A variation upon this theme is provided by the following clause:

> In the event that the purchaser (vendor) is unable to obtain by the ..... day of ..... 19....., financing upon the following terms (rezoning of the said property . . . etc.) then either party shall be at liberty to declare the agreement null and void by notice in writing to the address of the other party as stated in this agreement, provided that such written notice shall have been postmarked within two business days of the expiration of the period stipulated above for satisfaction of the condition.

This last clause gives the parties mutually coextensive rights to determine the contract. It will not therefore suit the purchaser who wishes to have the option of completing even if the condition is not satisfied. On the other hand it should be favoured by the vendor who believes that the property may increase in value significantly during the period allowed for fulfilment of the condition.

Conclusions

Which form of clause or combination of clauses is to be preferred? The answer must, of course, depend upon the respective interests of the parties and for which of them one is acting.

The difference between the express right of waiver clause and the purchaser's option clause is, of course, that in the former the purchaser will not, simply through inaction, be burdened with a contract he cannot handle, as may happen in the latter case. On the other hand, he may lose a contract which, despite his inability to fulfil the condition, he can complete and really wants. Probably the former consideration is likely to weigh more heavily.

If, however, the Supreme Court of Canada were to alter its approach to conditions and to adopt a construction similar to that adopted by courts in England and throughout the Commonwealth, the latter two forms would be preferable. The approach taken in those jurisdictions is that the words "null and void" will ordinarily be taken to mean voidable at the option of a party not in default, provided that the clause was inserted for the benefit of that party. Some may find them preferable in any event as they avoid the jungle that is the law of conditions precedent.

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FINANCIAL ASSISTANCE GRANTED BY COMPANY FOR PURCHASE OF ITS OWN SHARES:

MT. VIEW CHAROLAIS RANCH LTD. v. *HAVERLAND (1974) 2 W.W.R. 289, AND MURRAY AND MURRAY* v. *C. W. BOON & COMPANY LIMITED (1974) 2 W.W.R. 620*

The above two referenced cases recently reported in the same volume of the Western Weekly Reports highlighted a problem which has not often been discussed in legal periodicals,[1] but which is a common

[1] For some literature on this subject see a comment by H. Shandling in [1964] 43 Can. Bar Rev. 502; G. R. Bretton, *Financial Assistance in Share Transactions* 32 The Conveyancer 6, and F. P. Hennessy, *Provision of Financial Assistance by a Company for the Purchase of its Own Shares* [1951] 25 Aust. L.J. 394. Also, the article, *supra*, at 324.

problem facing practitioners in Alberta—whether a private company can validly give financial assistance in the form of security on its assets for the purchase of its shares. The companies acts of most jurisdictions contain a provision which prohibits a company from making loans to shareholders or giving, directly or indirectly, any financial assistance for the purpose of assisting in the purchase of its shares. The Alberta provisions[2] however, unlike most of the other statutes, merely prohibits such assistance in connection with the purchase of shares of public companies, thus, in the case of private companies leaving the question of the validity to be governed by common law principles.

In essence there really are two problems which always must be examined in determining whether the giving of such security is valid. The first is whether the transaction is *ultra vires* in the proper sense of that phrase—that is, whether such action is within the objects of the company as amplified by the powers granted by the governing statute. The second is whether such a transaction is *ultra vires* in the sense of being illegal as contrary to the principle established in *Trevor* v. *Whitworth*.[3] The first question is primarily one of construction and will not be pursued herein;[4] rather it is the second question which will be examined. In *Mt. View Charolais Ranch Ltd.* v. *Haverland*[5] and *Murray and Murray* v. *C. W. Boon & Company Limited*[6] two separate Alberta courts examined this problem, and came to opposite conclusions as to the applicability of the principle of *Trevor* v. *Whitworth*.[7]

In *Mt. View* the appellant Lynch purchased from the respondent, for $251,000, all of the shares of Mt. View Charolais Ranch Ltd., and the company's $87,000 note payable to the respondent. $81,000 of the purchase price was paid down and the unpaid portion of the purchase price was secured by a chattel mortgage granted by the company on certain of its assets. Default in payment by the appellant occurred and the respondent[8] moved to realize upon the security and the validity of the chattel mortgage arose. Prowse J.A. (with Smith C.J.A. concurring) reviewed *Trevor* v. *Whitworth*[9] and stated that the basic objection raised by such case to a purchase by a company of its shares was that it effected a reduction of capital in a manner not authorized by the Act, but ignored the concept of trafficking contained in that case.[10] He then reviewed and relied on *Hughes* v. *Northern Electric & Manufacturing Co.*[11] to conclude there was no common law rule that prohibited a company from giving financial assistance for the purchase of its shares. In the *Hughes* case the company was overwhelmed with debts and the shareholders were involved in disagreements with the result that effective administration of the company was impossible. Two of the shareholders purchased the shares of the third and the company

[2] The Companies Act R.S.A. 1970, c. 60, Sec. 14.

[3] [1887] App. Cas. 409.

[4] In *Mt. View Charolais Ranch Ltd.* v. *Haverland* [1974] 2 W.W.R. 289 (Alta. C.A.) the majority gave a very liberal construction of the corporate objects and the powers contained in Section 20 of The Companies Act.

[5] *Id.* This case is referred to as the *Mt. View* case.

[6] [1974] 2 W.W.R. 620. This case is referred to as the *Murray* case.

[7] *Supra*, n. 3.

[8] It may not be without significance to the outcome of the case that the respondent was a widow who was unable to manage the company herself and who was for some time seriously ill with cancer.

[9] *Supra*, n. 3.

[10] While the writer has always had problems understanding what is meant by trafficking it is presumed it means dealing or buying and selling, and if this is a proper meaning it is not stretching a point to suggest that such assistance amounts to trafficking.

[11] [1915] 21 D.L.R. 258 (S.C.C.). This case is referred to as the *Hughes* case.

granted a mortgage on its assets to secure payment to the vendor. In these circumstances Duff J., speaking for the majority of the Supreme Court of Canada, held the mortgage valid, and stated that it was[12] ". . . of course, not contented that the mortgaging of its property for the purpose of securing the payment of the purchase price of shares bought by one of its shareholders for his own benefit would in itself, special circumstances apart, be within the powers of this company", but concluded that the proposed transaction as a whole was necessary to save the company and as such should not be considered *ultra vires* merely because one incident of the consideration to the purchaser for procuring payment of the company's debt and arranging further financing for the company was security on the purchase price of the shares. In *obiter* Duff J. stated:[13]

> . . . our attention has not been called to any provision of the Ontario 'Companies Act' expressly forbidding such a transaction and I do not think any argument has been advanced which goes very far to establish ground for implying such a prohibition. It seems to have been assumed in the court below that the transaction is by analogy to be treated as governed by the rule (judicially established) which incapacitates a company from purchasing its own shares in the absence of authority expressly given. With great respect I am unable to discover the analogy.

Prowse J.A. relied on this statement in *Hughes* to conclude that the principle in *Trevor* v. *Whitworth*[14] had not been extended to cover the granting of financial assistance by a company to persons purchasing its shares. As additional authority he also cited an Australian case *Provident International Corp.* v. *International Leasing Corp. Ltd.*[15] and some statements in the English Report of the Company Law Committee 1962.[16] The majority conclusion constitutes quite a significant extension to the *Hughes* case as under *Mt. View* there is no need to show the transaction benefits the company to validate the transaction, whereas such was necessary under *Hughes*.

Clement J.A., in his dissent in *Mt. View*, also referred to *Hughes* but noted it was clear that in such case the basic purpose was to serve the objects of the company by saving its operations from certain disaster, and such not being the facts facing him, distinguished *Hughes* and ruled the mortgage valid only for the amount of the shareholder's loan. He pointed lot that a distinction must be drawn between the financial interests of a shareholder and business necessities of the company, and that there was no evidence in the present case that the company was in financial straits.

In the *Murray*[17] case Haddad D.C.J. was faced with an essentially similar fact situation. The plaintiffs were shareholders of the company and they entered into an agreement to sell their shares and shareholders' loans of $27,406.80 to one Berger for $50,000, which was to be paid by instalments. The purchase price was secured by a chattel mortgage granted by the company on its assets and the company also gave the vendors its note for the purchase price.[18] After default in

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[12] *Id.* at 363.

[13] *Id.* at 364.

[14] *Supra*, n. 3.

[15] [1969] 1 N.S.W.R. 424. Additional Australian authority for this view can be found in the decision of Williams J. in *Durack* v. *West Australian Trustee Executor and Agency Co. Ltd.* [1944] 72 C.L.R. 189.

[16] Cmnd. 1749 para. 1973.

[17] *Supra*, n. 6.

[18] Questions were raised in this case as to whether the mortgage was properly authorized and executed by the company, but this point was dealt with independently by the court.

payment of the purchase price, the plaintiff sued and obtained default judgment, and a seizure and sale followed. The defendant was an execution creditor who contested the validity of the chattel mortgage. The court was asked two questions: (1) whether the chattel mortgagees have priority over execution creditors of the company; and (2) whether the writ obtained by the plaintiff following its default judgment was valid. Haddad D.C.J. stated[19] ". . . the defendant takes the position that the delivery of the chattel mortgage and promissory note offend the principle that a company may not purchase or assist in the purchase price of its own shares by encumbering or jeopardizing its assets. This is a concept of company law long recognized and adopted in Canada". He then referred to the *Hughes* case and distinguished it on the basis that the company he was dealing with obtained no benefit or consideration for the mortgage, and no necessity for giving it was established so as to confer a benefit on the company as occurred in *Hughes*. As authority for his conclusion he referred to an earlier Alberta case, *Martin* v. *Northern Hotel Co.*[20] and stated[21] "The validity of a security must be tested by the intent and substance of the transaction creating it" and concluded that on the facts facing him the sole purpose was to enable Berger to purchase the shares—and thus the transaction was beyond the powers of the company. The judge in this case did not clearly separate *ultra vires* in the proper sense of being beyond the stated objects of the company and in the sense of illegality, but since he specifically referred to *Trevor* v. *Whitworth*[22] persumably he concluded it was *ultra vires* in the illegality sense.

Faced with such a dichotomy of views from two courts of the same province, one would normally accept the views of the higher of the two courts as being determinative. However, the *Mt. View* case has not enjoyed universal acceptance and some banks on the advice of counsel are loathe to rely on the same in taking security for loans given to finance the purchase of shares. In large part this lack of acceptance is due to the failure of the majority in *Mt. View* to consider and deal with the earlier cases which had extended the principle of *Trevor* v. *Whitworth* to such transactions, and many of these cases were factually more similar to *Mt. View* than the *Hughes* case. Even Duff J., in his decision in *Hughes*[23] seemingly believed that, except in unusual circumstances, such financial assistance could not be given by a company.

The most significant of these earlier cases not considered in *Mt. View* from an Alberta point of view is *Martin* v. *Northern Hotel Company Limited*[24]—a decision of the Alberta Supreme Court. In this case shares and debt of the defendant company were sold and as part of the purchase the company gave a chattel mortgage on its stock-in-trade and a land mortgage on its hotel property. Ewing J. considered the *Hughes* case but distinguished it on the basis that no necessity existed on the facts before him of the nature of that which arose in *Hughes*. He concluded the sole purpose of the transaction was to enable the

[19] *Supra*, n. 6 at 626.
[20] [1932] 1 W.W.R. 242 (Alta. S.C.).
[21] *Supra*, n. 5 at 626.
[22] *Supra*, n. 3.
[23] *Supra*, n. 9 at 363.
[24] *Supra*, n. 20.

purchaser to purchase the shares of the company and was accordingly *ultra vires*.

The Supreme Court of Ontario in *Re Inrig Shoe Co. Ltd.*[25] came to a similar conclusion on an analogous fact situation. Fisher J. stated:[26]

> . . . I am of the opinion the transaction was in fact not like a loan made by an individual to a company in the ordinary course of business, but was one that really resulted in the sale of shares to Inrig and the company's assets mortgaged as security for payment. Here the shareholders got rid of their shares and secured payment thereof by the security taken. This strikes me as tantamount to an indirect sale of stock for which the company paid or agreed to pay . . .

and concluded the mortgage was invalid to such extent but valid insofar as it was security for loans of the company which were also sold.

Additional authority for the proposition that a company may not grant financial assistance for the purchase of its shares is found in *Plain* v. *Kenley & Royal Trust Co.*,[27] *Rex* v. *Lorang*,[28] and *Re Pengelly-Akitt Ltd.*[29]

In essence the decision as to which view is proper depends upon whether the transaction whereby a company grants security is considered as being merely a change in form of the company's assets or whether it is properly treated as an indirect method of the company purchasing or dealing in its own shares, and thus either being an unauthorized reduction of capital or a trafficking in its shares.

In the *Mt. View* case the majority[30] accepted the former view, whereas the other cases cited have accepted the latter. In the writer's view the former view is questionable because if the company grants security on its assets for the purchase price and the shareholder does not make payment of the purchase price of the shares, then the company will be called upon to do so and its assets are diminished to that extent. At that point the company has paid for its own shares. Presumably it would have a right of subrogation against the shareholder whose obligation it satisfied, but if the vendor is not able to collect from the shareholder, it is perhaps equally unlikely that the company would be able to—not the less so because the shareholder in most of the cases cited is the sole shareholder of the company and is unlikely to cause himself to be sued, thus leaving the creditors of the company out of luck.

In conclusion it is submitted that because of the failure of the court in *Mt. View* to consider all relevant authorities it is unwise to rely on the case in situations where the sole purpose is to assist the purchaser without any benefit to the company because of the risk that a higher court would not agree with the broad authority given by such case to private companies[31] in Alberta, and that absent special compelling circumstances which directly benefit the company of the nature exhibited in *Hughes* a vendor should not be too content with such security. This whole question may well become academic if the Alberta

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[25] [1924] 4 D.L.R. 625 (Ont. S.C.).

[26] *Id.* at 633.

[27] [1931] O.R. 75 (Ont. S.C.).

[28] [1930] 22 Cr. App. R. 167.

[29] [1914] 16 D.L.R. 79 (Alta. S.C.).

[30] They referred to this concept as it appeared in the Jenkins report, *supra*, n. 16.

[31] An argument for distinguishing the case in the future could be made on the basis that the widow who owned the company was unable to operate it and her alternative if she could not sell the shares was to liquidate the assets and the company—thus the sale and the security is necessary to ensure the continued existence of the company as per *Hughes*.

Companies Act is amended as other provinces' companies acts have been to permit a company to purchase its shares if a solvency test is met.

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PROVINCIAL COURT JUDGE'S DUTY TO APPOINT COUNSEL: *REGINA* v. *WHITE*[1]

The case of *R.* v. *White* is the first to declare that a Provincial Court Judge has a discretionary right to appoint counsel. But before those who champion the cause of right to counsel think the battle is won, careful consideration must be given to the case. While perhaps making a step in the right direction, the case cannot be said to give anyone an automatic right to counsel.

Roderick A. White was charged with common assault and assaulting a police officer in the execution of his duty. The Crown elected to try both charges summarily. On the night in question the accused claimed that he had been drinking a great deal and could not recall any of the incidents referred to by the police. He believed he was suffering from an alcoholic seizure and had medical evidence that might have substantiated that claim. Because of his financial position the accused could not find a lawyer who would represent him and because the Crown elected to try the charges summarily, the accused was refused legal aid. The only semblance of legal help that the accused could find was from Student Legal Services who, recognizing the accused's need for a lawyer, decided that it was an opportunity to advance the cause of the indigent's right to counsel.

At his first court appearance, the accused, with a Student Legal Service's representative, appeared before His Honour Judge C. H. Rolf of the Provincial Court. It was requested that the court appoint counsel for the accused, but the request was rejected because, as the charges were mere summary matters, the accused should be able "to stand on his own two feet".[1a] The court made no inquiry into the facts of whether there were any exceptional circumstances that would put it beyond the ability of the accused to argue for himself. The mere fact that it was a summary matter was enough to place it in the accused's domain. Time was granted for the accused to seek counsel. On the next appearance, again with a Student Legal Services' representative, the accused appeared before His Honour Judge Dean Saks. The court answered the request to have counsel appointed by merely stating that it had "no power to appoint counsel".[2]

Before the case came to trial a motion was brought before Mr. Justice D. C. MacDonald of the Supreme Court, seeking an order in the nature of *certiorari* to quash the decisions of the judges of the Provincial Court not to appoint counsel and also seeking an order in the nature of

[1] Alta. L.R. (2d) 292 (Alta. S.C.T.D.).

[1a] *Id.* at 294.

[2] *Id.* at 294.