occurred but for the employment" (at [223]). What the employee was actually employed to do would become irrelevant.

(3) Gaudron, Gummow and Hayne JJ. also thought that the law of negligence was a more appropriate vehicle for determining the scope of an employer's liability for creating or increasing a risk that his employees would do wrong than the law on vicarious liability.

(4) Callinan J. was strongly critical of the suggestion that the courts should determine whether an employee's tort was committed in the course of his employment by *simply* asking whether it is "fair and just" to hold the employee's employer vicariously liable for the employee's tort. He thought that the law would be thrown into a state of intolerable uncertainty if such an approach were adopted in Australia, as different judges would take different views of what is "fair and just". Of course, this is exactly the approach that has now been adopted in England and, as a result, the law on vicarious liability in England has indeed become intolerably uncertain. It is regrettable that the House of Lords in *Dubai Aluminium* did very little to remedy this uncertainty.

NICHOLAS J. MCBRIDE

SALE OF GOODS—RELIANCE ON A THIRD PARTY'S SKILL AND JUDGMENT

IN *Britvic Soft Drinks Ltd.* v. *Messer UK Ltd.* [2002] EWCA Civ 548, [2002] 2 Lloyd's Rep. 368, affirming Tomlinson J. [2002] Lloyd's Rep. 20, carbon dioxide produced by Terra Nitrogen (UK) Ltd. was sold to Messer and resold to Britvic, who used it in the manufacture of sparkling drinks. The carbon dioxide was contaminated by benzene, but in such small quantities as to pose no danger to health. Even so, because of adverse publicity the drinks as a practical matter were unsaleable. Damages were awarded to Britvic against Messer under the Sale of Goods Act 1979, s. 14(3) as being unfit for the buyer's particular purpose. The case raises a couple of points of interest.

First, although we are taught that "goods" are "chattels personal", which Halsbury (and, much earlier, Blackstone) defines as "things which are at once tangible, movable and visible", there has never been any doubt that gases (and even air itself, *e.g.* as compressed air) are "goods" within the Sale of Goods Act, despite

lacking two of these three attributes. This was taken for granted by all concerned in the present case.

The issue of most interest was not pursued before the Court of Appeal. Section 14(3) not only requires that the buyer should make known to the seller, expressly or by implication, the particular purpose for which the goods are being bought, but also that the buyer should rely on the seller's skill and judgment. (In fact the onus of proof is reversed, the burden being on the seller to show that the buyer did not so rely, but nothing turns on this for present purposes.) Here Messer, the seller, had exercised no skill or judgment at all: *both* parties had relied on *Terra* not to have permitted its product to be contaminated. In Tomlinson J.'s view, this was sufficient. Messer was in breach of section 14(3) because Britvic had relied on the skill and judgment of Terra, the person from whom the seller had acquired the goods. Plainly this ruling makes good commercial sense, however much it departs from the literal meaning of the section, at least in situations where the product passes down the chain of sales and subsales with none of the intermediate parties being able to make an independent assessment of its quality. But it will not be so easy in many other cases to attribute to the producer of the goods knowledge of the "particular purpose" of the eventual end user—herring meal is not necessarily fed to mink, or plastic pails sent to Kuwait. So this innovatory ruling is likely to be of limited application.

L.S. Sealy

SYNDICATED CREDIT AGREEMENT: MAJORITY VOTING

In *Redwood Master Fund Ltd.* v. *TD Bank Europe Ltd.* [2002] EWHC 2703(Ch), [2002] All E.R. (D) 141 (Chancery Division, Rimer J.) the court upheld a clause in a syndicated bank credit agreement empowering a majority to bind a dissentient minority even though the minority were placed in a worse position than the majority.

The effect in summary of the case law on creditor voting clauses—mainly in the context of bond issues—when combined with the case law on shareholder voting, voting on corporate schemes of arrangement and the like, is that the clauses are valid provided that (1) the decision was clearly within the terms of the power, (2) the majority were in good faith, *i.e.* not motivated solely by malice or vindictiveness, (3) there were no secret advantages to some creditors to procure their votes, *e.g.* bribes, and (4) most difficult of all, there was no unjust oppression of the minority so as to constitute a fraud