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Declaratory Judgments in Theoretical Cases: The Reality of the Dispute

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I. Introduction

It has long been recognised that a declaratory judgment may have special advantages in many contexts. Bailhache J. once went so far as to describe the power to grant declarations as one of the most useful functions of the Commercial Court in England,¹ and, when the case went on appeal, Atkin L.J. described the declaration as “one of the most valuable contributions that the courts have made to the commercial life of this country”.²

Despite the unqualified warmth of *dicta* such as these, the courts in England and Canada have stressed that there are limits to the availability of a declaration and one of the most important of these is that a declaration will not normally be granted unless there is a real and not merely an academic or theoretical dispute between the parties. The emphasis placed on this restriction in cases where the remedy has not otherwise been handled with any lack of liberality seems to lend special importance to determining the factors the courts have in mind when deciding whether a dispute is real or unreal.

A situation in which a declaration may be of great utility, but which raises this problem, was indicated by Channell J. in *Société Maritime v. Venus SS. Co.*³ That case involved a long-running contract to load a ship. The plaintiff sought a declaration that the contract was not binding upon him since one of the original parties had not acted as his agent nor had there been an effective assignment or novation of the contract. In holding that this was a proper case in which to grant a declaration, Channell J. said that parties were not entitled to ask for an opinion on a speculative or

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1. *Spettabile Consorzio Veneziano v. Northumberland Shipbuilding Co.* (1919), 121 L.T. 628 at 629 (K.B. and C.A.)

2. *Id.* at 635

3. (1904), 9 Com. Cas. 289 (Q.B.) It will later be seen that if the defendant in such a case refuses to formulate his contrary claim until a cause of action has arisen this may deprive the plaintiff of the benefit of a declaration. See *infra*, notes 30-41

academic question but, on showing the need for a declaration, they were entitled to ask whether or not a contract was binding on them. He stressed that they were not bound first to refuse to perform the contract and so risk paying heavy damages for a substantial period of non-performance.

This approach was approved by the Court of Appeal in *Spettabile Consorzio Veneziano v. Northumberland Shipbuilding Co.*⁴ where a contract was alleged to have been discharged by breach. It was held that the issue of a writ claiming a declaration as to the validity of a contract was not itself a repudiation of the contract when the parties were prepared "to leave it to the court to say whether or not the contract was to be performed". Atkin L.J., like Channell J., recognised that the uncertainties resulting from long-running contracts on stringent terms had led to the rapid development of the declaration in commercial cases.

In *Guaranty Trust Co. of New York v. Hannay & Co.*,⁵ it was held by the Court of Appeal that there was no need for a cause of action in the ordinary sense to ground a claim for a declaration and Lord Sumner in *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade* approved the *Hannay* case, saying that for many years it had been the practice in cases in the Commercial List to hear and determine claims for declarations

when a real and not a fictitious or academic question is involved and is in being between the parties, in order that they may know what business course to take without having to run the risk of acting and finding themselves liable in damages.⁶

It is clear then that it is of great importance in making good a claim to a declaration that there should be a real and not a fictitious or academic question existing between the parties. The need for a real question applies generally⁷ and is not confined to claims for a declaration but the fact that in the case of claims for a declaration there is no need for a cause of action in the ordinary sense has meant that the problem has arisen more often in these claims than in other types of case.⁸

4. (1919), 121 L.T. 628

5. [1915] 2 K.B. 536 (C.A.)

6. [1921] 2 A.C. 438 at 452 (H.L.)

7. A. Kiralfy, *The English Legal System* (5th ed. London: Sweet & Maxwell, 1973) at 76

8. For the reasons justifying this rule see I. Zamir, *The Declaratory Judgment* (London: Stevens, 1962) at 50. He points out that the courts have used a wide

II. *The Nature of the Problem*

Although so much depends on there being a real question between the parties, it is by no means always easy to determine when such a question exists. There is no judicially formulated general criterion to be applied and, indeed, Sir Carleton Allen went so far as to say that the court "has complete liberty to distinguish between a 'real' and 'fictitious or academic' interest in the plaintiff".⁹ Dr. Zamir in his work, *The Declaratory Judgment*, considers this too pessimistic and identifies five classes of cases which have been regarded by the courts as "abstract" or "theoretical",¹⁰ that is cases where there is no dispute in existence, cases where the dispute is not attached to facts, cases where the dispute is based on hypothetical facts, cases where the dispute has ceased to be of practical significance and cases where the declaration can be of no practical consequence. He does, however, concede that the courts retain considerable freedom of action. Indeed, he considers that by exception to the general rule the courts will sometimes decide theoretical issues¹¹ and regards the "friendly action", as exemplified in *Thorne v. Motor Trade Association*,¹² as an illustration of this.

III. *Some Further Considerations*

It is submitted, however, that it is possible to carry analysis a little further and produce a formula which will cover not only the five classes of theoretical cases described by Dr. Zamir but also will not leave "friendly actions" as a difficult anomaly. The declaratory action is discretionary and two factors which will influence the court in the exercise of its discretion are the utility of the remedy, if granted, and whether, if it is granted, it will settle the questions at issue between the parties.¹³ It is doubtful if the English courts decline to decide theoretical issues because of lack of jurisdiction or in the exercise of their discretion¹⁴ but, in many of the cases held to

variety of terms to describe cases where there is no real dispute — "academic", "fictitious", hypothetical", "abstract", "theoretical" — but considers that nothing depends on the terminology. He prefers "theoretical" as a general term. See c.4, "Theoretical Issues" at 43-69

9. *Law and Orders* (2d ed. London: Stevens, 1956) at 270

10. Zamir, *supra*, note 8 at 50-69. See also 201-207

11. *Id.* at 67-68

12. [1937] A.C. 797 (H.L.)

13. Zamir, *supra*, note 8 at 191-99

14. *Id.* at 44-45 and cases there cited. In *Eastham v. Newcastle United Football Club*, [1964] Ch. 413 at 440; [1963] 3 W.L.R. 574 at 594, it was said by

be theoretical or abstract, it is clear that these two factors of utility and conclusiveness have weighed heavily with the court.¹⁵ Dr. Zamir thinks that the relationship between utility as a factor in deciding that a case is theoretical and utility as a basis for the exercise of discretion is a question of degree.¹⁶ If a declaration would be wholly useless then the court will regard the case as theoretical, whilst if it might have some but very slight utility, the court will refuse to grant a declaration in the exercise of its discretion. This demonstrates the close affinity between the question of the reality of the dispute and one of the factors governing the exercise of discretion, but the other factor, settlement of the dispute between the parties, must also be taken into account and with that the point of time at which the dispute would be settled and the utility of the declaration attained.

IV. *A Possible Formula*

If these are borne in mind it will be seen that a common characteristic of the cases where the dispute was held to be unreal appears to be that, if the declaration sought had been granted, it could not have been immediately and effectively available to resolve the dispute between the parties. This can be applied to the five classes of theoretical disputes set out by Dr. Zamir. If there is no dispute, *ex hypothesi*, nothing done by the court can resolve it. Where the dispute is not embodied in specific facts any order made by the court would not be effectively available since no one could ascertain with any certainty the ambit of its application. Where the

Wilberforce J. that it went to discretion and the same view was expressed by Buckley J. in *Gibson v. USDAW*, [1968] 1 W.L.R. 1187 (Ch.D.). Both cases concerned real disputes affected by events after the issue of the writ and in neither is there a full review of the authorities. See, *infra*, note 23. For Canadian authorities, especially *Vic Restaurant v. Montreal*, [1959] S.C.R. 58; 17 D.L.R. (2d) 81 and *Re Henning and City of Calgary* (1975), 51 D.L.R. (3d) 762 (Alta. S.C., A.D.), in which the matter is regarded as going to discretion (*infra*, notes 69-78).

15. See e.g. *Howard v. Pickford Tool Co.*, [1951] 1 K.B. 417 at 421; *Lever Bros. v. Manchester Ship Canal Co.* (1945), 78 Ll.L.R. 507 at 509; *Re Carnarvon Harbour Acts*, [1937] Ch. 72 at 80-81. See the distinction drawn between *Att.-Gen. v. Colchester Corporation*, [1955] 2 Q.B. 207 and *Llandudno UDC v. Woods*, [1899] 2 Ch. 705 by Zamir, *supra*, note 8 at 67. Conversely the fact that a judgment would be useful to dispose of a dispute has led courts to hold that a dispute is real in *Ruislip-Northwood UDC v. Lee* (1935), 145 L.T. 208 at 213, 214-15; *Thorne v. MTA*, [1937] A.C. 797 at 813. For Canadian cases see, *infra*, notes 48-58

16. Zamir, *supra*, note 8 at 64

case is hypothetical either the facts had never occurred or had yet to occur. In neither case would the order be immediately and effectively available since if the order were made the court would in the first case have to say what it would have ordered had circumstances been otherwise and in the second what would be the solution if certain non-existent facts were to eventuate in the future.¹⁷ The applicability of the formula to the remaining two classes of theoretical disputes — cases where the dispute has ceased to be of practical significance and cases where the declaration can be of no practical consequence — needs no elaboration.

The formula does, however, require some expansion. A declaration may be “immediately available” when it determines the rights of the parties at the time of the decision together with the necessary implications and consequences of these rights, known as “future rights”. These “future rights” are to be contrasted with “hypothetical rights”, which can only come into existence upon the happening of some contingency which may or may not occur after the decision and which cannot be the subject matter of a declaration.¹⁸ Present and future rights may, however, include rights, such as a right to an option, which may require some act or election for their full realisation but the fact that they are not fully realised does not mean that they are non-existent or hypothetical.¹⁹

A declaration will be “effectively available” if, when made, it will indicate to a party a claim he may make against the other or a claim made against him which he may either resist or to which he should accede. If, either because of the terms on which the parties are conducting their litigation, as in *Sun Life of Canada v. Jervis*,²⁰

17. In the first hypothesis the judgment, if made, could never be available since there are no actual facts to which it can apply; in the second there must be a hiatus between the judgment and the facts assumed, if they do eventuate. In neither case could a declaration be immediately available if the court were to grant it. These cases, where the declaration cannot in principle be immediately available, are to be distinguished from a case where there is a real dispute and the court grants a declaration but suspends its operation pending an appeal. Here the declaration *could* have been available but for the temporary procedural step. For Canada see *Charleston v. McGregor* (1958), 11 D.L.R. (2d) 78 (Alta. S.C.); *Macleod v. White* (1956), 37 M.P.R. 341 at 361 (N.B.S.C.).

18. Zamir, *supra*, note 8 at 201-207. For Canadian cases see *infra*, note 58

19. See *Wood Components of London v. James Webster & Co.*, [1959] 2 Lloyd's Rep. 200 (Q.B.). Another example would be a tenant's right to renew a lease when it expired. *Bogg v. Midland Rlyway. Co.* (1867), L.R. 4 Eq. 310. For Canada see *Re Calford* (1973), 37 D.L.R. (3d) 300 (Alta. S.C., T.D.)

20. [1944] A.C. 111 (H.L.) See this case distinguished in *Baker v. Turner*, [1950] A.C. 401 at 413, 428 (H.L.)

where the Court of Appeal made it a condition of granting leave to appeal to the House of Lords that the respondent should in any event retain the benefit of the judgment in his favour in the Court of Appeal, or because of the decision in another case, as in *Tindall v. Wright*,²¹ the parties would be in exactly the same position in respect of legal liability if the declaration were granted as if it were not, then the dispute is theoretical or unreal. Furthermore, the words “effectively available” cover the possibility that the party in whose favour the decision has gone may not want to make full use of his legal rights as determined by the courts. Nonetheless, if the declaration can deal with these rights in such a way that he can effectively avail of it if he wishes, the dispute will be real. This, it is suggested, explains the “reality” of the dispute in “friendly actions” which have often been entertained in the highest tribunals. It also seems consonant with the *dictum* of Lord James of Hereford in perhaps the best known of all “friendly actions”, *Powell v. Kempton Park Racecourse*. Dealing with the reality of the dispute Lord James said:

It seems that this action was brought in good faith for the purpose of obtaining an authoritative and final judgment. Probably the plaintiff will regard with satisfaction his want of success in the action. But the judgment, whatever it may be, will and must be acted upon. This is therefore not a case where the judgment of a judicial tribunal is sought for the purpose of determining a right for mere abstract purposes.²²

Thus if the effective character of the ultimate order of the court is looked to, there is no need to treat “friendly actions” as anomalies where the courts, by exception to a general rule, are prepared to entertain unreal or theoretical disputes.

Lastly, for a dispute to be real, any order made in consequence of it must be immediately and effectively available between the actual parties. If it cannot be effectively available between them when it is made, as was the case in *Sun Life v. Jervis* and *Tindall v. Wright*, the dispute will be unreal, no matter how useful a pronouncement of the court might be as between one of the parties and third parties not involved in the case. In the former case, the company wished to

21. (1922), 127 L.T. 149 (K.B.)

22. [1899] A.C. 143 at 190 (H.L.) The case dealt with mandatory rules of law and this explains the compulsive terms of the *dictum*. In *Nairne v. Smith & Co.*, [1943] K.B. 17 the plaintiffs obtained an injunction by which they could have prevented the sale of the substances in question so that in this “friendly” case also the judgment could have been immediately and effectively available.

proceed with an appeal in order to obtain a ruling upon their liability to other policyholders who might be in the same position as the respondent and in the latter both parties wanted a decision and a government department was interested in order to ascertain whether new legislation might not be required. Despite this the courts refused to determine the cases.²³

V. Policy Considerations

The reason for this requirement that the parties themselves should be fully involved seems to be the general justification for the refusal of the courts to entertain theoretical or unreal disputes. If the rule were otherwise and parties without a real stake in the outcome were allowed to litigate, then cases might not be adequately argued and there might be a real risk of fictitious cases being put to the courts in order to distort the development of precedent.²⁴

VI. Testing the Formula

The criteria proposed for determining the reality of a dispute may be

23. As to how far events after the commencement of the action affect the reality of the dispute see Zamir, *supra*, note 8 at 62-64. The settlement elsewhere of the issue of the law in *Tindall v. Wright* (1922), 38 T.L.R. 521 (K.B.) and the death of a party in *Marek v. Cieslak* (1975), 52 D.L.R. (3d) 663 (Ont. C.A.) were held to render the dispute unreal. Zamir points out that *Grant v. Knaresborough*, [1928] Ch. 310 should be confined to its special facts. In *Gibson v. USDAW*, [1968] 1 W.L.R. 1187 (Ch.D) events after the issue of the writ meant that a declaration as to trade union suspension would be operative for only three weeks. Buckley J. held that this did not render the dispute unreal but, even if it had, he would still have granted a declaration in the exercise of discretion if the dispute was real when the action was instituted. In *Eastham v. Newcastle United Football Club*, [1964] Ch. 413; [1963] 3 W.L.R. 574 a declaration relating to a footballer employment contract was granted against the employing club even though the plaintiff had left that employment at the time of the hearing. This too was based on discretion (at 440; [1963] 3 W.L.R. at 594) but at 446 ([1963] 3 W.L.R. at 599) Wilberforce J. also based it on the fact that there was a real dispute at the date of the writ. Counsel for the plaintiff had taken this point at 426 and argued that what happened after the writ only went to discretion, not jurisdiction. Though neither *Gibson* nor *Eastham* contains a full examination of the authorities they suggest that in England, whilst there must be a real dispute at the inception of an action, the court may exercise discretion in respect of subsequent changes of circumstance. A special aspect of *Eastham* was that the plaintiff took employment with another club which, together with his former employers, was a member of both the Football Association and League, other defendants in the case who were responsible for the impugned terms of employment, so that a link was maintained with the former employers which would not normally exist in the case of a former employee.

24. See Kiralfy, *supra*, note 7 at 76; Zamir, *supra*, note 8 at 50. But see Sellers J. in *Webster v. Commissioners of Customs and Excise*, *The Times*, July 24, 1954.

tested by applying them to a number of cases in which the question was raised and discussed. In *Thorne v. Motor Trade Association*,²⁵ the association had price maintenance rules enforced by a “stop list” and fines. There were conflicting decisions of the Court of Appeal and the Court of Criminal Appeal on the legality of these rules and the case, admittedly “friendly”, was instituted to resolve the conflict. Lord Wright said that he had had “some doubts” as to whether the action was one in which relief should be granted but went on to say that “the questions are not merely abstract, but are of practical importance to persons in the position of the appellant” and hence the House of Lords should not refuse to entertain the appeal.²⁶

Lord Wright cannot be taken to mean by this that the touchstone of reality lay in the fact that third parties might find the decision useful since that would conflict with *Tindall v. Wright* and *Sun Life v. Jervis*. It would appear in fact to be an elliptic way of saying that the parties themselves would be materially affected by the grant or refusal of the declaration and injunction which were sought and that, since this was a test case, others, too, would be affected. Perhaps this last factor might be relevant to the exercise of discretion once it had been determined that there was a real dispute. No other member of the House mentioned the question of reality but it is submitted that if the test suggested had been applied and the House had asked: “If the declaration sought had been granted would it be immediately and effectively available to resolve a dispute between the parties?”, they would have found the dispute to be real, as in fact they impliedly did.

Dr. Zamir asserts that there was no dispute in this case.²⁷ This seems to assume that a dispute must be “a quarrel or altercation”. Another meaning of the word is, however, “a controversy or difference of opinion”²⁸ and it is clear that the existence of a real dispute in the second sense may be perfectly consistent with a friendly spirit between the parties.

Another case in which the problem of reality was explored is *Hanoman v. Rose*.²⁹ In this appeal to the Privy Council from British Guiana the respondent claimed a right to graze his cattle over the

25. [1937] A.C. 797

26. *Id.* at 813

27. *Supra*, note 8 at 68

28. Pocket Oxford Dictionary: “dispute”

29. [1955] A.C. 154 (P.C.) (British Guiana)

whole of the appellant's adjoining land and that the appellant was not entitled to impound these cattle. The case was fought at first instance on the footing that the appellant was the legal owner of the land in question. In fact, though he had paid the purchase price and was the beneficial owner, he had not yet taken a transport (formal conveyance) from his vendors to complete his legal title. The Board said that there were substantial matters relating to the cattle in dispute between the parties, sufficient to allow the action to proceed and that they were reluctant to allow a difference between hypothesis and reality which went to a matter of form and not of substance, that is, the fact that the beneficial owner was also assumed to be the legal owner, to defeat the action. In any event, the defect could be cured by joining the appellant's vendors under rules which were substantially the same as those in England; hence, the West Indian courts should not have declined to hear the case.

This case seems to be authority for the proposition that a difference between the actual and the hypothetical dispute which is a matter of form and not of substance will not render a dispute unreal or theoretical. This will be all the more true if the defect, such as it is, can be cured, as by joinder of a defendant, before the judgment, which could then be immediately effective.

VII. *Has a Dispute Come into Being?*

Yet another aspect of the problem of the reality of disputes arose in *Singer-Cobble v. Ellison*³⁰ where Cross J., following *Re Clay*,³¹ upheld the defendant's contention that there is no jurisdiction to make a declaratory order against a party who has never made an assertion contrary to the declaration sought. In *Re Clay*, the Court of Appeal had refused to grant a declaration against a defendant who, when making a payment claimed by the plaintiffs, had merely "reserved his rights" under a deed of indemnity which might perhaps have provided an answer to the claim. The defendant had not, however, formulated a positive claim to be repaid; hence, there was no dispute to be settled. These and similar cases³² in effect hold

30. [1966] R.P.C. 357 For Canada see *Prudential Trust Co. v. Keller* (1958), 26 W.W.R. 664 (Sask. Q.B.)

31. [1919] 1 Ch. 66 (C.A.)

32. E.g. *In re Barnato*, [1949] Ch. 21, *aff'd* [1949] Ch. 258 (C.A.); *Honour v. Equitable Life Assurance Society*, [1900] 1 Ch. 852; *North Eastern Marine Engineering Co. v. Leeds Forge Co.*, [1906] 1 Ch. 324, *aff'd* [1906] 2 Ch. 498 (C.A.)

that a potential dispute is not equivalent to a real dispute for the purpose of granting a declaration, though difficult questions may arise in distinguishing the two. It is not enough to constitute a real dispute that steps that may be preliminary to a claim, such as an invitation to attend an inquiry,³³ have been taken. Nor is it enough that an opinion has been expressed that if certain hypothetical facts were to occur a claim might be made.³⁴ It seems, however, that a dispute need not be explicitly formulated in words and may be found to exist, despite the disclaimer of one of the parties, when its limits are plain from the facts as in *Ruislip-Northwood UDC v. Lee*.³⁵ The question was whether some old buses and carriages remained vehicles or had become temporary dwellings which the plaintiff could remove. The defendant, by moving the long immobile structures a few yards, had made it clear that he was prepared to argue that they were still vehicles so the Court of Appeal proceeded with the case.

The courts have made it clear that normally a potential plaintiff is entitled to the full period of limitation in which to decide whether to commence proceedings since this delay may be important to him to enable him to collect evidence and prepare his case. Hence, a potential defendant may not convert himself into a plaintiff by seeking a declaratory judgment against a person he suspects or fears might take action against him in the future if that person refuses to formulate a claim against him.³⁶ The courts thus recognise that it takes two to make a dispute and the existence of a real dispute may depend upon whether the parties have formulated their respective claims or whether one has refused to do so. Such a refusal may deprive the other party of that early clarification of his legal position which has been acclaimed as one of the commercial advantages of the declaration.³⁷ Thus, in *Honour v. Equitable Life Assurance Society*,³⁸ the insurance company refused to accept premiums from

33. *Draper v. British Optical Association*, [1938] 1 All E.R. 115 (Ch.D)

34. *In re Barnato*, [1949] Ch. 21

35. (1935), 145 L.T. 208 (K.B.)

36. See cases in note 32, especially *North Eastern Marine Engineering Co. v. Leeds Forge Co.*, [1906] 1 Ch. 324 at 329.

37. See *Société Maritime v. Venus SS. Co.* (1904), 9 Com. Cas. 289; *Spettabile Consorzio Veneziano v. Northumberland Shipbuilding Co.* (1919), 121 L.T. 628. In many cases a defendant far from objecting that a claim is premature, has formulated his own case and the courts have proceeded. See Zamir, *supra*, note 8 at 213-14

38. [1900] 1 Ch. 852

the assignee of a life policy, alleging that the policy had originally been obtained by fraud. When the plaintiff assignee sought a declaration as to the validity of the policy the company objected to the proceedings on the ground that the insured was still alive and the assignee had no present claim against the company on the policy. The company's objection was upheld since it might obtain further evidence of invalidity when the insured died but it was required to undertake that it would not raise the non-payment of premiums against the plaintiff in any later proceedings.

Some of these points are illustrated by a case in which judicial doubt was expressed as to the existence of a dispute. The case is *Wood Components of London v. Webster*,³⁹ a decision of Sellers L.J. sitting as an additional judge of the Queen's Bench Division. A contract for the sale of 5100 cubic feet of timber by the defendant sellers to the plaintiff buyers provided for a sample shipment of 500 cubic feet and that acceptance of the balance should be subject to this sample being satisfactorily received and approved by the buyers. The buyers sought declarations that they could accept or reject the sample at their complete discretion, that if they disapproved the sample the contract would be at an end so far as the balance was concerned and that if the sample was approved the balance of the goods had to correspond with the sample shipment.

The defendants asked in their turn for declarations that the sample could only be rejected if it failed to comply with description or some condition or warranty, that otherwise the buyers were bound to accept the balance and that an arbitration clause applied to the shipment of the balance.

Sellers L.J. said that if the buyers were bound to approve the sample provided it complied with description, condition and warranty there was no point in referring to it as a sample. The contract might then have been a simple sale by description of all the timber. Hence, he held that there was a concluded contract for the sample shipment and an option or firm offer for the balance which was to be accepted by the buyers' approving the sample. He therefore granted in part the declarations sought by the plaintiffs.

Sellers L.J. did, however, say that he had had some doubts as to whether the application was premature "for it may well be, and it is to be hoped that it will be, that no trouble of any kind will arise".⁴⁰

39. [1959] 2 Lloyd's Rep. 200 (Q.B.)

40. *Id.* at 202

Relying on the judgment of Channell J. in the *Venus*⁴¹ case, Sellers L.J. concluded that there was no necessity for one party to a contract to commit an act which might amount to a breach before an action for a declaration would lie but did not further analyse the requirements of a real dispute.⁴²

There are two points for comment on this. In the first place, it seems that the existence of a dispute which could be put to the court for settlement was dependent on the readiness of the defendant sellers to formulate their claims and ask in their turn for declarations. It would have been open to them to take their stand on cases like *Honour v. Equitable Life* and *North Eastern Marine v. Leeds Forge Co.*⁴³ and object that it was not for the buyers to convert themselves into plaintiffs because they feared or suspected that they might be sued for breach if they rejected the bulk when it complied with the contract terms. Had they wished, the sellers might have said that they had the full period of limitation after such an event in which to bring proceedings. Thus, the existence or non-existence of a dispute may very well depend on the readiness of the parties to place their claims in clear-cut form before the court.

The second point for comment is that the case seems consistent with the general test proposed for the reality of a dispute. If the judge had asked himself whether, if he granted the declarations sought, they would have been immediately and effectively available to resolve a dispute, he must have answered in the affirmative and entertained the case, as in fact he did.

VIII. *A Case to be Distinguished*

A clear line must be drawn between *Wood Components of London v. Webster* and another decision of Sellers J., *Webster v. Commissioners of Customs and Excise*,⁴⁴ where the dispute was held to be unreal. In the latter case, the plaintiffs sought a declaration that goods which they might later sell to the London County Council were subject to purchase tax in order that the tender price might be calculated. The Commissioners replied that, since there was as yet no contract of sale, the question whether purchase

41. (1904), 9 Com Cas 289 (Q.B.)

42. [1959] 2 Lloyd's Rep. 200 at 202-203

43. [1906] 1 Ch. 324 at 329

44. *The Times*, July 24, 1954 "There was no contract when the writ was issued and the case came before the Court solely for a declaration as to what the position would have been" *per* Sellers J. [emphasis added].

tax applied was hypothetical, the dispute was unreal and no declaration should be made. Whilst recognising the difficulty that faced the plaintiffs, Sellers J. accepted this contention.

The distinction seems to be that in *Webster v. Customs and Excise* the declaration, if granted, would not have been immediately and effectively available to clarify the plaintiff's legal position. Only if they entered into a new and independent transaction after the granting of the declaration would it be operative on a legal situation in which the parties were actually placed whereas in the *Wood Components* case the position was very different. Though the plaintiff might alter his legal position after the declaration had been granted by exercising his option to take the bulk of the timber, this would merely be working out a transaction in existence when the declaration was granted and not the creation of a wholly new and independent transaction. Hence the declaration could be immediately available to resolve a dispute in a sense in which it could not be in *Webster v. Customs and Excise*, where of necessity there would be some hiatus between the granting and the operation of the declaration if it had been granted.

There may also seem to be difficulty in reconciling the refusal in *Webster v. Customs and Excise* to say whether the purchase tax would apply and the readiness of the courts in cases such as *London and Country Commercial Properties Investment Ltd. v. Attorney-General*⁴⁵ and *Pyx Granite Co. v. Ministry of Housing and Local Government*⁴⁶ to say whether proposed action would incur criminal or administrative sanctions or civil liability.

The distinction seems to be that in *Webster* there was no doubt as to the legality of the contemplated contract of sale. In the second group of cases, the question was whether the proposed action could be lawfully undertaken and not merely whether certain concomitants might or might not attach to an unquestionably legal transaction. Hence, in the second group, the declaration if granted would be immediately available as against the other party without any need for the occurrence of some contingency or the entry into some intervening transaction. Put in another way, the question in *Webster* was: "What would be the consequences if the plaintiff changed his legal position as he was clearly entitled to do?" whereas in the other cases the question was "Could the plaintiff

45. [1953] 1 W.L.R. 312; [1953] 1 All E.R. 436 (Ch.D)

46. [1960] A.C. 260 (H.L.). See Zamir, *supra*, note 8 at 174-75

lawfully change his legal position?’’

IX. *The Reality of Separate Disputes in a Case*

A further point on the reality of disputes has recently been determined by the Court of Appeal in *Stott v. West Yorkshire Car Co.*⁴⁷ Even though the principal issue in a case may have been settled or determined there may remain subsidiary disputes as, for instance, between co-defendants with regard to contribution or indemnity and these will retain their reality and should be heard by the court. The parties to such disputes need not be put to the trouble and expense of commencing an independent action.

Thus it seems clear that the question whether or not there is a real dispute is one of misleading simplicity. It covers a complex of subsidiary questions which are to be answered by the application of a variety of tests, not all of which may be appropriate in any particular case in which the problem of reality arises. On the other hand, the courts have provided reasonably clear and flexible criteria for solving the problem and these are related both to policy considerations and to the grounds on which the courts exercise discretion in granting or refusing declarations.

X. *Canadian Illustrations*

Canadian courts have also set their face against deciding hypothetical and academic questions in granting declarations and, whether applying a rule of law or exercising a discretion, appear to act in this field on much the same general principles as the courts in England, even if some of the more special applications of these principles do not find an exact parallel in their case law.⁴⁸ It is clear, however, that questions of utility and immediate effectiveness are crucial in both countries.

This close resemblance is not unexpected since, as the Canadian courts themselves have sometimes pointed out, their decisions in this field have been based on legislation which is very similar to the corresponding English rules and English authorities have on occasion been employed.⁴⁹

47. [1971] 2 Q.B. 651 (C.A.), *not following* *Calvert v. Pick*, [1954] 1 W.L.R. 456 (Q.B.)

48. See cases collected in Canadian Abridgment, 2d ed., 3 *Practice*, Part V(4) at 62. A recent English case in which the Court of Appeal laid heavy stress on the question of utility in granting a declaration of non-liability is *Camilla Cotton Oil v. Granade S.A.*, [1975] 1 Lloyd's Rep. 470.

49. See *Hoffman v. McCloy* (1917), 38 O.L.R. 446 at 450; 33 D.L.R. 526 at 529

Thus the basic requirement that there should be a dispute between adverse parties and that this will not be satisfied when the defendant does not repudiate the plaintiff's interest is illustrated in the Saskatchewan case of *Prudential Trust v. Keller*.⁵⁰ The point that the judgment of the court should be immediately and effectively available between the parties can be supported from a number of Canadian cases. In one of the more recent, the trade union case of *Charleston v. McGregor*,⁵¹ a declaration was refused on the ground that if granted it would have been "barren of practical effect" since the original dispute had in substance ceased to exist. In this case considerable reliance was placed on passages from the judgment of McNair C.J.N.B. in the slightly earlier zoning case of *Macleod v. White*.⁵² These passages contained the clear statement that the pronouncements of the court

. . . must bind someone for the benefit of someone. It seems to me that by their proposed declaration the plaintiffs are seeking to elicit from the court a legal opinion not a judicial opinion with binding effects.

A much earlier *dictum* to the same effect came from Harvey C.J. in *Gilmore v. Callies*,⁵³ saying that "a declaratory judgment which the court will grant will be one under which some rights may be established; . . . the court will not make a declaratory judgment which is . . . entirely in the air."

Consistently with this it has been held that declaratory judgments will not be made in respect of rights which could only come into existence on the occurrence of some future uncertain contingency. So in *Re Lockyer*⁵⁴ a declaratory order was not made as to the

(S.C., A.D.). See *Stoddart v. Town of Owen Sound* (1912), 8 D.L.R. 932 at 940-941 (Ont. H.C.); *Re Lockyer* (1934), 1 D.L.R. 687 at 689 (Ont. C.A.); *Prudential Trust v. Keller* (1958), 26 W.W.R. 664 at 666 (Sask. Q.B.); *Charleston v. MacGregor* (1958), 11 D.L.R. (2d) 78 (Alta. S.C.); *Re Calford* (1973), 37 D.L.R. (3d) 300 (Alta. S.C., T.D.); *Re Henning* (1975), 51 D.L.R. (3d) 762 (Alta. S.C., A.D.). For Nova Scotia see D. Mullan, *The Declaratory Judgment* (1975), 2 Dalhousie L.J. 91 at 92.

50. (1958), 26 W.W.R. 664 (Sask. Q.B.)

51. (1958), 11 D.L.R. (2d) 78 (Alta. S.C.)

52. (1956), 37 M.P.R. 341 at 361 (N.B.S.C.)

53. (1911), 19 W.L.R. 545 (Sask. S.C.), cited in *Trottier v. National Mfg. Co.* (1912), 8 D.L.R. 138 at 139 (Sask. S.C.); *Charleston v. MacGregor* (1958), 11 D.L.R. (2d) 78 at 85; *Motor Car Supply Co. v. A.-G. for Alberta*, [1938] 4 D.L.R. 489 at 501 (Alta. S.C., T.D.). The words "in the air" reflect a *dictum* of Jelf J. in the English case of *A.-G. v. Scott* (1904), 20 T.L.R. 630 at 633 (K.B.).

54. [1934] 1 D.L.R. 687 (Ont. C.A.)

identity of beneficiaries when it appeared that the gift depended on events which might never happen and that in certain circumstances there might be nothing for the beneficiaries to take. *Re Lockyer* was relied on in *Fries v. Fries*⁵⁵ where a declaration relating to a wife's right to dower was refused when this depended on a number of uncertain events such as default, survivorship and the paying off of mortgages. Again, in *Dumny v. Yakimischak*,⁵⁶ the Court, whilst saying in general terms that a declaration should not be granted in respect of future rights or hypothetical questions, refused to grant a declaration as to rights which might be available at the conclusion of a period of limitation on a lost cheque which still had some time to run. The action was regarded as premature. Similarly, in *Hoffman v. McCloy*,⁵⁷ the Court granted a declaration that the plaintiff was entitled to certain royalties that might be received by the defendant in the future but refused by a majority to couple this with an order for a receiver and an account since it could be that no royalties would in fact be earned.

Some of the Canadian cases, such as *Dumny v. Yakimischak* and *Hoffman v. McCloy*, contain statements to the effect that declarations will only be granted in respect of present and not of future rights. This may appear at first sight to depart from the English cases where a distinction is drawn between future rights, that is to say the necessary consequences of present rights, in respect of which declaratory relief is available, and hypothetical or contingent rights, the coming into existence of which depends on some future uncertain event and in respect of which declaratory relief is not available.⁵⁸ On inspection, however, it seems that the apparent conflict is merely a difference of terminology and those "future rights" in respect of which declarations have been refused

55. [1949] 3 D.L.R. 849 (Ont. H.C.), *rev'd. on other grounds* [1949] 4 D.L.R. 784 (Ont. C.A.).

56. (1954), 12 W.W.R. 635 (Man. Q.B.)

57. (1917), 38 O.L.R. 446; 33 D.L.R. 526 (A.D.)

58. See *supra*, note 18. Leading English cases in this field — *Curtis v. Sheffield* (1882), 21 Ch.D. 1 (C.A.); *A.-G. v. Scott* (1904), 20 T.L.R. 630 (K.B.) and *In Re Steples*, [1916] 1 Ch. 322 — were cited without fundamental criticism in *Re Lockyer*. See also *Stoddart v. Town of Owen Sound* (1912), 8 D.L.R. 932 (Ont. H.C.) where a declaration was granted that a by-law submission was invalid and hence did not constitute an obstacle to the making of another submission at the end of a period fixed by statute. Here the future right was certain to come into existence at a fixed future time and was not dependent on any contingency or uncertainty. A recent case is *Re Calford* (1973), 37 D.L.R. (3d) 300 holding that a case relating to the renewal terms of an existent lease was not premature.

in the Canadian cases correspond to "hypothetical" or "contingent" rights in the English terminology. In such cases the action is premature. Thus in all these respects a close affinity between the Canadian and English approaches to the problem of the unreal dispute seems apparent.

XI. *Conclusions*

A number of the principal policy considerations which underly the unwillingness of courts at the present day to entertain unreal disputes have already been mentioned.⁵⁹ These include the risk that cases might not be adequately argued and the danger that fictitious cases might be advanced in order to distort the development of the law.

It is clear, however, that courts have not always taken this stand. In early Tudor times the courts showed no lack of readiness to deal with questions which would nowadays be regarded as theoretical or unreal.⁶⁰ A change of attitude seems to have appeared in the seventeenth century when the early Stuart monarchs endeavoured to forward their policies by taking advisory or consultative opinions from the courts on questions which had not come into actual dispute.⁶¹ Suspicions engendered by these proceedings became deeply ingrained in the legal profession and are reflected in the fierce attack launched by Lord Hewart C.J. in *The New Despotism*⁶² on a proposal to establish such a procedure in a Rating and Valuation Bill of 1928.

It is possible, however, to point to a number of exceptional cases where courts have been required to entertain cases which technically are theoretical or academic. A well known example is the duty laid on the Judicial Committee of the Privy Council to give rulings on special references at the instance of the Crown.⁶³ Such references

59. *Supra*, note 24

60. L. W. Abbott, *Law Reporting in England 1485-1585* (U. of London: Athlone Press, 1973) at 184-85

61. Zamir, *supra*, note 8 at 44-48 and authorities cited there. It is interesting that in the anonymous case from March's Reports (1641) 155-56 cited by Abbott, *supra*, note 60 at 184, n. 206, the objection to answering an academic question was put on the ground of *res judicata*. Serjeant Pheasant asked for advice from the Court in accordance with old-established practice. "But the whole Court was against him that they cannot be judges and counsellors, and that they ought not to advise any man, for by that means they should prevent their judgment."

62. *The New Despotism* (New York: Cosmopolitan Book Corp., 1929) at 112-42

63. Judicial Committee Act 1833, 3 & 4 Will. 4, c. 41, s.4. For Canada see *A. G.*

have been made to clarify the law in cases where the original dispute has ceased to exist.⁶⁴ Again in England patent legislation now provides for courts to determine the type of question which in *North Eastern Marine v. Leeds Forge* was regarded as unreal on general principle.⁶⁵

More recently the Criminal Justice Act 1972 provides for the reference to the Court of Appeal by the Attorney-General of a point of law following acquittal on indictment.⁶⁶ The Court of Appeal may of its own motion or on application refer the matter to the House of Lords.

In the cases in more recent years it has been seen that Sellers J. in *Webster v. Commissioners of Customs and Excise*, whilst holding the dispute to be unreal expressed sympathy for the difficulties of the prospective taxpayer and the same judge in *Wood Components of London v. Webster*, the Court of Appeal in *Stott v. West Yorkshire Car Co.* and the Judicial Committee of the Privy Council in *Hanoman v. Rose* showed no disposition to extend the range of cases which are to be regarded as unreal, theoretical or academic.

It has also been seen that it is not absolutely certain whether the English courts refuse to entertain unreal disputes because of lack of jurisdiction or in the exercise of their discretion⁶⁷ and these considerations may tell in favour of treating the matter as a question for the very cautious exercise of discretion rather than for total prohibition. The distinction between the real and the unreal may on occasion depend on technical subtleties⁶⁸ or on the tactics of one of the parties. Such obstructions to justice might perhaps be overcome if the courts were to make it plain that they were prepared to operate a discretionary power in such cases.⁶⁹

for *Ontario & A.-G. for Canada*, [1912] A.C. 571; [1912] 3 D.L.R. 509 (P.C.) (Can.) for similar Canadian legislation. Zamir, *supra*, note 8 at 47, n. 66 mentions that such legislation is also to be found in several American jurisdictions and in France.

64. *In re Piracy Jure Gentium*, [1934] A.C. 586 (P.C.) (Special Reference)

65. Zamir, *supra*, note 8 at 211, n. 18, citing Patents Act 1949 and Registered Designs Act 1949.

66. Criminal Justice Act 1973, c. 71, s. 36 (U.K.). The former accused takes no part in these proceedings and his acquittal cannot be reversed so that the dispute is, in principle, unreal.

67. *Supra*, note 14

68. There were strong dissenting judgments in *Hoffman v. McCloy* (1917), 33 D.L.R. 526 at 531 by Meredith C.J.C.P. and in *Re Lockyer*, [1934] 1 D.L.R. 687 at 690 by Middleton J.A.

69. For judicial discretion as a solution for other problems in declaratory relief see Mullan, *supra*, note 49 at 107-108.

This has, in fact, been done in some of the Canadian authorities. Thus in *Vic Restaurant Inc. v. City of Montreal*⁷⁰ the dispute related to a licence for a year which had expired and hence could technically be regarded as unreal. The Supreme Court of Canada, however, pointed out that the question was one of great importance for municipal institutions throughout Canada and, treating the reality of the dispute as going to discretion rather than jurisdiction, heard the case. Locke J. explicitly said:

The question of reality is not one in my opinion which goes to the jurisdiction of the court, rather it is a matter of discretion and one to be decided in each case on the facts disclosed.⁷¹

This case was relied on in *Re Henning and City of Calgary*.⁷² The facts were that the City passed a taxing by-law which was at first instance quashed for illegality in proceedings brought by the respondent. The City then passed a second taxing by-law which impliedly repealed the first and did not contain its controversial feature, discrimination between different classes of property. The City did, however, continue an appeal against the quashing of the first by-law and the respondent objected that this appeal was now academic. The judgment of the Court was delivered by McDermid J.A. After reviewing Canadian, English and Scots authorities⁷³ and citing the works of Dr. Zamir⁷⁴ and Professor de Smith,⁷⁵ he concluded that the Court might hear the appeal. He distinguished the present case from *Attorney-General (Alberta) v. Attorney-General (Canada)*⁷⁶ where litigation on repealed legisla-

70. [1959] S.C.R. 58; 17 D.L.R. (2d) 81

71. *Id.* at 89-90; 17 D.L.R. (2d) at 96; Cartwright J. was of the same opinion at 92; 17 D.L.R. (2d) at 99.

72. (1975), 51 D.L.R. (3d) 762 (Alta. S.C., T.D.)

73. *Id.* at 764-66. The cases reviewed were: *Vic Restaurant Inc. v. City of Montreal*, [1959] S.C.R. 58; 17 D.L.R. (2d) 81; *Kent Coal Co. v. Northwestern Utilities Ltd.*, [1936] 4 D.L.R. 337 (Alta. S.C., A.D.); *Mathews v. Coca-Cola Co. of Canada*, [1944] 2 D.L.R. 355 (Ont. C.A.); *Oatway v. Canadian Wheat Board*, [1945] 2 D.L.R. 145 (S.C.C.); *International Brotherhood of Electrical Workers v. Winnipeg Builders* (1968), 65 D.L.R. (2d) 242 (S.C.C.); *A.-G. Alberta v. A.-G. Canada*, [1939] A.C. 117; [1938] 4 D.L.R. 433 (P.C.) (Can.); *Hanson v. Radcliffe UDC*, [1922] 2 Ch. 490 (C.A.); *Barnard v. National Dock Labour Board*, [1953] 2 Q.B. 18 (C.A.); *Russian Commercial Industrial Bank v. British Bank*, [1921] 2 A.C. 438 (H.L.); *Chaplin's Trustees v. Hoile* (1890), 18 R. 27

74. *Supra*, note 8

75. *Judicial Review of Administrative Action* (2d ed. London: Stevens, 1968) at 524-25. *Eastham* is there cited but this case may be more restricted in its effect than is suggested. See *supra*, note 23

76. [1939] A.C. 117; [1938] 4 D.L.R. 433 (P.C.) (Can.)

tion had been held to be academic on the ground that in the earlier case there had been no intention to re-enact the repealed legislation. Here the City wished to retain the impugned by-law and had only repealed it by implication because if they had not passed the second by-law they would have been without a taxing by-law. The question was therefore "in substance a real one".⁷⁷ The City had a real interest in raising it and the respondent, as he represented a substantial group of landlords, had a real interest in opposing it. The concurrence of these three factors gave good grounds for exercising a discretion in favour of hearing the appeal.⁷⁸ McDermid J.A. concluded by saying that the courts had always been anxious that if they handled actions for declarations too liberally they would be inundated with such actions. If that proved to be the case the court might have to reconsider whether it should exercise its discretion in favour of hearing such appeals.

Re Henning is one of the latest of a number of cases in which the Canadian courts seem to have been rather more venturesome than their English counterparts⁷⁹ in entertaining cases which are in strictness unreal, theoretical or academic. It now remains to be seen whether the possibility of being overwhelmed with such actions alluded to by McDermid J.A. does eventuate and result in that revision of the courts' exercise of their discretion which he foresaw as its consequence.

77. (1975), 51 D.L.R. (3d) 762 at 767 The Judicial Committee of the Privy Council in *Hanoman v. Rose*, [1955] A.C. 154 (P.C.) (British Guiana) were prepared to entertain a dispute which was in substance real even though in matter of form hypothetical or unreal.

78. These three grounds were taken from Lord Dunedin's statement of the practice of Scottish courts in *Russian Commercial Industrial Bank v. British Bank for Foreign Trade*, [1921] 2 A.C. 438 at 448 (H.L.).

79. *Supra*, notes 14, 23. See also *Brownsea Haven Properties v. Poole Corp.*, [1958] Ch. 574 and *Baring v. ICI Pension Fund* (1974), 119 S.J. 48