(ii) C is introduced as an extra purchaser having an undivided share of three-twelfths of the bulk, thereby diluting A's and B's undivided shares to five-twelfths and four-twelfths respectively.

The second of those two solutions cannot apply because of the rule that the seller cannot give that which he does not have; he can give only that which he has got. This rule is known by its Latin: *nemo dat quod non habet* (no one can give that which he does not have) and is fully explained in Ch.5. Since, immediately prior to the sale to C, the seller has only an undivided share in one-tenth of the bulk of 1,000 tonnes, that is all C can get. Thus A's and B's shares remain undiluted and C gets an undivided share in one-tenth of the bulk of 1,000 tonnes. Suppose now, however, that the seller delivers to C, pursuant to the seller's contract with C, 300 tonnes out of the bulk. If at the time of that delivery C takes in good faith, unaware of A's and B's contracts, C will obtain complete property in the 300 tonnes delivered. This is because of s.24 of the Sale of Goods Act, which creates an exception to the rule that the seller cannot pass property (i.e. ownership) which he does not have. Section 24 applies where a person, having sold goods, continues in possession and then delivers the goods under any sale or other disposition to another person who takes them in good faith and without notice of the previous sale.[86] When in these circumstances C obtains property in the 300 tonnes that are delivered to him, A's and B's rights are reduced to undivided shares in the reduced bulk of 700 tonnes, shares of five-ninths and four-ninths respectively. That is the effect of s.20A(4) which provides that where the aggregate of the undivided shares of buyers in a bulk would exceed the whole of the bulk, the undivided share of each buyer is reduced proportionately so that the aggregate of the undivided shares is equal to the whole bulk. If the next thing that happens is that the seller becomes bankrupt, A and B will be entitled to take the remaining 700 tonnes and divide it between themselves in proportions of five to four. This will of course leave each of them with a shortfall and to that extent they will become unsecured creditors of the seller.

Of course it could have happened that, shortly before becoming insolvent, the seller delivered out of the remaining bulk of 700 tonnes to one or other of A or B. Suppose then that, before becoming insolvent and bankrupt, the seller delivered to B 400 tonnes from the bulk pursuant to B's contract. In that case complete property in the 400 tonnes will have at that point passed to B, by virtue of s.18, r.5(1). At the moment of delivery to B, A will have become the only buyer entitled to the remaining bulk which at a mere 300 tonnes was less than he contracted to buy. Thus at that moment complete property in the remaining 300 tonnes will have passed to A. So far as his shortfall of 200 tonnes is concerned, his only claim is as an unsecured creditor against the seller. Thus the effect of delivery to B is to transfer to A the full effect of the shortfall. At least, this is so unless there was an express contractual agreement to the contrary between A and B. This is because s.20B provides that each owner in common of the bulk (here A, B and C) is deemed to have consented to delivery out of the bulk to any other owner in common of the bulk.

86 s.24 is dealt more fully at para.5–022, below.

The Seller Delivers Goods Out of the Bulk to Another Buyer in Pursuance of a Contract Other Than One to Supply Goods from That Particular Bulk

3–037

Suppose that the bulk is 1,000 tonnes and that A is the only buyer to whom the seller has contracted to sell goods (500 tonnes) from that particular bulk and suppose that A has paid for them. In that case a delivery to another buyer (X) of 100 tonnes will simply reduce the bulk to 900 tonnes and A will then have an undivided share of five ninths of the 900 tonnes remaining. Now, however, suppose that the quantity sold and delivered to X is 600 tonnes out of the bulk. The effect of this delivery is to reduce the remainder of the bulk to 400 tonnes. Obviously, complete property in the remaining 400 tonnes will pass to A. The sale and supply of 600 tonnes to X appears to have reduced A's rights by 100 tonnes. How can A's proprietary rights in 100 tonnes be given to X? The answer lies again in s.24 that, despite the fact that the seller does not have a right to any more than 500 of the 1,000 tonnes, he can nevertheless pass to X good title to goods already sold to A. This occurs, by virtue of s.24, provided that X takes in good faith and unaware of A's contract.

The Bulk is Destroyed, Reduced or Damaged by Accident or Act of God

3–038

Suppose that there are 1,000 tonnes in the bulk and that A has contracted to buy, but has not yet paid for, 500 tonnes of them. In that case A will have acquired no property, not even an undivided share in the goods. That being so, no risk will have passed to A, unless the parties have agreed otherwise or else the seller can establish that delivery has been delayed through A's own fault.[87] A's contract will become frustrated at common law if the contract has become impossible, e.g. if the bulk is totally lost in an act of God, such as an accidental fire.[88]

Now, suppose that A has paid for his 500 tonnes before the fire occurs and suppose that there is no other buyer with an interest in the 1,000 bulk. A and B each had an undivided share of 50 per cent in the 1,000 tonnes. Normally, risk passes with property. So, assuming that the whole of the 1,000 tonnes are lost, each of A and B loses his entire interest in the bulk.[89] The position is different, however, if the fire destroys only part of the bulk. According to the Law Commission Report whose recommendations the Sale of Goods (Amendment) Act 1995 was passed to implement, "the risk of partial destruction of the goods rests with the seller (in the absence of agreement to the contrary) so long as the quantity destroyed is within

87 See s.20 at para.3–024, above.

88 For more explanation of frustration see para.4–009, below.

89 For a discussion of the uncertainty surrounding the question of whether risk passes with co-ownership under s.20A, see McKay, "The passing of risk and s.20A Sale of Goods Act 1979" [2010] Cov.L.J. 17.

cases the statutory agent of the finance company.[31] The customer cannot be bound to the finance company by his signature on a document which the finance company's agent knows does not reflect the customer's intention.

Mercantile Agents

5–010 The Factors Act 1889, s.2(1) provides:

> **"Where a mercantile agent is, with the consent of the owner, in possession of goods or of documents of title to goods, any sale, pledge or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same."**

There are six requirements to be fulfilled in order for an unauthorised sale by a mercantile agent to confer good title upon an innocent purchaser.

The Seller Must Be a Mercantile Agent, i.e. a Factor

5–011 Broadly, a mercantile agent is an independent agent acting in a way of business to whom someone else entrusts his goods and upon whom is conferred authority of a type referred to in the Factors Act 1889, s.1(1). That section provides:

> **"The expression 'mercantile agent' shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purposes of sale, or to buy goods, or to raise money on the security of goods."**

31 See para.22–006, below.

This statutory definition is not complete. In order to be a mercantile agent, an agent must have not merely the customary authority referred to in the statute but also three further characteristics. First, he must be independent from the person (his principal) for whom he is agent. A "mere servant or shopman" or "caretaker" is therefore not a mercantile agent.[32] Secondly, he must be acting as agent in a way of business. This "business" characteristic does not require that he should regularly carry on business as agent but simply that on the occasion in question he was acting as a business proposition. In **Lowther v Harris**[33] an agent was entrusted with a tapestry with a view to selling it. He was instructed not actually to conclude a sale without having first referred back to his principal; he was to receive commission if a sale was concluded. In fact, he sold the tapestry to an innocent purchaser without having first referring back to his principal. Wright J. held that the agent who had no general occupation as agent, who normally bought and sold goods on his own account and who was the agent for only the one principal, was nevertheless a mercantile agent. Therefore, since all the requirements in s.2 of the Factors Act were fulfilled, the innocent purchaser had good title to the tapestry.

The third characteristic referred to above is that the agent must be authorised to deal with the goods in his own name without disclosing his agency. In **Rolls Razor Co v Cox**[34] the court had to consider the status of some travelling salesmen. Lord Denning M.R. said[35]:

> **"The usual characteristics of a factor are these. He is an agent entrusted with the possession of goods of several principals, or sometimes only one principal, for the purpose of sale in his own name without disclosing the name of his principal and he is remunerated by a commission. These salesmen lacked one of those characteristics. They did not sell in their own names but in the name and on behalf of their principals, the Company. They are agents pure and simple and not factors."**

Before leaving the question of who is a mercantile agent, it should be said that someone who is not an agent cannot be a mercantile agent.[36] It can be difficult sometimes when someone takes goods on "sale or return" terms to decide whether he was acting as an agent or as principal.[37]

32 Nor does the Act apply where the mercantile agent is selling goods in his own right, i.e. is the legal owner.
33 [1927] 1 K.B. 393.
34 [1967] 1 Q.B. 552.
35 [1967] 1 Q.B. 552 at 568.
36 Equally, it is not necessarily true that someone who is an agent will be a mercantile agent under the definition of the Factors Act 1889, s.1(1) and the common law.
37 See Ch.1, above.

seeing "proof" of the buyer's identity as Richard Green (a pass for Pinewood Studios), Lewis agreed to accept a cheque. The rogue took the car and registration documents. The cheque was worthless. The rogue posed as Mr Lewis in selling the car to Averay, an innocent purchaser. The Court held that there was a contract between Lewis and the rogue and that therefore Averay now had perfect title to the car. Lord Denning M.R. said[59]:

> **"When a dealing is had between a seller like Mr Lewis and a person who is actually there present before him, then the presumption in law is that there is a contract, even though there is a fraudulent impersonation by the buyer representing himself as a different man than he is. There is a contract made with the very person there who is present in person. It is liable no doubt to be avoided for fraud but it is still a good contract . . . "**

In both the last cases, the innocent purchaser (the pawnbroker in **Phillips v Brooks**,[60] and Mr Averay in **Lewis v Averay**[61]) acquired the goods before the contract between the original owner and the rogue had been avoided. If, before the innocent purchaser bought the goods, the original owner had avoided his contract with the rogue, ownership in the goods would have reverted to the original owner. If this had happened the rogue could not have conferred title upon the innocent purchaser (unless under some other exception to the *nemo dat* principle) for the rogue would no longer have a voidable title.

The normal method of the original owner to "avoid" the contract is for him to inform the rogue that he does so. However, it is often impossible to locate the rogue. In this case the contract is avoided as soon as the original owner has done all that he reasonably can. **Car and Universal Finance v Caldwell**[62] was another case where a rogue bought a car and by fraud induced the seller to accept a cheque which proved to be worthless. On discovering this the seller immediately informed the police and the Automobile Association. It was held that this operated to avoid the contract. After this, but before the car or rogue had been traced, the rogue sold the car to an innocent purchaser. Since, at the time the rogue sold the car, his title had been avoided, it was held that the purchaser acquired no title under s.23.[63]

5–021

Although entirely pragmatic, it may be questioned why, as a matter of principle, communication of the seller's intention to avoid the contract, communicated only to a third party, i.e. the police, should have the effect of avoiding a contract. This rule is obviously designed to assist the original owner who having been deceived by a rogue is desperate to avoid the contract

59 [1972] 1 Q.B. 198 at 207.
60 [1919] 2 K.B. 243.
61 [1972] 1 Q.B. 198.
62 [1965] 1 Q.B. 535.
63 It is for the innocent third party purchaser to show that his purchase was made before the original owner avoided the contract: *Thomas v Heelas* [1988] C & F.L.R. 211.

and reclaim the goods. Nevertheless, it is rather harsh on an innocent third-party purchaser as their legal claim to goods bought in good faith depends upon: (i) the speed with which the rogue sells the car on; and (ii) the speed with which the original owner takes steps to avoid the contract. This is particularly true in the (common) case where the original owner accepts a cheque as payment for the goods.[64]

Seller in Possession

5–022

Two provisions in two different statutes are almost identical: s.24 of the Sale of Goods Act and s.8 of the Factors Act 1889. Section 8 provides:

> **"Where a person, having sold goods, continues, or is, in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same."**

This relates to the situation where A sells or agrees to sell goods to B and then later sells them to C. To whom do the goods belong? If under the contract between A and B property had not yet passed to B (see Ch.3), then A was still the owner when he sold to C. Still being the owner, A could pass that ownership to C. One has to examine the two contracts, B's and C's, and find out under which of them property was to pass first. If it is C's then C will be the owner.

Usually (i.e. in the case of a sale of specific goods in a deliverable state, see Ch.3), property will have passed first to B (i.e. at the time that he made his contract). In this case, following the *nemo dat* principle, B is now the owner; they were B's goods at the time A sold them to C and therefore A could not, without B's authority, confer title upon C. The result would be different, however, if C could show that C's contract with A fell within one of the exceptions to the *nemo dat* principle.

The statutory provisions in s.8 of the Factors Act and s.24 of the Sale of Goods Act constitute one of those exceptions and were designed specifically to help someone in C's position. In order for C to acquire good title under these provisions, a number of requirements must be fulfilled.

64 The Twelfth Report of the Law Reform Committee (1966) Cmnd. 2958 called for actual communication to be required in order for the original owner to avoid the contract, see para.16.

> **"Where a right, duty or liability would arise under a contract of sale of goods by implication of law, it may (subject to the Unfair Contract Terms Act 1977) be negatived or varied by express agreement, or by the course of dealing between the parties, or by such usage as binds both parties to the contract."**

The provisions of the Unfair Contract Terms Act 1977 will be considered in Ch.10. In the present chapter we shall consider terms other than exemption clauses. The Unfair Terms in Consumer Contracts Regulations 1999 represent a further inroad into the doctrine of freedom of contract. These Regulations, which are capable of applying to other terms as well as to exemption clauses, will also be considered in Ch.10.

Rights of Third Parties

7–003

As a general rule only the buyer and the seller can sue or be sued on a contract of sale. This results from two aspects of the privity of contract doctrine. First, the contract can be enforced only against someone who is party to it. Secondly, only someone who is a party to the contract can enforce it. The Contracts (Rights of Third Parties) Act 1999, however, created an exception to the latter.[1] Section 1 provides:

> **"(1) Subject to the provisions of this Act, a person who is not a party to a contract (a "third party") may in his own right enforce a term of the contract if—**
>
> **(a) the contract expressly provides that he may, or**
> **(b) subject to subsection (2), the term purports to confer a benefit on him.**
>
> **(2) Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.**

1 For a discussion of the effect of the 1999 Act, see Dean, "Removing a Blot on the Landscape" [2000] J.B.L. 143.

> **(3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.**
>
> **(4) . . . "**

Suppose X buys an item, informing the retailer that it is a gift for Y (whom he names[2]) and arranging that the retailer will send it to Y at her address. If the item proves to be defective can Y rely on this provision to enable her to claim against the retailer under the terms in the contract governing the quality of the goods? The answer is not easy. The effect of the 1999 Act is to enable Y to enforce a *term* which purports to confer a benefit upon her. Arguably the only term which purports to confer a benefit on Y is the term as to delivery, thereby giving her a right to sue the retailer if the item is not delivered. Much depends on the circumstances presented. Will the courts read the situation as one where there was a term of the contract that Y was to have the benefit of *all* the terms in the contract which give rights to the buyer? A similar situation arises where M buys a wedding present for P and Q from the shop where P and Q have informed M that they have arranged their wedding present list.

7–004

Where the 1999 Act gives a third party a right to enforce a contract term, that right is subject to any other relevant terms of the contract such as a clause expressly limiting such a claim—although no term will be effective to exclude or limit a right to sue for death or personal injury caused by negligence. Where the third party's right exists, the judicial remedies available to the third party for breach of contractual term are the same as if the third party had been a party to the contract, e.g. damages and/or rejection of the goods and return of the price (see Ch.13). Also the Act limits the ability of the parties to the contract subsequently to remove or alter the third party's right, e.g. by varying the contract. Unless the contract otherwise provides, they cannot (s.2) do so without the third party's consent, if:

> **"(a) the third party has communicated his assent to the term to the promisor, [i.e. to the party who was contracted to perform the term in question], or**
>
> **(b) the promisor is aware that the third party has relied on the term, or**

2 The word "expressly" in s.1(3) prevents any process of construction or implication: *Avraamides v Colwill* [2006] EWCA Civ 1533 at [19].

an inch and nine-sixteenths of an inch thick, he is in breach of the condition as to description: **Arcos v Ronaasen**.[30] If the seller wants a margin, he must stipulate for it in the contractual description.

The fact that the goods are of defective quality is usually irrelevant in deciding whether they correspond with their description. **Pinnock Bros v Lewis & Peat**[31] involved a contract for the sale of "copra cake" which was to be used to feed cattle. The goods actually supplied consisted of copra cake combined with a quantity of castor oil, the latter being poisonous to cattle. The sellers were in breach of the condition as to description. However, this was not because the goods were unfit for use but rather because they included goods of a different description. **Ashington Piggeries v Hill**[32] involved a contract for the sale of "Norwegian herring meal fair average quality for the season, expected to analyse . . . " which was to be used to feed mink. The sellers supplied Norwegian herring meal, i.e. Norwegian herrings plus preservative. The herrings and preservative had reacted together and produced a chemical which was poisonous to mink. Here, the sellers were not in breach of the condition as to description since, unlike **Pinnock**'s case, there was no addition of goods outside the contractual description. The key to s.13 was said to be "identification" not "quality". Hence the expression "fair average quality for the season" was not held to be part of the contractual description, since it did not "identify" the goods sold. Goods which are useless or unsuitable for any normal purpose will still correspond with their description (here "Norwegian herring meal") if it accurately identified them. A balloon, though punctured, is nevertheless accurately identified and descibed as a "balloon".

Re Moore and Landauer[33] is now a controversial decision. The sellers had agreed to sell a quanitity of tinned pears which were to be packed in cases containing 30 tins each. They had delivered the correct total quantity of tins but half of them were packed in cases of 24 tins each. It was held that the contract requirement that they be packed in cases of 30 was part of the contract description. Therefore the buyers were entitled to refuse to accept delivery because the sellers had committed a breach of condition (i.e. of s.13) and the buyers were entitled to do so even if they would have suffered no loss by having the tins packed in cases of 24 instead of cases of 30. The correctness of the decision in **Re Moore and Landauer** has, however, been doubted by Lord Wilberforce in **Reardon Smith Line v Hansen Tangen**.[34] Because s.13 is an implied *condition*, anything which is regarded by the court as part of the contract description automatically becomes "of the essence" and, if not complied with, has until recently automatically given the buyer the right to reject the goods for breach of condition, no matter how slight the breach was. The modern trend has therefore been to regard as part of the contract description only those contract words which help in "identifying" the goods. Other expressions in the contract (such as "fair average quality for the season" or "packed in cases of 30") can then be regarded not as part of the contract description, but as

30 [1933] A.C. 470.
31 [1923] 1 K.B. 690.
32 [1971] 2 W.L.R. 1051.
33 [1921] 2 K.B. 519.
34 [1976] W.L.R. 989.

express terms of the contract in their own right. Unless the contract clearly indicates otherwise, these express terms (not being stipulations as to the time of delivery) will then normally be warranties and not conditions. Thus if the seller is in breach of one of them, the buyer will not be entitled to reject the goods unless the seller's breach is such as to deprive the buyer of substantially the whole benefit of the contract: **Cehave v Bremer**.[35] Of course, if there is a defect of quality, a buyer who wishes to reject the goods may still be able to do so, i.e. if he can show that there has been a breach of one of the conditions implied by s.14. Even then, however, a buyer who is a non-consumer will not be entitled to reject the goods if the breach was so slight as to make rejection unreasonable.[36]

It is clear from the wording of s.13(1) that the implied term as to description is of application to all sales, and not restricted to those which are "in the course of business". Thus in **Varley v Whipp**[37] a non-trade seller was liable under s.13 where a second-hand reaping machine was described, wholly inaccurately, as being little used. The implied term as to quality was inapplicable, due to the status of the seller, but the court held that the misdescription breached s.13. Thus the relationship between s.13 and s.14 will frequently be of great practical importance.[38]

Quality—Section 14

7–016

There are two conditions which may be implied by s.14—as to satisfactory quality (s.14(2)) and as to fitness for purpose (s.14(3)). Before considering in what circumstances these conditions will be implied, note should be made of s.14(1) which reads:

> **"Except as provided by this section and section 15 below and subject to any other enactment, there is no implied term about the quality or fitness for any particular purpose of goods supplied under a contract of sale."**

The two conditions implied by s.14 extend, not only to the goods actually bought, but also to goods "supplied under" the contract, e.g. a returnable bottle: **Geddling v Marsh**.[39] They also extend to the instructions. It would, for example, be no defence for the seller to say that his farm fertiliser was perfectly safe and effective when applied in the right concentration (at the right time of year) if the instructions supplied with the fertiliser stated in error the wrong concentration, whether too weak to be effective or so strong as to kill the crops. The

35 [1976] Q.B. 44; para.7–007, above.
36 See para.13–004, below.
37 [1900] 1 Q.B. 513.
38 See generally, the discussion above and *Ashington Piggeries v Hill* [1971] 2 W.L.R. 1051.
39 [1920] 1 K.B. 668.

categories of contract which are excepted from that.[18] The first two are contracts of sale of goods and hire-purchase contracts. The reason for these exceptions is that both categories are governed by its own set of statutory implied terms. The relevant statutory provisions are as follows: in the case of sale of goods contracts, ss.12–15 of the Sale of Goods Act 1979 and in the case of hire-purchase agreements, ss.8–11 of the Supply of Goods (Implied Terms) Act 1973.[19] The two other excepted contracts are, first, where the property is transferred under a deed (covenant) gratuitously made and, secondly, any contract intended to operate by way of mortgage, pledge, charge or any other security.[20]

The Second Set—Contracts of Hire

8–008

A contract of hire is a contract of bailment. Under it, the hirer (the bailee) obtains possession but not property (i.e. not ownership). Since there is no transfer, or agreement to transfer, property (ownership) to the hirer, the first set of implied terms in the 1982 Act is not implied in a hire contract. Sections 6–10 of the Supply of Goods and Services Act 1982 apply to contracts of hire, other than hire-purchase agreements.[21] The intention behind them is to imply in hire contracts, terms similar to those implied in sale of goods contracts by ss.12–15 of the Sale of Goods Act. In fact the implied terms as to description,[22] satisfactory quality and fitness for purpose[23] and sample[24] are identical in effect to the corresponding Sale of Goods Act provisions. Section 7 of the 1982 Act contains (i) a condition as to title, namely that the bailor has (or, in the case of an agreement to bail in the future, will have) a right to transfer possession to the bailee (hirer) for the period of the hire, and (ii) a warranty of quiet possession during the period of hire except in so far as the bailee's (hirer's) possession may be disturbed by someone entitled to the benefit of any charge or encumbrance disclosed or known to the bailee (hirer) before the contract.

18 s.1(2).
19 See para.23–009, below.
20 Until April 6, 2005 there was a further category of excepted contracts, namely where property in goods was obtained in exchange for trading stamps. This was repealed by the Regulatory Reform (Trading Stamps) Order (SI 2005/871) and such contracts are now governed by the 1982 Act. Where, however, a combination of cash and trading stamps are used the Sale of Goods Act 1979 will apply.
21 s.6(3) makes clear that an agreement to hire goods falls under the Act regardless of whether services are also to be supplied and that the consideration can take any form, i.e. monetary or otherwise.
22 s.8.
23 s.9.
24 s.10.

The Third Set—Contracts for Services

8–009

The third set of terms is implied into any contract where one party (the supplier) has agreed to carry out any service (whether or not he has also agreed to supply goods).[25] By way of exception, however, these terms are not implied in any contract of employment or apprenticeship.[26] It is clear that these terms are implied not only in contracts where the supply of service is the substance of the contract but also in contracts of hire and sale of goods where, although the substance of the contract is the hire or transfer of ownership of goods, there is nevertheless an undertaking by the seller that he will provide a service (e.g. of installing the goods).[27] These terms are implied by the Supply of Goods and Services Act 1982, ss.13–15:

> **"13 In a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill.**
>
> **14(1) Where, under a contract for the supply of a service by a supplier acting in the course of a business, the time for the service to be carried out is not fixed by the contract, left to be fixed in a manner agreed by the contract or determined by the course of dealing between the parties, there is an implied term that the supplier will carry out the service within a reasonable time.**
>
> **(2) What is a reasonable time is a question of fact.**
>
> **15(1) Where, under a contract for the supply of a service, the consideration for the service is not determined by the contract, left to be determined in a manner agreed by the contract or determined by the course of dealing between the parties, there is an implied term that the party contracting with the supplier will pay a reasonable charge.**
>
> **(2) What is a reasonable charge is a question of fact."**

25 See, for example, *Abramova v Oxford Institute of Legal Practice* [2011] EWHC 613 (QB) where a claim for negligent teaching was rejected.
26 s.12(2).
27 s.12(3).

- The characteristics and composition of the product, its packaging and instructions for assembly and maintenance;
- Its effect on other products, where it is reasonably foreseeable that it will be used with other products;
- Its presentation, labelling, any instructions for use and disposal and any other information provided by the producer;
- The categories of consumers at serious risk when using the product, especially children.

Obviously articles such as toys that are likely to be used by children will have to be safe for that group of consumers. The reference to instructions for disposal leaves open the possibility of a product being found to be unsafe because of the risks it poses when it is to be disposed of, i.e. after its useful life is over. This could well catch products which contain toxic chemicals. The reference to a product being used with other products might well apply, for example, to a shelf support bracket. Clearly such a bracket is only likely to be used together with other products, i.e. the shelf and the items to be placed on the shelf. The strength of the bracket will in that situation clearly be a feature of its safety.

The giving of information is a key feature. Thus reg.7 requires a producer to provide information to enable consumers to assess the risks inherent in it throughout the normal or reasonably foreseeable period of its use, where those risks are not immediately apparent without adequate warnings. It also requires producers to take measures, commensurate with the characteristics of the product, to enable consumers to be informed of the risks and to enable the producer, if necessary, to withdraw the product. In the case of many products, this in effect requires the producer to use a batch number system, so that different batches of the product can be identified from a mark or number on the product itself. It may also require sample testing of the marketed products, the investigation of complaints and keeping of distributors informed of risks which materialise after marketing.

In relation to many products there are published standards. Sometimes these are embodied in safety regulations, or they may be Community technical specifications, or they may be national voluntary standards, or contained in codes of good practice etc. There is no absolute defence in respect of a product which complies with safety regulations. There is in that case, however, a presumption, until the contrary is proved, that the product is safe.[78] So far as concerns other types of standards, these are things to be taken into account in determining the safety which consumers may reasonably expect and hence whether the risks presented by the product are acceptable.

78 See reg.6.

9–023

Who is Liable?

Primarily, it is the "producer" as defined in reg.2. There are, however, various people who may be regarded as the producer and thus liable. They are: the manufacturer provided that the manufacturer is established in the European Community; any own-brander in the Community[79]; anyone reconditioning the product; the importer of the product into the Community[80]; the manufacturer's established representative in the Community. As seen above, a distributor also can be liable, e.g. for failing to act with due care to help ensure compliance.

9–024

Defences

The defence of due diligence is available to anyone charged with an offence under the Regulations.[81] The defence is commonly found in consumer protection legislation and was for example, also a defence to someone charged with an offence under s.10 of the Consumer Protection Act[82] or under safety regulations. It is that the defendant took all reasonable steps and exercised all due diligence to avoid committing the offence.[83] An importer or wholesaler will not be able to rely on this defence if he has taken no steps to require his supplier to supply goods which correspond with the relevant legal requirements. This may mean not only placing specific contractual obligations upon his supplier but also making tests on more than infrequent random samples of the goods supplied: **Riley v Webb**[84]; and **Rotherham MBC v Raysun**.[85]

The amount of care required before the defendant can be said to have taken all reasonable steps and exercised all due diligence will be a question of fact in each case. In a situation where the defendant had imported goods from a source (e.g. the German wine industry) where there is known to be a thorough system of verification and testing to see the correct standard has been reached, he may not be expected to sample at all: **Hurley v Martinez**.[86] When considering whether he should sample, the degree of risk to be guarded against is an important factor. Thus, it is noticeable that in cases (such as **Rotherham MBC v Raysun**[87]) where the defendant is relying on the defence of due diligence to a consumer safety charge, the court is much more likely to demand a thorough sampling system than it is in cases (such as **Hurley v Martinez**[88]) where the defendant is relying on the same defence

79 Where, for example, someone who presents himself as the manufacturer by affixing to the product his name, trade mark or other distinctive mark.
80 Where, for example, the manufacturer is not himself established, and has no representative established in the Community.
81 See reg.29.
82 Now repealed by the General Product Safety Regulations 2005, see reg.46(2).
83 See generally, Parry, "Judicial approaches to due diligence" [1995] Crim. Law Rev. 695.
84 [1987] C.C.L.R. 65.
85 [1989] C.C.L.R. 1.
86 [1991] C.C.L.R. 1.
87 [1989] C.C.L.R. 1.
88 [1991] C.C.L.R. 1.

Exemptions From Sections 12–15 of the Sale of Goods Act: Section 6

10–017 Section 6 of the Unfair Contract Terms Act 1977 applies to any clause claiming to exempt the seller from any of the terms implied by ss.12–15 of the Sale of Goods Act, i.e. the terms as to title, description, satisfactory quality, fitness for purpose and sample. The effect of s.6 depends upon whether the buyer was "dealing as a consumer".

Consumer Deals

10–018 In any case where the buyer "deals as a consumer" it is impossible for the seller to exempt himself from any of his liability under ss.12–15 of the Sale of Goods Act. Section 12 of the Unfair Contract Terms Act 1977 tells us when a buyer "deals as a consumer":

> **"(1) A party to a contract 'deals as consumer' in relation to another party if—**
>
> **(a) he neither makes the contract in the course of a business nor holds himself out as doing so; and**
> **(b) the other party does make the contract in the course of a business; and**
> **(c) in the case of a contract governed by the law of sale of goods or hire-purchase, or by section 7 of this Act, the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption.**
>
> **(1A) But if the first party mentioned in subsection (1) is an individual para.(c) of that subsection must be ignored.**
>
> **(2) But the buyer is not in any circumstances to be regarded as dealing as consumer—**
>
> **(a) if he is an individual and the goods are second hand goods sold at public auction at which individuals have the opportunity of attending the sale in person;**
> **(b) if he is not an individual and the goods are sold by auction or by competitive tender.**
>
> **(3) Subject to this, it is for those claiming that a party does not deal as consumer to show that he does not."**

Thus the following are not consumer deals:

(i) The sale of goods for the purpose of resale by the purchaser to a wholesaler, retailer or distributor.

(ii) The sale of goods for use by the purchaser in an industrial process, e.g. manufacturing.

(iii) The sale of goods for use by the purchaser in the running of his business, e.g. a computer for use in a firm's office.

(iv) The sale of goods by a private individual.

(v) The sale of goods by competitive tender.

The Sale and Supply of Goods to Consumers Regulations 2002 have recently amended the wording of this section by inserting s.12(1A) and a new subs.(2) as above. The impact of the new s.12(1A) is to remove any difficulties where the goods supplied are goods *not* ordinarily supplied for private use where the buyer is an individual. Thus where the buyer is an individual, the status of the goods is now irrelevant. For example where an individual buys building materials, such as cement, timber, power-tools etc., the fact that goods supplied are not ordinarily supplied for private use is irrelevant.[30]

The second change introduced by the 2002 Regulations continues the distinction between situations where the buyer is an individual and those where the buyer is not. Under s.12(2)(a) an auction sale can now be a consumer deal provided that:

(i) The buyer is an individual; and

(ii) The auction is for new goods (rather than second hand goods); and

(iii) There was no opportunity of attending the auction in person.

10–019 Under s.12 as originally enacted, a buyer could never be regarded as dealing as a consumer at an auction. This position has been retained for non-individual buyers under s.12(2)(a).

The question as to whether the contract was a consumer deal arose in **Rasbora Ltd v JCL Marine Ltd**.[31] A contract was made between Mr Atkinson and JCL Marine Ltd, a Norfolk boat builder, for JCL Marine to build a boat for Mr Atkinson. This contract included a clause

30 Unless, of course, the individual purports to be a trade purchaser in which case there will be a non-consumer deal. The Law Commission Report has recommended that this "holding-out" provision should be abolished, i.e. an individual's status as a consumer should not be lost by holding themselves out to be acting in the course of a business, see paras 3.25 and 3.26 of the Report, discussed at para.10–040, below.

31 [1977] 1 Lloyd's Rep. 645.

(4) This section applies unless a contrary intention appears in, or is to be implied from, the contract."

Thus, in order to exercise a right of partial rejection under this provision, the buyer must first have a right to reject the goods, e.g. because of a breach of condition, and must secondly accept all the goods which comply with the contract. Providing he accepts all the goods which comply with the contract, he is not precluded from rejecting some, or all, of those which do not. It should be observed that although s.35(A)(4) states that this section applies only if a contrary intention does not appear, nevertheless, a clause in a contract which purported to deprive the buyer of his right of partial rejection would be an exclusion clause and therefore could well be rendered ineffective by the Unfair Contract Terms Act 1977.

There is one qualification to the right of partial rejection just mentioned. This lies in the concept of a "commercial unit". A commercial unit is a unit of goods, "division of which would materially impair the value of the goods or the character of the unit". An example might be a two-volume dictionary, the first volume dealing with, say, A to K and the second with L to Z. Suppose that one of the volumes is, and the other is not, of satisfactory quality. By virtue of s.35(7), a buyer accepting any goods in the commercial unit is deemed to have accepted all the goods in that unit. Thus the buyer could not accept one of the volumes and reject the other.

Waiver

13–009 The buyer may lose his right to reject by waiver of that right.[23] This may be particularly relevant where the seller is, to the buyer's knowledge, in breach of condition before the goods are delivered. If the buyer indicates that he will nevertheless accept delivery in spite of the breach of condition, that may well amount to waiver.[24]

Treatment of Contract as Repudiated

13–010 The buyer's right to treat the contract as repudiated arises in the same circumstances as his right to reject the goods, i.e. if the seller commits a breach of condition or a breach of

23 s.11(2).
24 See *Rickards v Oppenheim* [1950] 1 K.B. 616 discussed at para.7–008, above.

warranty which deprives the buyer of substantially the whole benefit of the contract.[25] Often the buyer will exercise both remedies at once, i.e. will reject the goods and will also indicate that he is not going on with the contract, e.g. by demanding his money back. He can, however, reject the goods without treating the contract as repudiated. If he does, then the seller is at liberty, if he can do so, to re-tender the goods which comply with the contract. If the seller does so, he will be entitled to the price. It can of course also occur that the buyer treats the contract as repudiated by the seller and yet does not reject any goods. This could occur if the breach by the seller is a failure to deliver the goods by the contractual delivery date, or if the seller commits an anticipatory repudiation, e.g. informs the buyer that he will not be delivering or will not be delivering by the contractual delivery date. In the circumstances where the buyer accepts the seller's breach as a repudiation of the contract, the buyer will be entitled to damages assessed as for non-delivery of the goods.[26] To exercise his right to treat the contract as repudiated by the seller's repudiatory breach, the buyer must inform the seller that he regards the contract as at an end.

Suppose the seller commits a wrongful anticipatory repudiation which the buyer does not accept as a repudiation. This latter point would be clear if, for example, the buyer responded to the anticipatory breach by indicating that due delivery was still expected. If then the seller duly makes delivery in accordance with the contract, the buyer must accept it. This is because an anticipatory repudiation terminates a contract only if it is accepted by the innocent party: **Fercometal S.a.r.l. v Mediterranean Shipping Co.**[27] If after having failed to accept the seller's breach as a repudiation, the buyer himself subsequently repudiates the contract, e.g. by rejecting goods which conform to the contract, he will himself be liable to the seller for damages assessed as for non-acceptance (see Ch.14). These principles work exactly the same vice versa. Thus where the buyer commits an anticipatory repudiation which the seller fails to accept as terminating the contract, the seller will be liable if he himself subsequently fails to perform the contract.

Where one of the parties, say the buyer, treats the contract as repudiated giving a bad reason (e.g. simply that he has changed his mind about buying) or even giving no reason at all, that repudiation will not be wrongful if at the time of the repudiation he in fact had a valid reason for it. A party who gives a bad reason for his refusal to perform the contract, does not thereby deprive himself of a justification which in fact existed, whether or not he was aware of it, **Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce.**[28] The only exceptions to this are: (i) where that party is estopped from relying on the valid reason by virtue of an earlier representation of his, or (ii) where the valid reason later relied upon is one which if given at the time, could have been put right by the other party. In this regard, however, note that in the case of a c.i.f. contract, the fact that goods were not

25 See paras.7–006–7–007, above.
26 See Ch.14.
27 [1988] 3 W.L.R. 200.
28 [1997] 4 All E.R. 514.

available only in another language without clearly disclosing this to the consumer before the consumer is committed to the transaction.

9. Stating or otherwise creating the impression that a product can legally be sold when it cannot.

10. Presenting rights given to consumers in law as a distinctive feature of the trader's offer.

11. Using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial).

12. Making a materially inaccurate claim concerning the nature and extent of the risk to the personal security of the consumer or his family if the consumer does not purchase the product.

13. Promoting a product similar to a product made by a particular manufacturer in such a manner as deliberately to mislead the consumer into believing that the product is made by that same manufacturer when it is not.

14. Establishing, operating or promoting a pyramid promotional scheme where a consumer gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products.

15. Claiming that the trader is about to cease trading or move premises when he is not.

16. Claiming that products are able to facilitate winning in games of chance.

17. Falsely claiming that a product is able to cure illnesses, dysfunction or malformations.

18. Passing on materially inaccurate information on market conditions or on the possibility of finding the product with the intention of inducing the consumer to acquire the product at conditions less favourable than normal market conditions.

19. Claiming in a commercial practice to offer a competition or prize promotion without awarding the prizes described or a reasonable equivalent.

20. Describing a product as "gratis", "free", "without charge" or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item.

21. Including in marketing material an invoice or similar document seeking payment which gives the consumer the impression that he has already ordered the marketed product when he has not.

22. Falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer.

23. Creating the false impression that after-sales service in relation to a product is available in a Member State other than the one in which the product is sold.

24. Creating the impression that the consumer cannot leave the premises until a contract is formed.

25. Conducting personal visits to the consumer's home ignoring the consumer's request to leave or not to return except in circumstances and to the extent justified, under national law, to enforce a contractual obligation.

26. Making persistent and unwanted solicitations by telephone, fax, email or other remote media except in circumstances and to the extent justified under national law to enforce a contractual obligation.

27. Requiring a consumer who wishes to claim on an insurance policy to produce documents which could not reasonably be considered relevant as to whether the claim was valid, or failing systematically to respond to pertinent correspondence, in order to dissuade a consumer from exercising his contractual rights.

28. Including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them.

29. Demanding immediate or deferred payment for or the return or safekeeping of products supplied by the trader, but not solicited by the consumer except where the product is a substitute supplied in conformity with art.7(3) of Directive 97/7/EC (inertia selling).

30. Explicitly informing a consumer that if he does not buy the product or service, the trader's job or livelihood will be in jeopardy.

31. Creating the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact either: there is no prize or other equivalent benefit, or taking any action in relation to