellants contend that demands so signed do not comply with s.218(a) of the Companies Act 1955 because that section requires that the demand by a creditor must be "under his hand".

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The Appellants contend that the Supreme Court rightly held that the demands were not executed in the manner required by s. 218(a) and that the Court of Appeal erred in reversing that decision. It is submitted that the true construction of the section requires that, in the case of a demand by a company, the demand must be executed under seal.

10 33. The Appellants contend that the Respondent was not at the date of demand a creditor of either Appellant in the very sums demanded. It is convenient to take the cases of the Appellants on this point separately.

Bateman Television Limited

20 34. The Respondent alleged that Bateman Television Limited was indebted to the Respondent in the sum of \$8,704.46. That Appellant contended that as that sum represented only some items in a long sequence of transactions, and that as the Respondent had not produced an account showing a balance owing by the Appellant, it could not be taken that the particular debts alleged had not been paid.

30 35. In the Supreme Court Macarthur J. held that the evidence was ample to show a prima facie case that the whole of the debt as claimed was owing but he added that it could be that some part of the debt would ultimately be shown as not owing and observed that if there were any real point involving a substantial part of the debt then he had no doubt that facilities were available to the debtor companies to enable them to bring the point to the notice of the Court and that that has not been done.

Macarthur J.  
117 line 26.

40 The Appellants contend that, read as a whole, His Honour's judgment shows that His Honour was not satisfied that the very sum of \$8,704.46 demanded on behalf of the Respondent was due and owing.

36. In the Court of Appeal, North P. was prepared to accept the conclusion of Macarthur J. that there was a prima facie case that the debt as claimed was owing, Turner J. referred to the payments and cross payments and placed the onus of proof of appropriation of payments on the

North P.  
137 line 49  
to 138 line  
32.

Turner J.  
161 line 33  
to 163 line 11.

Record  
McCarthy J.  
166 line 15  
to 168 line  
35.

Appellant which, he said, the Appellant had not discharged, while McCarthy J. was content to state that he would not disagree with Macarthur J. 's conclusion that there was sufficient proof of a debt large enough to support a petition.

37. Bateman Television Limited contends that there is no finding in either Court that the sum of \$8,704.46 demanded on behalf of the Respondent from Bateman Television Limited was due and owing when demand was made.

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38. Bateman Television Limited further contends that if there is a finding that Bateman Television Limited was indebted to the Respondent in the sum of \$8,704.46 then that finding is erroneous in fact and in law for the following reasons:-

- (a) It is evident that the learned judges placed reliance on the omission of the Appellants to call evidence in regard to the state of account between the parties. The Appellants contend that the onus lay on the Respondent of proving the debt it demanded; that the judgments on the point show that the Respondent did not discharge that onus; and that the action or inaction of the Appellant cannot, it is submitted, cure deficiencies of the Respondent's proof;
- (b) Turner J. erred in holding that the onus of proof of the appropriation of a debtor's payments to his creditor lies on the debtor. The Appellants contend that, where the debtor does not make an appropriation, the creditor may do so and that failing specific appropriation by either debtor or creditor, the payments must be applied towards the earliest debts. The Appellants will refer to Deeley v. Lloyds Bank [1912] A.C. 756. Consequently the Appellants contend that the mere production of a list of alleged debts is not proof that such debts are unpaid where it is evident that the debtor has paid sums far exceeding the alleged debts. The Appellants contend that proof of the

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- alleged debts in that situation requires proof by the creditor that the payments made by the debtor have been properly appropriated towards other indebtedness. The Appellants contend that the creditor did not furnish such proof in the present case and that accordingly it cannot be inferred that the very sum of \$8,704.46 was owing when demanded;
- 10
- (c) The Court of Appeal appears to have given some weight to the statement of counsel for the Respondent that the sum of \$74,000 which had admittedly been paid to the Respondent represented, so he said, repayments of instalments due by Bateman T.V. Hire Limited. There is no evidence to support that statement, and the Appellants contend it is erroneous. It was the Respondent's case that its right to collect moneys from Bateman T.V. Hire Limited arose as assignee by way of mortgage to secure loans which it alleged it had made to Bateman Television Limited. If that is so, it is evident that the moneys received by the Respondent from Bateman T.V. Hire Limited were received on account of Bateman Television Limited and should have been treated by the Respondent accordingly.
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Bateman T. V. Hire Limited

39. The Respondent alleged that Bateman T.V. Hire Limited was indebted to the Respondent in the sum of \$166,354.54. The Appellant Bateman T.V. Hire Limited contends that there is no finding in either Court that that Appellant was indebted to the Respondent in that sum. The Supreme Court did not determine whether or not the very sum was due and owing. In the Court of Appeal, North P. does not refer to the point. Turner J. said: -
- 40

"I understand it to follow by concession that the Hire Company owed the Finance Company the amount of \$166,354.54 as claimed, or some lesser sum of much the same order. It therefore follows that it is shown to be indebted in a sum exceeding \$100 to the Finance Company.

Turner J.  
161 line 11.

Record

McCarthy J. said:-

McCarthy J.  
164 line 5.

"The allegations in respect of Bateman T.V. Hire Limited were similar, except that in this instance the debt alleged was \$166,354.54, an amount which the evidence showed was climbing rapidly with the result that by the time the petition came for hearing at the end of November, it had reached \$247,300.54."

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Later he said:-

170 line 46.

"So far as Bateman T.V. Hire Limited is concerned, even if I were to assume that some of the agreements were unenforceable against it for this particular reason, the amount owing is still so substantial that the company is nonetheless hopelessly insolvent, unless, of course, the legal defences raised in this case are upheld."

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The Appellants contend that the point taken by them, namely that in the absence of a proper account, there is no proof that the Appellant Bateman T.V. Hire Limited was indebted in the very sums demanded, is sustained by those observations.

40. Both Appellants contend that they have not "neglected" to pay the sums demanded on behalf of the Respondent within the meaning of paragraph (a) of s.218. They contend that their refusal to pay the sums demanded is based on reasonable grounds, and they will refer to In re London and Paris Banking Corporation L.R. 19 Eq.444. None of the judgments refers to this point, but the submission of counsel for the Appellants upon it is noted in the official report of the case in the Court of Appeal (Bateman Television Limited and Anor. v. Coleridge Finance Company Limited/1969/N.Z.L.R. 794 at 798). The grounds upon which the Appellants seek to justify their refusal to pay the sums demanded on behalf of the Respondent are:-

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- (a) That the Respondent refused to produce accounts showing that the sums of



\$8,704.46 alleged against Bateman Television Limited or \$166,354.54 alleged against Bateman T.V. Hire Limited, are owing to the Respondent.

(b) That the Appellants contend that the sums demanded are not owing to the Respondent.

10 (c) That after a close enquiry neither the Supreme Court nor the Court of Appeal was prepared to hold that the very sums were owing.

41. The Appellants next refer to paragraph (c) of section 218 and contend that the judgments of the Supreme Court and the Court of Appeal that the Appellants are unable to pay their debts are erroneous in fact and law in the cases of both Appellants.

20 42. In the case of Bateman Television Limited, the only debt alleged by the Respondent as the foundation of its prayer for a winding up order was the alleged debt of \$8,704.46 in respect of hire purchase agreements entered into by Bateman Television Limited as "vendor" and members of the public as "purchasers" the benefit whereof had been assigned by way of mortgage by Bateman Television Limited to the Respondent. Bateman Television Limited does not contend that those transactions are illegal; it contends that, inasmuch as the  
30 Respondent has not brought into account payments made by the Appellants to the Respondent for the credit of Bateman Television Limited, there is no proof that Bateman Television Limited is indebted to the Respondent in the sum claimed, and it repeats the contentions mentioned in paragraphs 33 to 39 inclusive hereof, and further contends that it is not unable to pay the said sum if it is owing.

40 43. In the case of both Appellants, the Respondent's case was that both Appellants must be held to be unable to pay their debts because, so it was alleged, they were unable to pay debts allegedly arising out of the Bateman Inter-Company Agreements mentioned in paragraph 5 hereof, the benefit whereof

so it was alleged, had been assigned by Bateman Television Limited to the Respondent by way of mortgage to secure loans allegedly made by the Respondent to Bateman Television Limited.

The Respondent claimed to be a creditor of Bateman T. V. Hire Limited by virtue of the alleged assignments. The Respondent did not rely upon the alleged loans to Bateman Television Limited as constituting the Respondent a creditor of that company.

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44. The Appellants contend that the reasons for judgment in the Supreme Court are deficient in that they do not contain the findings of fact necessary to sustain the judgment of the Court. In the Court of Appeal, each of the learned judges made his own findings of fact, in some instances harmonious, in others conflicting. In this situation, the Appellants contend that the evidence taken in the Supreme Court should be brought into consideration.

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45. The Appellants contend that the loans made by the Respondent amounted to money-lending within the meaning of the Money-lenders Act 1908 and that they are illegal and void because the Respondent was not registered as a moneylender under that Act and had not complied with the requirements of that Act. The Respondent admitted that if the Moneylenders Act 1908 applied to the loans they were illegal and void but the Respondent contended that the Act did not apply to them by virtue of the provisions of the Chattels Transfer Act 1924.

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46. The Appellants desire to develop the contentions mentioned in paragraph 45 by advancing the following contentions:-

- (a) The Appellants contend that the real nature of the transactions is that of moneylending and that the Bateman Inter-Company Agreements and the assignments by way of mortgage thereof, or a substantial number of them, are "shams" got up by the parties at the instance of the Respondent in a vain attempt to disguise illegal and void moneylending transactions as customary hire purchase agreements and assignments thereof. (Paragraphs 47 to 55 hereof).

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(b) Alternatively the Appellants contend that the loans made by the Respondent are not exempted from the operation of the Moneylenders Act 1908 by the provisions of s.2(3) of the Chattels Transfer Amendment Act 1931 and are illegal and void accordingly. (Paragraphs 56 to 70 hereof).  
In particular;

- 10 (i) The Bateman Inter-Company Agreements or a substantial number of them do not relate to specific goods. (Paragraph 57 hereof).
- (ii) Alternatively, the Bateman Inter-Company Agreements are agreements between a "wholesale dealer" and a "retail dealer" within the  
20 meaning of s.2(5) of the Chattels Transfer Amendment Act 1931. (Paragraphs 58 to 65 hereof.)
- (iii) Further alternatively, the Bateman Inter-Company Agreements are void under the provisions of the Hire Purchase and Credit Sales Stabilisation Regulations 1957. (Paragraphs 66 to 70  
30 hereof).

47. The Appellants contend that the Bateman Inter-Company Agreements were part of a scheme of financing devised by the Respondent for the purpose of disguising moneylending transactions entered into for the purpose of financing the purchase of television sets from third parties as the discounting of hire purchase agreements.

40 The Appellants contend that the Conditional Purchase Agreements were prepared by the Respondent, not for the purpose of evidencing agreements for the sale of television sets from Bateman Television Limited to Bateman T.V. Hire Limited and the subsequent "discounting" thereof by the Respondent, but for the purpose of providing for the Respondent documents purporting to secure loans previously made by the Respondent to one or other of the Appellants to finance  
50 the purchase of television sets from third parties in a form which would appear to fall

outside the scope of the Moneylenders Act 1908. The contention is that the real nature of the transactions was the lending of money for the purchase of goods from third parties which loans the parties invalidly attempted to secure upon goods subsequently purchased by "cloaking" the loans with documents which appear to show the lending of money upon the security of assignments of choses in action and other rights which did not exist when the money was lent. The Appellants contend that the sequence of events is crucial; the loans were made to enable the purchase of goods, then the goods were purchased, next the conditional purchase agreements were entered into between the Bateman Companies, and finally there was the assignment to the Respondent purporting to secure the money already lent. The "Conditional Purchase Agreements" and the assignments were merely a facade for the concealment of the real nature of the moneylending business.

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The course of dealing was not that of a dealer who, having entered into hire purchase agreements with his customers, takes the agreements to a finance company for discounting.

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48. In the Supreme Court, Macarthur J. said:-

Macarthur J.  
123 line 36.

"Now           counsel for the Respondent/ submitted, and I accept his argument, that when one examines the documents in this case and the course of dealing, and when one considers the oral evidence, then speaking generally the documents here were valid customary hire purchase agreements and assignments thereof .... Now there were some subsidiary arguments that were raised by           counsel for the Appellants/. I do not need to deal with them in detail.... But there is one further point in this connection and that is that there is evidence that there are some agreements amongst the many produced that do not in their schedules have serial numbers of the television sets, and there is some evidence, principally from Mr. Currie, that in some cases there are fictitious numbers inserted

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in the schedules. Having regard to the total amount of the advances under consideration, the total amount covered by these particular types of agreement is not a very large proportion of the grand total. But there is a question raised by Mr. Gough as to whether, by reason of these defects in the schedules, these documents are shown to be customary hire purchase agreements within the meaning of the Act. As to that, I accept the counsel for the Respondent's argument, namely that the voiding provisions of ss. 23 and 24 of the Chattels Transfer Act 1924 (which are brought into play by reason of s.16 of the Statutes Amendment Act 1936) affect only persons outside the customary hire purchase agreement and its assignees. The exact provision of ss. 23 and 24 reads:-

'Shall be void to the extent and as against the persons mentioned in sections eighteen and nineteen hereof in respect of any chattels not so described.'

And s.18 of course refers to questions of bankruptcy and the like, and s.19 refers to bona fide purchases for value. I do not think, however, that the defects under consideration can affect the rights of the petitioning creditor and the debtor companies inter se, or mean that the documents are not customary hire purchase agreements within s.2(3) of the 1931 Amendment."

40. 49. The Appellants contend that this passage of the learned judge's reasons is erroneous because it does not recognise that the defects referred to indicated more fundamental objections to the transactions; and that it is erroneous in that His Honour misunderstood the scale of the defects, which, the Appellants contend, affected the majority of the Bateman Inter-Company Agreements.

Record

50. In the Court of Appeal, their Honours unanimously rejected the Appellants' contention upon the facts their Honours found. There are two observations upon the Appellants' contention which the Appellants desire to notice now:-

McCarthy J.  
170 line 32.

(a) McCarthy J. said that the contention that the descriptions contained in a number of the documents was so inadequate that the particular goods intended to be covered by the agreement could not be identified raised in part at least a question of fact not raised in the Supreme Court. The Appellants contend that the statement is erroneous and refer to the observations of Macarthur J. in the Supreme Court cited in paragraph 45 hereof and to the evidence.

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Turner J.  
155 line 41.

(b) The Appellants contend that the passage in the judgment of Turner J. in which His Honour said there was no dispute as to certain facts, is erroneous and can only have proceeded upon a misconception of the Appellants' contention.

51. The Appellants contend that the judgments of the Court of Appeal are erroneous in fact and law in rejecting the Appellants' contention mentioned in paragraph 47 hereof.

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North P.  
138 line 33.

52. In the Court of Appeal, North P. said:-

"[Counsel for the Appellants] next submitted that the conditional purchase agreements between the T.V. Company and the Hire Company, which were assigned by way of mortgage to the Finance Company, were shams got up by the three parties in a vain attempt to disguise ordinary money-lending transactions as dealings in customary chattels. This submission was not made in the Court below but was advanced for the first time by [Counsel for the Appellants] in this court. [Counsel for the Appellants]

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conceded that if the conditional purchase agreements entered into between the T.V. Company and the Hire Company were genuine customary hire purchase agreements then it could not be contended by him that the assignments by way of mortgage from the T.V. Company to the Finance Company were caught by the Moneylenders Act 1908 (see s. 2 of the Chattels transfer Amendment Act 1931). But he argued that when the documents are examined and the surrounding circumstances considered it is plain that the Hire Company and the Finance Company were engaged in an ordinary money-lending transaction."

His Honour referred to Re George Inglefield Ltd. [1933] Ch. 1; Olds Discount Co. Ltd. v. Playfair Ltd. [1938] 3 All E.R. 275 and Cash Order Purchases Ltd. v. Brady [1952] N.Z.L.R. 898.

Upon that passage of His Honour's reasoning, the Appellants contend:-

- (i) That the issue whether the "Conditional Purchase Agreements" were genuine was opened before the Supreme Court, evidence of the course of dealing and evidence that the documents referred, in most instances, to fictitious chattels, was led, and Macarthur J. directed himself to the question as to the proper approach by the Court to the consideration of the documentary and other evidence in a matter of this kind, and referred to Cash Order Purchases Ltd. v. Brady [1952] N.Z.L.R. 898.
- (ii) The submission that the transactions were ordinary moneylending transactions is not dependent upon the proposition that the loans were made to the Bateman T.V. Hire Limited (referred to by North P. as "the Hire Company") - it is contended that the Respondent made loans to whichever of the Bateman Companies purchased the sets from the external supplier.

Macarthur J.  
121 line 21.

North P.  
140 line 9.

Record  
North P.  
140 line 9  
to 141 line  
36.

North P. proceeded to consider the contention in detail. The Appellants contend that His Honour's findings from the evidence are erroneous in fact, and desire to refer to the evidence.

Turner J.  
156 line 21  
to 157  
line 7.

53. Turner J. thought the contention involved a misconception of the meaning of the word "sham". His Honour thought that the occasions on which courts have set aside the form of a transaction as a "sham" are confined to cases in which, really doing one thing, the parties have resorted to a form which does not fit the facts in order to deceive some third person, often the revenue authorities, into the belief that they were doing something else. Thus where in a lease both parties prescribe a rent in excess of what is really to be paid, so as to deceive those who collect taxes as to the quantum of a deduction to be allowed, that was a sham; but he did not agree that the term is applicable to the form of a transaction into which the parties are legally at liberty to enter, and into which they do in fact enter, if what they do is simply to prefer one form of transaction to some other into which they might have entered, but did not. His Honour accepted the form of the transaction as indicating the true nature of that into which the parties in fact and in law entered; and held that unless they were incapable of entering into such a transaction their liability to each other must be determined upon the basis of the documents which they signed.

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Upon that passage the Appellants contend that it is not necessary for them to show deception of a third party as a pre-requisite of opening an issue as to the real nature of the transactions. The Appellants of course accept that the documents are some evidence, but not conclusive evidence, of the nature of the transactions; but they contend that the form of the transaction does not preclude an enquiry into its real nature for the purposes of determining whether the transaction is unlawful.

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54. McCarthy J. reviewed the evidence and concluded:-

Record

10 "Diplock L. J. in Snook v. London and West Riding Investments Ltd. /1967/ 2 Q.B. 786; /1967/ 1 All E.R. 518 said, and I respectfully concur, that, whatever else is accepted as being involved in the concept of a sham, one thing is clear in legal principle, morality and authority, namely that for acts or documents to be a sham all the parties thereto must have a common intention that the acts or documents are not to create legal rights and obligations which they give the appearance of creating. I see no evidence in the present case that the parties had that intention. I think the proper deduction from their conduct is to the contrary."

McCarthy J.  
170 line  
18 to 31.

20 The Appellants contend that the real nature of a transaction in law should be ascertained from a consideration of all of the relevant evidence, including of course, the form of the documents which appear to express it. The Appellants contend that when the Bateman Inter-  
30 Company Agreements and the assignments by way of mortgage thereof are seen in their surrounding circumstances those documents plainly appear as an ex post facto attempt to disguise illegal loans in a form apparently lawful, after the money had been lent.

55. The Appellants desire to refer to the evidence as follows:-

- 40 (a) The course of dealing was described by:-  
(i) Respondent's witness John Nicholas Rundle who said in paragraph 2 of his affidavit of 1st October 1968:-

6 line 27.

"In the case of a television set to be hired to a member of the public, Bateman T.V. Limited would sell that set to Bateman T.V. Hire Limited and under a hire purchase or conditional purchase

Record	agreement and then Bateman T.V. Limited would assign its rights as vendor under that agreement to one of the finance companies in consideration of the appropriate cash advance. The instalments payable to the finance company would be found by the Bateman Company out of hire charges received by that company and it would also guarantee losses or default by persons paying hire purchase instalments direct to the finance company."	10
41 line 40 to 45.	but under cross-examination he denied that he was familiar with the method of making advances to the Bateman Group and said that they had all been made before he assumed control of the Respondent's affairs.	20
	(ii) The Appellants' witness Robert Currie who deposed in paragraph 4 of this affidavit dated 9th October 1968 as follows:-	
19 line 23.	"4. That the funds or moneys employed in the purchase of television receivers used for hiring out to customers were obtained in the main from the said Coleridge Finance Company Limited and Cambridge Credit Corporation Limited, the method of financing being that the said Bateman Television Limited having secured a cash advance from one of the finance companies would purchase television receivers from a wholesaler or manufacturer and would then in turn sell such receivers at retail price to the said Star T.V. Limited and Bateman T.V. Hire Limited, a security document for each cash advance from the finance company concerned being given by the said Bateman Television Limited and Bateman T.V. Hire Limited entering into a form	30 40 50

of Conditional Purchase Agreement expressed to refer to the number of unspecified television receivers which would be assigned to the finance company concerned. A true copy of one such Agreement is hereunto annexed... "

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(iii) Mr. Currie gave evidence orally in the Supreme Court. In examination in chief he said:-

"The basis employed in the obtaining of advances from the group of companies - when an advance was required an approach was made to Mr. Hintz / Respondent's Manager / usually by Mr. Bateman. And Mr. Hintz in due course would send a cheque around for the amount requested. As to whether anybody else made these approaches, other than Mr. Bateman, yes, I would say I made the request by telephone at the direction of one of the directors of the company. There were no details supplied to support the request. The reasons given for wanting the money were for stock purchase generally. The amounts required would be £5,000, £2,000. The money would be employed for the purchase of stock. Details of the stock purchased would not be given. The agreements which were put in yesterday, the conditional purchase agreements, they would be signed subsequent to receiving the cheque. Sometimes several months later on occasions."

78 line 11.

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Mr. Currie said:-

87 line 38.

"Wasn't the system going along these lines: the Bateman companies would want money to pay their wholesalers' accounts? Yes. If they wanted £5,000 they would produce a conditional purchase agreement covering 50 sets between Bateman T.V.Limited and Bateman T.V.Hire? No, that's not correct, those were produced afterwards. To borrow £5,000 would want 50 sets? Yes. Was that because it had been agreed to allocate £100 to a set as approximating the price for it? Yes. The true price might be a bit under or a bit over? Yes. So then an agreement would have to be done for the 50 sets? For the £5,000. And then Mr. Hintz would draw up the agreement with the advance and other details and then he would have to ask your company for the serial numbers in your possession? That would have been the correct procedure. Isn't that what happened? No apparently not. How did he get the numbers? I don't know. He rang me up on about one occasion that I can recall for serial numbers of sets. You agree that the vast majority of the agreements had on them serial numbers of sets owned by your group? The vast majority of the agreements handed in this morning would have serial numbers that didn't belong. We've only got your word for that? Yes. What records does your company keep of the serial numbers? These agreements were checked with our invoices back to

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1963. What records did your Company hold to relate today the serial numbers of sets which it owned? We have a stock card for every set, complemented by a hire card for every set on hire. We have a separate sort for sets in stock. When a number of sets have been bought from manufacturers or distributors do you usually record the serial numbers of them? Yes, they are recorded on a card. And then when you want to borrow from the finance company on say ten sets all you have to do was to notify the company ten numbers of sets? We didn't do that. What did you do? We merely asked for the money and banked the cheque."

In re-examination Mr. Currie said:-

"Were some of the hire purchase agreements between Bateman Hire and Bateman Television prepared during the time you were employed by the Bateman Group? Yes. Did you see these when they came to Mr. Hintz's office? If they came round to our office I usually saw them. Did they have the schedules completed? No. Only on occasions. Were you ever asked to furnish numbers? Yes, I was. Can you remember any particular time? 1966 I would say. I had a 'phone call from an employee of Coleridge Finance. Can you recall the information you gave? She asked for numbers of television sets and I gave her serial numbers relating to sets we had. Was there any other conversation over that supply of numbers? Yes about six months ago Mr. Hintz referred to some numbers. How was this request made, in writing? No, verbally. Did Mr. Hintz call or how was the request made? I think it was made by telephone first and then Mr. Hintz came

102 line 20.

Record

around with a typist and began to type numbers on the sheets. And he brought the agreements with him? Yes. How many? Quite a number. A large number."

- 106 to 109 (b) The documents were prepared by the respondent (evidence of the Respondent's witness Yvonne Rosa Parry). 10
- 198 to 203 (c) The Bateman Inter-Company Agreements and the endorsed "assignments by way of mortgage of conditional purchase agreements" (with four exceptions namely the agreements dated 5th August 1965, 19th April 1966, 27th June 1966 and 28th October 1966) all bear the same date.
- 198 to 203. (d) The amount shown in the forms of assignment by way of mortgage plus the finance charges shown therein in all cases equal the amount shown as the "deferred balance" in the corresponding Bateman Inter-Company Agreement. The documents therefore purport to evidence "sales" for the very sums borrowed from the Respondent. 20
- (e) The Respondent provided funds for the entire pool of stock, i.e. loans for the initial stock as well as replacement stock, as appears from the cross-examination of the witness Currie:- 30
- 86 line 40. "Where did the Bateman Group get the money from to buy its stock of sets for hire? From the Finance Company. What was the peak number of sets which Bateman Group had bought for hire? Is that the total number of sets for hire on hand at one time or over the years. The total numbers they bought between 1964 and the end of 1966 on finance provided by the Finance Company? I think I would have to do some research. Would it not be between 2,000 and 2,500 sets? I would say that would be a minimum, yes. They got finance from the Finance Companies to build up 40 50

a stock of sets for hire?  
 Yes. And they accumulated  
 the stock by this means of  
 not less than 2,000 sets?  
 Correct. And they did this  
 between 1964 and the end of  
 1966? That's correct."

10 According to the accounts of the 280 line 15.  
 Bateman group of companies as at 286 line 11.  
 31st March 1967, Bateman T.V. Hire  
 Limited and Star T.V. Limited then  
 held a stock of television sets  
 which had cost approximately  
 \$383,800 (Star T.V. Limited having  
 acquired its stock of sets from  
 Bateman T.V. Hire Limited for \$7,000. 27  
 The total of the alleged advances  
 in respect of the Bateman Inter-  
 Company Agreements was \$364,000. 203  
 20 As the shareholders of the Bateman  
 companies had contributed no capital,  
 and as the other liabilities of those  
 companies were insignificant, it  
 is evident, on the basis of these  
 accounts, that the advances made by  
 the Respondent had been applied  
 towards the purchase of the pool of  
 stock and that when sets had been  
 sold to the public, replacement sets  
 30 had been purchased from the proceeds. 91 line 44.  
 That position is corroborated by the  
 fact that as at the date of hearing  
 the number of television sets held  
 by the Bateman companies in stock or  
 let out on hire was not less than the  
 number of sets mentioned in the  
 Bateman Inter-Company Agreements then  
 said to be outstanding. Currie 105 line 31.  
 40 deposed that as at the date of  
 hearing the Bateman Companies held  
 1,854 television sets and that 1,852  
 sets were mentioned in the Bateman  
 Inter-Company Agreements.

(f) The Bateman Inter-Company Agreements  
 are inconsistent with the accounts of  
 the Bateman companies in the following  
 respects:-

50 (i) Bateman T.V. Hire Limited is 280 line 10  
 not shown as a debtor to  
 Bateman Television Limited  
 for unpaid purchase money,  
 whereas the agreements appear  
 to create that relationship.

Record 280 line 15.	(ii) The stock of television sets is shown as an asset of Bateman T.V. Hire Limited and Star T.V. Limited, whereas the "Conditional Purchase Agreements" appear to reserve the property to Bateman Television Limited.	
278	(iii) The Respondent does not appear as a creditor of Bateman Television Limited, whereas the "assignments by way of mortgage purport to secure advances to that company.	10
187 line 30 to 189 line 4.	(g) Clauses 3, 4 and 5 of the "Conditional Purchase Agreements" are inconsistent with the purposes of the business, viz., to enable Bateman T.V. Hire Limited to let the television sets out on hire.	
	(h) The majority of the Bateman Inter-Company Agreements did not relate to specific chattels. The Appellants will refer to an analysis of the agreements and to the evidence of the witness Currie upon his classification of the documents produced, from which it appears that of the total of \$364,000 allegedly advanced by the Respondent, \$64,000 purports to have been advanced in respect of 17 transactions for which no description of the goods (other than "T.V. Sets") is provided, \$112,000 purports to have been advanced in respect of 56 documents which referred to serial numbers which were described by the witness Currie as fictitious, and \$188,000 purports to have been advanced in respect of 83 documents which he said contained serial numbers of some television sets which had been acquired by the Bateman group of companies and other numbers, the majority of the numbers being, so he said, fictitious.	20
198 to 203.		
84 line 29 to 85 line 37		
88 line 11 to 17. 90 line 20 to 25.		30
		40
	56. The Appellants contend that the Supreme Court of New Zealand and the Court of Appeal erred in fact and in law in holding that the loans made by the Respondent were exempted from the application of the provisions of the Moneylenders Act 1908 by s. 2(3) of the Chattels Transfer Amendment Act 1931. The	50



Bateman Inter-Company Agreements on which the Respondents relied are not customary hire purchase agreements. Those agreements or most of them do not meet the requirements of Section 57(1), but if they do, they are all excluded from the definition by Section 2(5) of the Chattels Transfer Amendment Act 1931. Further, they are all void under the provisions of the Hire Purchase and Credit Sales Stabilisation Regulations 1957. These contentions will be propounded in paragraphs 57 to 70 hereof.

57. The Appellants contend that it is an essential feature of a customary hire purchase agreement that it should refer to ascertained or specific goods for the reasons:-

- (a) A customary hire purchase agreement is a security device whereby the property in the subject matter is reserved in the vendor or bailor until payment (Chattels Transfer Act 1924 s. 57(1)(b)). Such a reservation is possible, it is submitted, only in relation to a specific and ascertained subject matter.
- (b) The requirement of a schedule of chattels introduced by s.16 of the Statutes Amendment Act 1931 does not, it is contended, derogate from the necessity of relating the agreement to ascertained or specific goods. That requirement, it is submitted, deals with avoidance in favour of third parties, not with the essential features of the concept.

In the Supreme Court, Macarthur J. said that the defects in the schedules of chattels did not affect the rights of the parties inter se.

Macarthur J.  
124 line 36.

In the Court of Appeal the submissions of counsel for the Appellants that "it is not possible to have a customary hire purchase agreement in relation to unascertained goods" is recorded in the Report of the proceedings in that Court (/1969/ N.Z.L.R. 794 at p.796).

Record  
Turner J.  
157 line 20.  
McCarthy J.  
170 line 31.

Turner J. rejected the submission; but neither North P. nor McCarthy J. appear to have given particular consideration to it. McCarthy J. said that even if he were to assume that some of the agreements were unenforceable against Bateman T.V. Hire Limited because the descriptions of the goods were inadequate, the amount owing was still so substantial that the company was nevertheless hopelessly insolvent unless the legal defences prevailed. 10

Macarthur J.  
122 line 1,  
line 16

The Appellants contend that the conclusions of the learned judges as to the number of agreements (and loans) affected by this contention are erroneous in fact, and proceed upon a misunderstanding of the evidence of the witness Currie, whose evidence appears to have been acceptable to Macarthur J. in other matters. It is plain, with respect, from his evidence that the substantial majority of the Bateman Inter-Company Agreements did not relate to goods at any time in the possession of the Appellant companies. The appellants have referred to that evidence in paragraph 55(h) hereof. 20

58. The Appellants contend that none of the Bateman Inter-Company Agreements is a customary hire purchase agreement for the reason that they all fall within the provisions of s. 2(5) of the Chattels Transfer Amendment Act 1931. It is contended that Bateman Television Limited is a "wholesale dealer" and that Bateman T.V. Hire Limited is a "retail dealer" within the meaning of that enactment. 30

59. The Supreme Court rejected that contention. Macarthur J. said:-

Macarthur J.  
122 line 17.

"At this stage I turn to a very short consideration of subs. (5) of the Chattels Transfer Amendment Act 1931. The whole of the text of that subsection is this:- 40

'(5) An agreement in relation to customary chattels, made between the manufacturer of or a wholesale dealer in such chattels or a finance corporation and a retail 50

dealer in such chattels,  
 by which possession of the  
 chattels is given to such  
 dealer, shall not be deemed  
 to be a customary hire  
 purchase agreement.'

10 On this particular matter, counsel  
 referred me to the various definitions  
 of the words 'wholesale' and 'retail'  
 given in the Oxford Dictionary and the  
 matter was very carefully canvassed  
 It is no doubt an important point in  
 the consideration of this case but  
 I have a perfectly clear mind about  
 the correct decision here. I am  
 quite clear that in the ordinary sense  
 of the words Bateman T.V. Hire is not  
 a 'retail dealer' and that it does not  
 20 come within those words as used in  
 subs. (5). I am equally clear that  
 Bateman Television is not a wholesale  
 dealer within the ordinary meaning  
 of the words and within the meaning  
 of the words used in that section.  
 In substance I accept /Counsel for  
 the Respondent's/ clear argument on  
 this aspect of the matter. With  
 regard to Bateman T.V. Hire he  
 submitted strongly that the dictionary  
 30 definition of selling did not go as  
 far as hiring without an option to  
 purchase, which was the case here.  
 I would only add that in my opinion  
 just because it sold television sets  
 to Bateman T.V. Hire, Bateman  
 Television did not thereby become a  
 wholesale dealer within subs. (5).  
 There was no evidence that Bateman  
 Television sold sets to companies  
 40 or persons other than Bateman T.V.  
 Hire or members of the public.  
 I am quite clear, as I have said,  
 that /Counsel for the Respondent's/  
 argument on this aspect of the matter  
 should be accepted and I do accept it."

The Appellants submit that the definition of  
 selling is no guide to the interpretation of  
 the word "dealer".

50 60. In the Court of Appeal, North P. thought  
 the point was the hub of the case and  
 described it as "a narrow one" and a "crucial"  
 one, but he rejected Appellants' contention.

North P.  
 141 line 36  
 to 145 line  
 22.

Record  
Turner J.  
158 line 22.  
McCarthy J.  
171 line 16.

Turner J. and McCarthy J. did likewise, each learned judge expressing his own reasons.

61. The Appellants contend that, in its dealings with Bateman T.V. Hire Limited, Bateman Television Limited was acting as, and should be held to be, a wholesale dealer within the meaning of s.2(5) of the Chattels Transfer Amendment Act 1931, and that Macarthur J. erred in holding that it was not. In the Court of Appeal, North P. and McCarthy J. did not express an opinion on the point; and Turner J. felt unable on the evidence as it stood to come to a thoroughly satisfactory final conclusion that at the material times Bateman Television Limited was a whole-sale dealer.

10

The phrase for construction being "wholesale dealer", the Appellants contend that the word "wholesale" refers to the size of the parcels dealt with. The transactions concerned over 2,000 television sets in parcels of 5, 10, 15, 20 or 25 sets, which, it is submitted, constitute dealings on a wholesale scale.

20

Alternatively the Appellants contend that the term "wholesale dealer" connotes a dealer who deals with another dealer. By that test Bateman Television Limited was, it is submitted, a wholesale dealer for it dealt with Bateman T.V. Hire Limited which in turn dealt with the public.

30

62. The Appellants contend that Bateman T.V. Hire Limited was at all material times a "retail dealer" within the meaning of the said enactment, and that the Supreme Court and Court of Appeal erred in holding that it was not.

40

Both courts concluded that a company engaged in the business of hiring out goods to the public is not a retail dealer. Both courts considered that the concept necessarily involved the sale of goods to members of the public.

The Appellants contend that in the context the phrase "retail dealer" should not be construed as synonymous with "seller". It is contended that the word "dealer" has a much wider import embracing other modes of disposition of chattels including bailment.

10 63. North P. considered that the context of the enactments indicated that the intention of the legislature was that the words "a retail dealer" should be limited to persons engaged in selling customary chattels to members of the public. However, the context includes references to other modes of dealing in chattels including bailments in particular.

North P.  
145 line 1.

20 64. McCarthy J. considered the purpose of the use of the words "retail dealer" in the legislation. He said that events had proved that unregistered dispositions of chattels by hire purchase agreements between manufacturers or wholesalers on the one hand and retailers on the other, could lead to danger to the public because a purchaser from a retail dealer might find later that the article purchased was not owned by the retailer but merely held under a hire purchase document with the property in the article remaining in the manufacturer  
30 or wholesaler. Thus, he said, the general public did not receive sufficient protection, and the amendments introduced by the Amendment Act of 1931 were designed to give that protection. He believed that the purpose of subs. (5) was to protect people purchasing from a retailer and preferred to think that a retail dealer for the purposes of subs. (5) must be one who does something more than hire out without  
40 transferring ownership. So he considered that s. 2(5) was not intended to apply to situations such as that before him.

McCarthy J.  
172 line 6.

The Appellants contend that a bailee is as much in need of protection of the kind described by McCarthy J. as is a purchaser. Bailees may of course pay such a substantial rental in advance, or have such a particular need of the chattels as to justify the protection of their interests from the

Record incursion of the rights of antecedent vendors. Indeed in relation to television sets in particular it is a requirement of law that the bailee must pay a substantial sum by way of advance rental on entering into the bailment. The Hire Purchase and Credit Sales Stabilisation Regulations 1957/170 as amended by Amendment No. 19 1965/144 which came into force on 1st September 1965 provide that the bailee of a television set is required to pay 12 weeks rent in advance at the time of signing the agreement of bailment. 10

North P. 65. The learned judges of the Court of Appeal found that Bateman T.V. Hire Limited did not sell television sets to members of the public. This point is taken by Their Honours as conceded by counsel for the Appellants. With respect, the Appellants contend that too much has been taken from counsel's argument which was that even if Bateman Television Limited did not sell, but merely hired, television sets to the public it was nevertheless a retail dealer. Counsel for the Appellants referred to the finding of Macarthur J. in the Supreme Court that the evidence seemed to His Honour to show clearly that the general course of business was that Bateman T.V. Hire Limited did not sell television sets to members of the public, observing that there was some direct evidence that if a set was sold to a member of the public that was done by Bateman Television Limited. 20

Turner J. 151 line 23  
159 line 25.  
McCarthy J. 171 line 28.

Macarthur J. 122 line 4. 30

90 line 12. On this topic the Appellants desire to refer to the evidence of the witness Currie, who deposed under cross-examination by Respondent's counsel that there were some hundreds of transactions whereby persons holding sets on hire from Bateman T.V. Hire Limited would purchase them on hire purchase. 40

The Appellants contend from this evidence that the customers of Bateman T.V. Hire Limited were enabled to purchase the sets hired to them. The exact nature of the dispositions necessary to enable such purchases does not appear to have been explored in the Supreme Court but it is 50

10 contended that some disposition by  
 Bateman T.V. Hire Limited must be  
 inferred; either on the footing that  
 the hire purchase agreement entered  
 into between Bateman Television Limited  
 and the customer was so entered into on  
 behalf of Bateman T.V. Hire Limited or  
 on the footing that the interest of  
 Bateman T.V. Hire Limited in the  
 20 chattels was passed to Bateman Television  
 Limited. If the sets let out on hire  
 could be identified with the sets allegedly  
 comprised in the Bateman Inter-Company  
 Agreements entered into between Bateman  
 Television Limited and Bateman T.V. Hire  
 Limited it would no doubt have sufficed  
 for Bateman T.V. Hire Limited to  
 relinquish its interest in those sets in  
 favour of Bateman Television Limited, who  
 would then be at liberty to enter into a  
 hire purchase agreement with the customer.

But the witness Currie could not relate  
 the serial numbers of the sets sold to  
 the Hire Company's customers to the serial  
 numbers in the conditional purchase  
 agreements. The Appellants contend that  
 while the general course of business of  
 Bateman T.V. Hire Limited was the hiring  
 out of television sets by way of simple  
 30 bailment, nevertheless it is evident  
 that the company so disposed -its affairs  
 as to enable the hirers to purchase the  
 sets and it is further evident that on  
 the materials before the Supreme Court  
 the conclusion could not be reached that  
 Bateman T.V. Hire Limited did not sell  
 television sets to the public.

91 line 13.

40 66. The Appellants further contend  
 that none of the Bateman Inter-Company  
 Agreements is a customary hire purchase  
 agreement for the reason that they are  
 all void for contravention of Regulation 3  
 of the Hire Purchase and Credit Sales  
 Stabilisation Regulations 1957 (S.R. 1956/170),  
 and amendments. This contention had not  
 been raised in the Supreme Court.

50 In the Court of Appeal North P,  
 and Turner J. held that the agreements did  
 not contain a statement of the cash price  
 of the goods while McCarthy J. did not express  
 a final opinion on that point. Their  
 Honours were unanimous however in holding

North P.  
 145 line 40.  
 Turner J.  
 160 line 14.  
 McCarthy J.  
 173 line 2.

that the Regulations did not apply to the "conditional purchase agreements" and consequently rejected the Appellants' contention. The Appellants contend that the Court of Appeal acted in error in holding that the Regulations did not apply to the Bateman Inter-Company Agreements and further contend that the majority of the Court of Appeal were right in holding that the agreements did not comply with the requirements of the Regulations as to the statement of the cash price. Consequently the Appellants contend that, by virtue of Regulation 10 of the said Regulations, the conditional purchase agreements were void and were therefore not customary hire purchase agreements.

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67. The said Regulation 10 provides as follows:-

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"Where -

- (a) A hire purchase agreement or a credit sale agreement is entered into or varied; or
- (b) A loan is made; or
- (c) Any money or other consideration is accepted by a seller; or
- (d) Any other transaction is entered into, -

30

in contravention of these regulations, the agreement, loan, sale, or other transaction shall be void:

Provided that all money paid and the value of any other consideration provided by the buyer under any agreement or on any sale shall be recoverable as a debt due to him from the bailor or vendor."

40

Regulation 2(3) of the said Regulations provides that:-

"Nothing in these Regulations shall apply in respect of or in connection with the purchase or sale or disposal of any goods:-

- (a) Otherwise than at retail . . . "



68. The Court of Appeal concluded that the Bateman Inter-Company Agreements were not disposals of the goods mentioned therein "at retail". The Appellants contend that that conclusion is erroneous.

North P.  
146 line 17.

10 North P. held that the Bateman Inter-Company Agreements were entered into "simply as a matter of convenience between two companies having common shareholders and common directors" and considered that it would be quite unreal to regard those agreements as constituting sales "at retail". With respect, the Appellants contend that viewed in that way, the agreements cannot be regarded as evidencing genuine dealings in goods and that on this basis the contentions made in paragraph 47 should have prevailed.

20 Turner J. said that he might possibly have regarded the agreements as transactions between a wholesale dealer and a retail dealer (and therefore as wholesale transactions) but for the fact that he would not accept the submission that Bateman T.V. Hire Limited was a "retail dealer". He had not the slightest doubts that the transactions were not transactions "at retail". If he had to choose whether they were "wholesale" or "retail" transactions, he said he must choose "wholesale", but he said that that choice was not necessary for he did not accept that there was no tertium quid. He did not accept that all transactions were either wholesale or else retail. Consequently His Honour rejected the Appellants' contention.

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Turner J.  
160 line 29.

40 McCarthy J. said that on no basis, so it seemed to him, could the term "at retail" be applied to the dealings between Bateman Television Limited and Bateman T.V. Hire Limited.

McCarthy J.  
173 line 17.

50 69. The Appellants contend that the Respondent is placed in a dilemma; if the Bateman Inter-Company Agreements refer to genuine transactions they must, it is contended, be treated as commercial transactions. All commercial transactions, it is contended, are either wholesale transactions or retail transactions; if the transactions are wholesale transactions they are not customary hire purchase.

agreements for the reason contended for in paragraphs 58 to 65 hereof; if the transactions are retail transactions they are not customary hire purchase agreements for the reason contended for in paragraph 66 hereof.

70. For the reasons contended in paragraphs 45 to 69 or any of them, the Appellants contend that the Bateman Inter-Company Agreements were not customary hire purchase agreements. If that is so, the loans made by the Respondent were not exempted from the application of the Moneylenders Act 1900 and in that event are admittedly illegal and irrecoverable.

10

If all the loans are illegal, the Appellants are not unable to pay their debts. If a substantial number of the loans are illegal, the assets of the Appellants remain the same while their liabilities decrease, and the Appellants are not unable to pay their debts.

20

71. The Appellants contend, by way of further alternative to all of their previous contentions, that the Court of Appeal erred in fact and in law in rejecting the Appellants' contention that there was sufficient doubt in the matter to entitle the Appellants to the dismissal of the petitions on the grounds that a winding up order will not be made on a "creditor's" petition raised upon a disputed debt. That contention was raised in answer to both petitions.

30

On the petition against Bateman Television Limited, the Respondent had relied upon the alleged debt of \$8,704.46 mentioned in paragraph 8 hereof (which was disputed on the grounds mentioned in paragraph 34 hereof) in support of Respondent's contention that it is a creditor entitled to petition, but it also relied upon the loans mentioned in paragraph 4(b) hereof (which were disputed on the grounds mentioned in paragraphs 41 to 82 hereof) in support of its contention that Bateman Television Limited is unable to pay its debts.

40

On the petition against Bateman T.V. Hire Limited, the Respondent relied upon the alleged assignments of the Bateman Inter-Company Agreements as constituting the Respondent a creditor of Bateman T.V. Hire Limited and as proof that that Appellant is unable to pay its debts, which were disputed on the grounds mentioned in paragraphs 41 to 82 hereof.

10

72. In the Court of Appeal, North P. rejected the contention on both petitions. His Honour considered that even if it is shown that a company is insolvent nevertheless if the petitioning creditor's debt is disputed on substantial grounds the usual course would be to adjourn the petition or in some circumstances dismiss it. But the learned judge referred to cases where the Court had thought it right to decide a legal question on the hearing of a petition, and he considered that the questions raised by the Appellants should be disposed of by the Court of Appeal on the appeal before that Court. The reasons the learned judge mentioned were:-

North P.  
148 line 15.

20

148 line 23  
to 149 line  
33.

(i) That Counsel for the Appellants had made no application to the Supreme Court to require the Respondent to proceed by action in the ordinary way,

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149 line 43.

(ii) That the hearing of the petitions occupied a number of days, viva voce evidence was called, there was discovery and inspection, and that in those circumstances - it would be contrary to the interests of justice if the Respondent was denied the relief it sought and obliged to embark on new and no doubt lengthy proceedings,

40

(iii) That the allegation of sham was not raised in the Supreme Court and that he was satisfied there was no substance in it,

(iv) That the other defences largely raised questions of law which required to be determined on the documents before the Court, that

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Record

the Court had all the necessary information to decide those questions, and that His Honour was satisfied that they failed.

73. With respect to the reasons given by North P. the Appellants, in the sequence adopted by His Honour, contend:-

(i) That counsel for the Appellants had applied to the Supreme Court for the dismissal of the petitions upon all the grounds for which the Appellants contend and had in fact referred to the rule submitted in respect of disputed "debts". 10

Macarthur J.  
116 line 37.

(ii) That the point about the length of hearing evidence and discovery is, with respect, without significance in view of the fact that a major subject of investigation in the Supreme Court was the question whether the debts alleged had been compromised by agreement. 20

Macarthur J.  
121 line 21.  
123 line 36.  
124 line 9.

(iii) That the allegation of sham was indeed raised in the Supreme Court on the question whether the Bateman Inter-Company Agreements were genuine customary hire purchase agreements, that evidence relevant to that issue was taken (which is referred to in paragraph 55 hereof) and that Macarthur J. directed himself upon it, and referred to aspects of the evidence. 30

(iv) That other "defences" raise questions of fact (with the exception of the contention under the Hire Purchase and Credit Sales Stabilisation Regulations mentioned in paragraph 66 hereof) which require an investigation of the facts of each loan and each Bateman Inter-Company Agreement before the amounts (if any) owing to the Respondent and the solvency or insolvency of the Appellants can be determined. 40

Turner J.  
161 line 46.

74. Turner J. considered the cases of the Appellants separately. Regarding Eateman Television Limited, the learned judge referred to the Appellants' contention and rejected it for two reasons:- 50.

- (i) The application was too late. Record  
The Appellant companies, His Honour said, had been well 162 line 7  
content to submit their case  
to the Supreme Court and had  
had an elaborate hearing.
- (ii) Once the debt relied upon by 162 line 38.  
the creditor had been prima  
facie proved, as, His Honour  
said, it had been proved in  
the case, the onus must fall  
on the debtor to show that  
**payments made between the**  
**parties had been appropriated**  
towards the debt.

10

20

Regarding Bateman T.V. Hire Limited,  
the learned judge did not explicitly  
consider the contention, although he did  
refer to Re Tweeds Garage Limited / 1962/  
Ch. 406.

161 line 17.

75. With respect to the reasons given  
by Turner J., the Appellants contend:-

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- (i) That the Appellants were not  
content to submit their case  
for determination in winding up  
proceedings; they sought the  
dismissal of those proceedings.  
They contend that insufficient  
weight has been given to the  
position that the Appellants were  
brought to the Supreme Court to  
answer a winding up petition which  
**baldly alleged** that they were  
indebted to the Respondent and  
were unable to pay their debts.  
The many issues arising out of  
a complex factual situation were  
not defined by pleadings and the  
Appellants contend that both in  
the Supreme Court and in the Court  
of Appeal there has been confusion  
about the issues calling for decision.  
The Appellants contend that they  
should not be held responsible for  
that state of affairs. They were  
called upon to present their cases  
as best they could in a procedure  
which the Appellants contend was  
unsuitable to the raising and deter-  
mination of complex questions of  
fact and law.

(ii) That the second reason stated by Turner J. is erroneous for the reasons contended in paragraphs 34 to 38 inclusive hereof.

(iii) That the rule in Re Tweeds Garage Limited [1962] Ch. 406 can only be applied on proof that the petitioner is a creditor in such a sum as the debtor company is unable to pay, which, it is contended, is not the case in respect of either Appellant.

10

McCarthy J.  
167 line 4.

76. McCarthy J. expressly dealt with the contention in particular relation to Bateman Television Limited, and rejected it for substantially the same reasons as those stated by North P. and Turner J.

77. The Appellants desire to refer to the effect of a winding up order as res judicata or issue estoppel, for they respectfully contend that the decision of North P. that the Court of Appeal should dispose of the issues raised on the appeal without allowing further litigation, and the similar views of Turner J. and McCarthy J. are, with respect, misconceived. The Appellants contend that a winding up order made at the instance of a petitioning creditor does not constitute res judicata or issue estoppel as against the liquidator and any other creditor or contributory in respect of the quantum or validity of the debts alleged by the petitioning creditor. The Appellants contend that it is erroneous in law to suppose that the decision of the Court of Appeal will dispose of the Appellants' contentions as to the validity of the Respondent's claims.

20

30

78. Rule 86 of the Companies (Winding Up) Rules 1956 provides as follows:-

40

"The Liquidator shall examine every proof of debt lodged with him, and the grounds of the debt, and in writing admit or reject it, in whole or in part, or require further evidence in support of it. If he rejects a proof he shall state in writing to the creditor the grounds of the rejection."

Rule 87 of the said Rules provides  
as follows:-

Record

"If a creditor or contributory  
is dissatisfied with the decision  
of the liquidator in respect of  
a proof, the Court may, on the  
application of the creditor or  
contributory, reverse or vary  
the decision . . ."

10

The Appellants refer to In re Van  
Laun ex p. Chatterton /1907/2 K. B. 23;  
In re Home and Colonial Insurance Co. Ltd.  
/1930/ 1 Ch. 102 and In re Lupkovics ex p.  
the Trustee v. Freville /1954/ 1 W.L.R.1234.

79. The Appellants contend that particular  
weight should be given to the contention  
mentioned in paragraph 77, having regard to  
the following circumstances: -

20

(a) That neither the Supreme Court  
nor the Court of Appeal has  
determined the very sum, if any,  
owing by either Appellant to the  
Respondent.

30

(b) That it is evident, so the Appellants  
content, that all the materials  
relevant to the determination of  
the contentions hereinbefore raised  
by the Appellants have not been  
placed before the Court in the  
winding up proceedings. The  
Appellants refer in particular to  
evidence of the course of dealing  
between the Respondent and the  
Appellants and desire that it be  
noticed that neither the directors  
nor the manager of the Respondent  
gave evidence in the Supreme Court  
and that the directors of the  
Appellant companies did not give  
evidence in the Supreme Court, that  
the Court of Appeal rejected many of  
the Appellants' contentions because  
the evidence, so it was held, was not  
sufficient to sustain them, and that  
further evidence bearing upon such  
contentions is obviously available.

40

Record  
North P.  
150 line 3.

80. The Appellants further contend that the statement of North P, that it would be quite contrary to the interests of justice if at this late stage the Respondent was denied the relief it sought is erroneous. If it should be found in liquidation consequent upon the affirming of the winding up orders that the Respondent is not a creditor, or that the Appellants are not unable to pay their debts, irreparable loss will have been caused to the Appellants and their contributories upon false premises. The Appellants further contend that it may be relevant to notice that the Appellants' main contention in the Supreme Court that a contract had been made whereby the Appellants had accepted the Respondent's terms (including restraints of trade upon the Appellants' directors in wide terms insisted upon by the Respondent) failed because, at the last moment, the solicitor for the Respondent to whom the Appellants had been required to communicate acceptance was absent from his office and the Respondent withdrew its offer before acceptance was communicated. The Appellants contend that the interests of justice require that the issues as to whether or not the Appellants or either of them are indebted to the Respondent should be determined by an action and that, pending the determination of such an action, proceedings upon the winding up petitions should be stayed or the petitions should be dismissed.

62 line 23  
to 63 line  
13.

81. The Appellants contend that if it should be thought that the interests of the Respondent require protection pending the determination of such an action, that can be achieved by the continuance of the appointment of a provisional liquidator, a course which was followed upon the presentation of the petitions pending the hearing thereof.

82. The Appellants therefore contend that, inasmuch as they dispute the Respondent's claims on substantial grounds it cannot be predicted that the Respondent is a creditor entitled to petition or that the Appellants are unable to pay their debts and that inasmuch as the judgments upon the winding up proceedings will not, so it is contended, constitute res judicata upon



the Respondent's rights, the winding up petitions should either be dismissed or stayed, and that the Supreme Court and the Court of Appeal acted in error in deciding otherwise.

Record

10 83. The Appellants and each of them therefore contend that their appeals should be allowed, that the orders of the Court of Appeal of New Zealand made on the 8th day of May 1969 and of the Supreme Court of New Zealand made on the 12th day of December 1968 herein and each of them should be reversed, and that the petitions for winding up herein and each of them should be dismissed with costs to the Appellants or alternatively stayed upon such terms as to costs or otherwise as may be just, for the following reasons: -

175,  
126, 128

20 (1) That the said orders were made for reasons erroneous in fact and in law.

(2) That the Respondent is not a creditor of either Appellant.

(3) That neither Appellant has been or should have been deemed to be unable to pay its debts within the meaning of section 218 of the Companies Act 1955 because:-

30 (a) The demands served upon the Appellants on behalf of the Respondent were not given under the hand of the Respondent as required by the said section, or

(b) Neither Appellant was indebted to the Respondent in the sums demanded, or

(c) Neither Appellant has neglected to pay the sums demanded.

40 (4) That neither Appellant should have been held to be unable to pay its debts because: -

(a) The debts alleged by the Respondent (or so many of them as preclude the drawing of an inference that either Appellant is unable to pay its debts) are illegal and void, or

Record

- (b) On substantial grounds the Appellants disputed the Respondent's claims so that it cannot be determined on the evidence that either Appellant is indebted in such sums as it is unable to pay.

C. I. PATTERSON

Counsel for the Appellants

IN THE PRIVY COUNCIL

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ON APPEAL  
FROM THE COURT OF APPEAL OF  
NEW ZEALAND

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BETWEEN

BATEMAN TELEVISION LIMITED  
(in Liquidation) and BATEMAN T.V.  
HIRE LIMITED (in Liquidation)

Appellants

and

COLERIDGE FINANCE COMPANY  
LIMITED

Respondent

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CASE FOR THE APPELLANTS

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Linklaters & Paines,  
Barrington House,  
59-67 Gresham Street,  
London, E.C.2.